The Regulation of Social Media in Nigeria and its Effect on Free Speech: Perspectives from Constitutional Law and International Norms

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ABSTRACT

This thesis explores the multifaceted and evolving topic of social media regulation, with a focus on Nigeria. As social media platforms have become central to communication, information dissemination, and public discourse, concerns have arisen about their impact on individuals, society, and democracy. The research question addressed in this thesis is whether the Nigerian bills on restriction of social media can legally restrict false speech and hate speech without overreaching on the right to freedom of expression, and if not, what measures can be taken to improve these bills.

The thesis begins by analyzing three key theories for the justification of freedom of expression, which show that freedom of expression is essential to the discovery of truth, self-autonomy, and promotion of an open and vibrant democratic discourse. However, these theories are not an absolute justification and may be restricted. The thesis also examines the conditions for justification of limits on freedom of expression in Nigeria, which is that the law must be shown to be within reasonable limits permissible in a democratic society. Section 45 of the Nigerian Constitution states specific grounds for the restriction of freedom of expression, but the section is vague as it gives no further direction as to how Nigerian courts should balance competing interests, such as freedom of expression on the one hand and public interest on the other.

The thesis argues that the importation of proportionality analysis and international standards is necessary to restrict hate speech and false speech in Nigeria while protecting the right to freedom of expression. The delicate balance between preserving freedom of expression and addressing harmful content, such as hate speech and false information, is a critical consideration in social media regulation.

The thesis suggests that drawing from Canadian law and international standards could enhance Nigeria’s regulation of free speech on social media. The thesis concludes that the protection of freedom of expression is crucial, especially in a diverse cultural, political, and socio-economic landscape such as Nigeria.
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CHAPTER ONE: GENERAL INTRODUCTION

1.1 Introduction

The regulation of social media has increasingly become an issue that has confronted different countries and has been a subject of debate. Regulating social media is not, however, the main reason behind these debates, but rather the concerns raised in the context of freedom of expression.

Freedom of expression is widely regarded as a fundamental principle of liberal democracies worldwide. However, regulating it is a complex issue due to the significant impact that restrictions can have. Advocates of free expression argue that it is an integral part of human identity, enabling individuals to participate in political affairs and express themselves freely. However, others believe that social media has created new challenges that require certain types of expression to be restricted, such as hate speech and false speech. While they acknowledge the importance of freedom of expression, they believe that regulating social media is for the greater good of society.

On this basis, the Nigerian National Assembly proposed two bills that would impact the freedom of expression of its citizens. These bills are “Protection from Internet Falsehoods and Manipulation and Other Related Matter Bill 2019 (False Speech Bill)” and “the Independent National Commission for the Prohibition of Hate Speeches Bill (Hate Speech Bill).” The False Speech Bill seeks to prevent the transmission of false statements of facts through social media platforms.\(^1\) At the same time, the Hate Speech Bill aims to promote national cohesion and integration by curbing unfair discrimination and hate speech based on race or ethnic relations.\(^2\)

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No progress has been recorded on the Hate Speech Bill since its introduction in the House of Representatives on July 24, 2019, or the False Speech Bill, which reached the second reading in the Senate on November 20, 2019. Despite the lack of official withdrawal, the absence of developments raises the possibility of abandonment, though resurgence remains a plausible outcome. The recent announcement by the National Broadcasting Commission (NBC) regarding the submission of a new bill to the Senate, aimed at obtaining enhanced regulatory powers over social media, further supports the potential resurgence of these bills, emphasizing the continued relevance of this thesis. However, this thesis went for defence and library deposit before it was possible to obtain a copy for comparative analysis with the earlier bills.
The basis for introducing these bills lies in the recognition that the rights and freedoms granted by the Nigerian Constitution are not absolute. The government is permitted to impose limitations on these liberties, provided that the laws are reasonable. However, there are a couple of complications with this provision. The first issue arises when a law impinges on a safeguarded right, and a delicate balance must be struck between the law and the right. This can be particularly challenging, as the Constitution does not provide clear guidance on this matter. Secondly, it can be challenging to draft limitation laws that restrict free expression appropriately and consistently with the right.

In the specific case of Nigeria, a difficult question arises: how can bills regulating social media be consistent with the fundamental right to freedom of expression? If such bills fail to achieve this balance, it is necessary to explore effective solutions to address the issue. This requires a theoretical examination of the justification for protecting free expression and a legal analysis of the right in the context of Nigerian law. The objective of this study is to determine whether the Nigerian Bills have a balanced approach to regulating social media and protecting freedom of expression. Specifically, the study analyzes whether these bills are in line with the Constitution and international standards and makes recommendations for amendment if needed.

The thesis delves into the interpretation of constitutional provisions of reasonable limit by Nigerian courts. Currently, there is no established framework for defining reasonable limit in Nigeria’s legal system. This gap complicates discussions around restricting free expression on social media and raises questions regarding the scope and constitutionality of such laws. To address this gap, the thesis examines Canada’s reasonable limit concept, which employs a proportionality analysis called the “Oakes test” from a Supreme Court of Canada case, *R. v. Oakes*.3 Although the test has faced criticism, the thesis argues that its adoption in Nigerian courts would facilitate rigorous discussions on restricting free expression and provide certainty. To do so, the thesis references some Canadian cases on freedom of expression that demonstrate how the Canadian court has determined the reasonableness of limits on freedom of expression.

This thesis also refers to international norms, like Canadian law, to reaffirm proportionality analysis. The focus on international standards stems from their emphasis on human rights standards, which are lacking in many national frameworks and their universal approach to

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addressing different kinds of contextual issues on regulating social media and how they affect freedom of expression.  

This thesis also examines the provisions of the Nigerian bills proposed to restrict free expression on social media. This analysis is achieved by drawing upon the proportionality test and international norms, as well as the theories of freedom of expression. The thesis will delve into the implications of these provisions and how they may affect individuals’ rights to freedom of expression.

The study is based on three fundamental theories: Truth, Autonomy, and Democracy. These theories are critical to protecting the freedom of expression globally. They offer insight into why it is crucial to safeguard this right and serve as guiding principles for lawmakers and the judiciary when assessing the appropriateness of laws that seek to limit free expression, such as those related to social media.

1.2 Theoretical Justification of Freedom of Speech and its Relevance to This Research

Theories of freedom of expression provide a framework for interpreting the scope and limits of free speech, which judicial bodies rely on. While free speech is vital, there may be legitimate reasons for restrictions. This thesis aims to advance the protection of freedom of expression by analyzing how these theories relate to the regulation of hate speech and false speech. Subsequent chapters will evaluate the application of truth, autonomy, and democracy theories to this regulation, underscoring the inadequacies of using these theories to defend hate speech and highlighting how hate speech undermines democratic principles.

1.2.1 Theories of Freedom of Expression

There have been several theories put forth to safeguard free expression, but they all revolve around three key justifications: (a) Truth; (b) Autonomy; and (c) Democracy. Some have argued that

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4 International human rights norms are emphasized as a body of norms that are founded on international law and thus may provide guidance in a range of national contexts. Such norms are founded on a social vision that encourages a wide variety of various and potentially opposing points of view and strives for inclusive, equal, and varied public involvement. At the same time, they include provisions for limiting expression that incites violence, hatred, or harassment with the intent of silencing people, certain groups, or minorities.
democracy is the principal justification for defending freedom of speech, empowering citizens to speak, and holding state actors accountable. Others have contended that self-autonomy provides a bedrock for the protection of free speech. However, the truth theory is the oldest justification for the defence of freedom of speech.

This section explores justifications for the truth theory and critiques against it, specifically in regulating speech. Criticisms include comparing the theory to a marketplace of ideas, assuming people are always rational in seeking truth, and determining what speech falls under the theory. Lastly, some argue that discussing a subject does not always lead to discovering the truth.

1.2.2 Truth Justification

The truth justification can be traced back to Abrams v. United States in a dissent written by Justice Oliver Wendell Holmes. Justice Holmes enshrined this idea in the U.S jurisprudence on freedom of speech by explaining that “the ultimate good desired is better reached by free trade in idea - that the best test of truth is the power of the thought to get itself accepted in the competition of the market…” Some have argued that the truth justification creates a marketplace of ideas in which truth ultimately prevails over falsity. The most common version of the truth rationale for protecting the right to freedom of expression was expressed by John Stuart Mill in his book On Liberty.

Mill argued that freedom of expression should not be restricted based on three assumptions. The first assumption is that the opinion sought to be restricted might be true. According to Mill, it is essential to permit the free expression of opinions and ideas to discover the truth. In Mill’s words, having “complete liberty of contradicting and disproving opinions is the condition which justifies us in assuming its truth...on no other terms can a being with human faculties have any rational

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9 Ibid.
10 Marshall, supra note 7 at 44.
12 Ibid at 19.
13 Ibid.
assurance.” In other words, one’s beliefs can only be justified when all available evidence has been thoroughly examined with no limitations. Therefore, when an opinion is subjected to criticism or support, it reveals the authenticity or justification of that opinion.

In his second assumption, Mill argues that freedom of expression must be permitted even if the expressed opinions are false. If an opinion is not subjected to ‘frequent’ and ‘fearless’ discussion, it will be ‘held as a dead dogma’ and not a ‘living truth.’ If humans are rational beings, then they must be able to find truth in opinions through understanding and balancing various viewpoints. As such, we need to show ‘why that other theory cannot be the true one: and until this is shown, and until we know how it is shown, we do not understand the grounds of our opinion.’ As Mill claims, being able to offer opinions or reasons for one’s belief involves the ability to ‘refute the reasons on the opposite side.’

Third, Mill observes the existence of a ‘commoner case’ wherein there are conflicting statements. In such a scenario, rather than one statement being true and the other being false, both statements contain a portion or part of the truth. Mill offers an example of partial truth - a healthy state of politics demands the presence of two distinct factions - one that champions order and stability, and another that advocates progress and reform. As such, it is crucial to merge dissenting views to obtain the whole truth of an opinion.

1.2.2.1 Arguments Against Mill’s Position

From the above, Mill’s main arguments for freedom of expression are on these grounds: discovery of truth and allowing diverse opinions. Some have argued that likening the truth justification to the ‘marketplace of ideas’ is not practicable. William P. Marshall, in his work, *The Truth*
*Justification for Freedom of Speech*, argues against the marketplace of ideas for three reasons.\(^{25}\) First, it is unfounded to assume that the marketplace of ideas can effectively handle the various obstacles and costs that arise in the market, as markets typically do not reach optimal outcomes.\(^{26}\) Second, he argues that ‘truth may not prevail in the marketplace of ideas because access to the market is profoundly unequal.’\(^{27}\) Therefore, it is an irrational assumption to imply that truth can only be discovered where there is freedom of speech. This is mostly because, in the marketplace, there is unequal bargaining power. Consequently, those with ‘greater resources’ can market their ideas better than those with little or no resources.\(^{28}\) The fact that those with ‘greater resources’ can market their ideas or opinions does not make their assertions true.\(^{29}\) On the subject of a marketplace of ideas, Mill believes that individuals are rational and capable of identifying truth.\(^{30}\) This implies that people engage in discussions through exchange of reasoning, where a side presents their argument, which is then countered by their opponent’s reasoning until the truth is revealed.\(^{31}\)

The rationality criticism is undoubtedly one of the most common censures amongst scholars against the truth justification.\(^{32}\) When Mill uses the terms ‘discussion’ or ‘dialogue,’ it implies that only rational individuals can participate in such conversations. Therefore, Mill supported the concept of free speech based on the belief that humans can use their intellect to arrive at the truth through discussion.\(^{33}\)

Another challenge with the truth justification is determining the scope of freedom of speech.\(^{34}\) Christopher Macleod, in his work, *Mill on Liberty of Thought and Discussion*, argues that Mill’s idea is narrow because the truth argument can only be subjected to discussions that can be classified as true, false, or partially true. In essence, speech that is not ‘truth-apt’ cannot be protected under Mill’s discussion term.\(^{35}\) Macleod provides examples of actions that do not fall

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\(^{25}\) Ibid.
\(^{26}\) Ibid.
\(^{27}\) Ibid.
\(^{28}\) Ibid.
\(^{29}\) Ibid.
\(^{30}\) Ibid.
\(^{34}\) Mill, *supra* note 11 at 21.
under the umbrella of truth-apt discourse, such as ‘jokes,’ ‘burning of the flag,’ and ‘wearing of religious symbols.’ He also emphasizes that ‘discussion’ is not equivalent to ‘expression’ since not all actions can be described as ‘contributing to the discussion’; rather, some acts may be open to multiple interpretations or meanings.  

Lastly, while the truth theory posits that knowledge is objective, critics contend that its assumption that discussion leads to truth is flawed.  

Truth is limited and relative, making it difficult to establish a reliable yardstick to measure its veracity. Moreover, individual beliefs often influence truth, whereas observable facts and evidence are not subject to such biases.

1.2.2.2 Contemporary Limitations to the Truth Justification of Free Expression.

Preserving a diversity of information sources is crucial for protecting the marketplace of ideas. This allows people to freely choose and select the truth, in line with the concept of knowledge transmission and truth generation in a free market. However, social media has greatly affected the dynamics of discussion and truth discovery.

With social media platforms being privatized, the purpose of these platforms is not only to discover truth or exchange ideas but also to make profits. Social media providers can select what information to display to a particular target or decide what kind of information may be found on their platforms, unlike the marketplace of ideas where the speaker is directly in control of what they say. These private companies have their own rules and can take down any expression or block users without any justification.

Mill’s assumption that the marketplace of ideas always leads to the truth is not valid. In an article, Claudi Lombardi, an assistant professor at the University of Cambridge, shares the view that the

36 Ibid at 16.
40 Ibid.
internet has affected the nature of the “marketplace of ideas.”42 Lombardi highlights the influence of the internet and social media platforms on the behaviour and conversations of people, noting that algorithms and user control have created a community-centric environment with limited exposure to diverse viewpoints.43 Also, social media users can select what kind of information they want, thereby limiting the exchange of ideas.44 In fact, some writers have claimed that using social media to find and view content can result in a “confirmation bias.”45 This is because these platforms tend to connect users who have similar preferences for certain types of content, which can strengthen this tendency.46

In addition, the notion of a marketplace of ideas presupposes that people should have unhampered access to information and that the search for truth is a rational process. However, certain elements can hinder the evaluation of information, such as cultural biases, cognitive limitations, and echo chambers.47 Often, individuals cling to their opinions not based on logical reasoning but because they align with a preconceived belief that they do not feel the need to validate. As a result, Mill’s assertion that truth will always be uncovered is restricted by this reality.

Cass Sunstein, a Harvard Law School Professor, succinctly captures this point:

Mill’s argument is undermined by the fact that humans have limited time and attention. The sheer effort required to discover whether a statement is true or false may mean that people will simply believe it, certainly if it fits with antecedent convictions.48

Although social media allows people to connect with others who share similar interests globally, it also creates a challenge for the exchange of ideas. Powerful commercial and political actors can easily direct misleading or untrue messages towards specific individuals without public scrutiny.49

42 Lombardi, supra note 38.
43 Ibid.
44 Ibid.
45 Christopher Seneca, “How to Break Out of Your Social Media Echo Chamber”, Wired (17 September 2020), online: <https://www.wired.com/story/facebook-twitter-echo-chamber-confirmation-bias/> (The primary distinctions between the major social media platforms are examined in this essay along with how those variations may affect how information spreads and how echo chambers emerge.)
46 Lombardi, supra note 38.
47 Ibid.
49 Moon, supra note 41 at 24.
The way information is commercialized on social media has had an impact on people’s ability to engage in rational discussions. Advertising on these platforms often blurs the line between concepts and arguments, making it harder to distinguish between the two.\textsuperscript{50} News and information are frequently presented alongside sponsored content aimed at specific consumer groups to boost the effectiveness of marketing campaigns and associated products. \textsuperscript{51} Additionally, the fast-paced and high volume of these advertisements leaves little room for people to think critically about them.\textsuperscript{52}

With the advent of online platforms, users have the ability to modify and combine information to create new content.\textsuperscript{53} The internet has made it possible to share vast amounts of information quickly and inexpensively, which was not possible before. However, the abundance of information has created a need for sorting and filtering to navigate the online space more effectively.\textsuperscript{54}

In today’s world, uncovering the truth has become increasingly difficult, particularly in light of the rise of hate speech and disinformation on social media. This poses a significant threat to public discourse, as people are unable to distinguish fact from fiction. According to Richard Moon,\textsuperscript{55} relying solely on more speech is not enough to combat false news, particularly in “a communication environment that is increasingly fragmented and in which a significant element of the population is not only receptive to “false news” and conspiracy theories but is also (reflexively) hostile to competing opinions and evidence that contradicts their views.”\textsuperscript{56} Some scholars have also questioned Mill’s argument for protecting false speech. Sunstein states that “…his argument does not provide a convincing basis for the protection of all falsehoods, intentional or otherwise- and the argument is palpably inadequate when falsehoods threaten to produce clear and imminent harm.”\textsuperscript{57}

\begin{itemize}
  \item \textsuperscript{50} Lombardi, supra note 38.
  \item \textsuperscript{51} Ibid.
  \item \textsuperscript{52} Moon, supra note 41 at 22.
  \item \textsuperscript{54} Ibid at 6 -7.
  \item \textsuperscript{55} Ibid at 30.
  \item \textsuperscript{56} Ibid.
  \item \textsuperscript{57} Sunstein, supra note 48.
\end{itemize}
The proliferation of hate speech has had an adverse effect on the exchange of ideas in society. The internet has become a breeding ground for hate speech, which easily gains traction and promotion.\footnote{Richard Moon, \textit{Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet} (Ottawa: Canadian Human Rights Commission, 2008) 1 at 26.} This kind of communication is often propagated in public spaces where countering it is a challenge. Usually, it is circulated among closed communities that have no interest in considering other perspectives.\footnote{Ibid.} Consequently, some experts have argued for regulation of free expression on the internet.

This thesis asserts that while the truth theory has limitations due to social media’s impact on obtaining truth, it remains crucial when regulating false speech. While distinguishing truth from falsehood can be complex and subjective, criminalizing false speech for the sake of protecting free expression should generally be avoided, except in extreme cases.

Regarding hate speech, relying solely on truth theory is insufficient in justifying its protection. From this perspective, hate speech should be prohibited by law because it lacks constructive value, has the potential to cause harm, and undermines the importance of upholding freedom of expression. While freedom of speech is a fundamental right, it must not infringe upon the rights of others or promote hatred towards individuals or groups. Therefore, this thesis firmly supports the regulation of hate speech to ensure a safe and inclusive society.

1.2.3 Autonomy

Apart from the truth justification, another common justification for free speech is autonomy, which is mainly focused on the development of individuals. However, what is a burning issue is the challenge of ascertaining the meaning or description of autonomy.\footnote{Catriona Mackenzie & Denise Meyerson, “Autonomy and Free Speech”, in Adrienne Stone & Frederick Schauer, eds., \textit{The Oxford Handbook of Freedom of Speech} (New York: Oxford University Press, 2021) at 61 [Mackenzie and Meyerson].} According to McKenzie and Meyerson, autonomy can be broadly divided into ‘choice autonomy’ and ‘relational autonomy.’\footnote{\textit{Ibid} at 62.} First, the concept of choice or individualist autonomy is examined. Here, I will be examining the views of Scanlon and Baker regarding autonomy, and as we shall see, autonomy is seen as the
independence of individuals to express themselves freely. Second, the relational autonomy argument by feminists emphasizes that individual interests should be weighed against social or state interests to effectively promote the autonomy of everyone. Both forms of autonomy shall now be discussed in the following subsections.

1.2.3.1 Choice or Individual Autonomy

Choice autonomy, simply put, is the ability of individuals to make free choices.62 This implicitly echoes Mill’s description of free discussion, and similarly, autonomy means the freedom of individuals to express themselves without any restriction.63 Having understood what is meant by autonomy, the big question then is: who is an autonomous person?

Scanlon, in describing an autonomous person, states that ‘an autonomous person cannot accept without independent consideration the judgement of others as to what he should believe or what he should do.’64 Therefore, autonomy involves mental freedom to think and express oneself without being influenced by external factors. Individuals must be able to reach their decision or conclusion by themselves. Scanlon’s position on autonomy seems to rely on the idea that humans are reasonable, though he still acknowledges that humans do not require a ‘perfect rationality.’65

According to Scanlon, an ‘autonomous man’ does not have an ‘obligation’ to believe in a law created by the state if he has a ‘strong reason’ not to obey it after deliberation.66 Therefore, individuals should have the freedom to choose whether to obey or disobey a law based on their own reasoning and judgment.67 In a later work, Scanlon revised his position on autonomy.68 He argued that his concept of autonomy places an absolute restraint on the state’s ability to limit free speech and autonomy should not be used as justification for harmful speech.69

62 ibid.
63 Mill, supra note 11 at 14. In Mill’s opinion, free speech is needed for the growth of individuals as progressive beings.
65 ibid at 215.
66 ibid.
67 ibid at 216.
68 Mackenzie and Meyerson, supra note 60 at 65.
69 ibid.
Edwin Baker also argued for the defence of free speech based on autonomy justification.\textsuperscript{70} Baker recognizes that autonomy is a ‘slippery’ term, and its meaning can be subjected to various interpretations by people.\textsuperscript{71} Baker introduces ‘formal autonomy’ in explaining autonomy. Formal autonomy, he believes, ‘consists of a person’s authority (or right) to make decisions about herself—her meaningful actions and usually her use of her resources—as long as her actions do not block others’ similar authority or rights.’\textsuperscript{72} Baker describes this autonomy as ‘self-expressive’ and ‘value-expressive’ that deserves absolute protection and is free from state interference.\textsuperscript{73} Baker clarifies that formal autonomy does not imply the freedom to act without limits, but rather the right to persuade, unite, offend, expose, condemn, or disassociate oneself from others.\textsuperscript{74} However, a state can legitimately restrict speech if a person uses his or her formal autonomy to interfere with another’s.\textsuperscript{75}

The concepts of autonomy presented by Scanlon and Baker revolve around the fundamental right to express oneself. They both recognize that while free expression is important, it is not an unlimited right and can be restricted by the government. However, some feminists have raised concerns about this view of autonomy, arguing that it places too much emphasis on the individual and neglects the societal context that is necessary for true autonomy to flourish.\textsuperscript{76} In the following section, we will delve into the social and relational aspects of autonomy.

\textbf{1.2.3.2 Relational Autonomy.}

Autonomy is also recognized for the advancement of societal conditions. Some have termed this \textit{relational autonomy}. Feminists have argued that the liberal concept of autonomy is defective because it fails to acknowledge autonomy’s relational and societal conditions.\textsuperscript{77} Susan Williams, in her book, \textit{Truth, Autonomy, and Speech Feminist Theory and the First Amendment},\textsuperscript{78} observes that autonomy is ‘neither a pre-existing condition to be assumed for all persons nor is it an end-
state that can be taken for granted once achieved.\textsuperscript{79} Rather, it involves a discursive and interpersonal activity that is not just focused on choice.\textsuperscript{80}

Williams argues that protecting speech is crucial for autonomy for three reasons. Firstly, if autonomy is defined as the ability to express oneself and develop as a person, speech acts and other forms of non-verbal communication are essential in exercising this right.\textsuperscript{81} Second, relational autonomy necessitates a deep comprehension of the societal context surrounding speech systems, which encompasses various entities such as the educational system, mass media, internet, political campaigns, government funding for artistic speech, and rules governing the use of public and other government property.\textsuperscript{82} The focus is not on individual speakers or listeners but rather on the social structures and practices that support large-scale speech.\textsuperscript{83} Lastly, speech is a key component of political engagement, and therefore essential to promoting autonomy in society.\textsuperscript{84} Political discourse is crucial to the identity of individuals and the social relations in which they operate, with speech being the primary means of such participation.\textsuperscript{85} Briston presents a convincing critique of the liberal idea of autonomy.\textsuperscript{86} She argues that the concept of choice autonomy fails to justify why hate speech should be protected over other types of speech.\textsuperscript{87}

Undoubtedly, autonomy plays a critical role in safeguarding freedom of speech and is frequently cited as a basis for defending hate speech when debating freedom of expression and censorship boundaries. However, it is not an absolute right, and it is subject to reasonable limitations to safeguard other fundamental rights and the well-being of society. This emphasis on social responsibility is particularly significant in Nigeria where debates on restricting hate speech are ongoing.

Hate speech is a form of expression that targets and demeans individuals or groups based on their race, ethnicity, religion, gender, sexual orientation, or other characteristics. It is harmful and can

\textsuperscript{79} Ibid.
\textsuperscript{80} Ibid.
\textsuperscript{81} Ibid at 76.
\textsuperscript{82} Ibid.
\textsuperscript{83} Ibid.
\textsuperscript{84} Ibid.
\textsuperscript{85} Ibid.
\textsuperscript{87} Ibid at 338.
lead to real-world consequences, such as discrimination, violence, and the perpetuation of social divisions. However, in safeguarding autonomy, it is equally important to strike a balance that prevents hate speech from undermining other equally important values, such as equality, tolerance, and social cohesion.

1.2.4 Democracy

The word ‘democracy’ is a term that comes from two Greek words: “demos,” which means people, and “kratein,” which means to govern or rule. According to Moon, democracy is important because, first, it is necessary for understanding the scope of freedom of expression. Second, it defends the constitutional protection of the right to freedom of speech. Moon, quoting Meiklejohn, states that ‘the principle of freedom of speech springs from the necessities of the program of self-government.’ In other words, freedom of speech is therefore seen as an integral part of a democratic government.

Dworkin, in his work, argues that democracy involves collective action; when a democratic government is by the people, it means that people collectively do things, for instance, elect leaders. Sen’s view is broader. Sen gives support to “public reasoning” and “government by discussion,” however, he realizes that though ballots play a significant role in articulating public reasoning, democracy goes beyond this. He argues that the effectiveness of ballots becomes manifest where there is free speech. Public opinion here is not just restricted to when people elect their representatives to the government but also involves people constantly speaking out about social or political issues that affect them. Only when people can give public opinions will they be able to control the government’s policies. However, with the increased use of internet/social

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90 Ibid.
91 Ibid.
94 Ibid at 327.
95 Ibid.
96 Bhagwat & Weinstein, supra note 88 at 85.
97 Ibid.
media, it has become more challenging to determine how much speech should be allowed on the ground of democracy.

Public opinion is a fundamental aspect of democracy that empowers citizens, ensures accountability, shapes policies, and strengthens the overall functioning of the democratic system. However, in safeguarding the formation and articulation of public opinion, there is a need to protect freedom of expression. When citizens can freely discuss and debate issues, it leads to a more informed and diverse public opinion, contributing to the richness of democratic deliberation. Therefore, any restriction on either public opinion or free expression breaches the fundamental principle of the Constitution.

In a democracy, the people’s right to public information must be protected because it underpins transparency and informed decision-making. Democracy thrives when citizens are well-informed and can make educated decisions about their governance. The right to public information ensures that individuals have access to diverse sources of information, enabling them to understand the issues, compare different perspectives, and make informed choices when voting in elections or participating in public debates.

Hence, the defense against the restriction of false and hate speech often revolves around democratic rights to public opinion and information. Some free speech defenders argue that limiting hate speech might inadvertently restrict legitimate criticism and dissent. They believe marginalized communities should be allowed to speak out against injustice and advocate for their rights, even if it involves contentious or uncomfortable speech.

A vibrant democracy thrives on robust public discourse. Allowing different perspectives, even controversial ones, contributes to the richness of debates, enabling the exchange of ideas and the discovery of common ground. However, democracy also involves respecting each other’s opinions, engaging in respectful debates, and collectively working toward the betterment of society.

This thesis contends that restricting hate speech is essential as it goes against democratic values. Hate speech silences opposing voices, breeds fear, hinders open discussions, and undermine

\[98\text{ Ibid at 90.}\]
democratic principles like equality, inclusivity, social cohesion, and respect for human rights. Also, hate speech “lays the groundwork for later, broad attacks on vulnerable groups ranging from discrimination to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide.” Therefore, it is imperative to restrict hate speech to ensure that democratic values are upheld.99

While hate speech should be prohibited, there must be a balance between protecting freedom of expression and safeguarding against harmful speech. Individual rights must be protected for a free and diverse media landscape, fostering an environment where open dialogue and constructive criticism are valued rather than suppressed.

Furthermore, theories of expression, particularly in the context of freedom of expression, play a crucial role in shaping principles and considerations applied in the proportionality analysis of regulatory measures. Just as theories of expression emphasize the fundamental role of free speech in promoting open and vibrant democratic discourse, the proportionality analysis considers how regulatory measures impact the free flow of information and ideas, ensuring that democratic values are protected and enhanced. In the proportionality analysis, regulations that hinder this exchange may be disproportional, as they impede the functioning of the marketplace of ideas. Proportionality analysis considers how laws may impact individuals’ ability to express themselves freely and make informed choices. Their influence on the proportionality analysis ensures that regulatory measures strike a balance between protecting freedom of expression and addressing legitimate societal concerns.

1.3 Research Structure

Chapter two explores the nature and scope of the right to freedom of expression under constitutional law in Nigeria with insight from Canada and international laws. The chapter discusses the nature of the right of freedom of expression under the Nigerian Constitution. Specifically, it highlights whether the right to freedom of expression in Nigeria can be restricted by laws and under what conditions this right may be restricted. Judicial interpretation of cases relating to the right to freedom of expression and its limitations are also examined. However, in

restricting freedom of expression, there are no further principles that guide states and the courts in ensuring the right to freedom of expression is protected.\textsuperscript{100}

Due to the lack of extensive discussion on the issue of restriction of freedom of expression under Nigerian constitutional law, this chapter draws from Canada’s jurisprudence on the scope and extent of the right to free speech. The reasons for specifically selecting Canada include the impact of the \textit{Canadian Charter of Human Rights and Freedoms} on constitutional law in other nations, such as South Africa, Israel, and New Zealand; the textual similarity in the provision of the right to freedom of expression in both Nigerian and Canadian constitutional law; and the fact that Canada has succeeded in going further by creating a structure that addresses constitutional rights violations like free speech while simultaneously looking out for their protection. This structure also aligns with provisions of international standards like the International Covenant on Civil and Political Rights on protecting freedom of expression.

In this chapter, we will examine the interpretative technique used by Canadian courts to balance the protection of free expression and its restriction. Apart from the provision of the Canadian Charter on the right to freedom of expression, the Supreme Court of Canada has developed a test to justify limitations on rights and freedom in the Charter. We will analyze the effectiveness of this test in achieving such a balance by examining arguments both for and against the proportionality test. Also, we consider the protection and limitation of freedom of expression according to the current international laws that apply to this right. This would be limited to provisions of international legal standards such as the \textit{Universal Declaration of Human Rights} (UDHR), the \textit{International Covenant on Civil and Political Rights} (ICCPR) and the \textit{African Charter on Human and Peoples’ Rights} (ACHPR).

Chapter three is on the regulation of social media in Nigeria. The analysis highlights the obstacles associated with social media regulation, particularly the prevalent issue of vague and overreaching provisions that fail to safeguard freedom of expression on social media. Upon examination of the bills, the thesis argues that they contain provisions that leave room for abuse, resulting in an

\textsuperscript{100} It is however noted that even though the Nigerian Constitution mention specific grounds upon which the right to freedom of speech may be restricted, these conditions are broad. In addition, there is little or no guidance as to how these conditions can be interpreted when faced with real life cases. This point is discussed further in chapter two of this research work.
overreaching restriction on freedom of expression. To evaluate the impact of these bills, the thesis employs the proportionality test and references international norms on the regulation of false and hateful speech.

Despite some criticism of the proposed bills,\textsuperscript{101} this thesis delves into the crucial matter of safeguarding freedom of expression. Through an analysis of the gaps in Nigeria’s constitutional framework for restricting free speech, as well as the challenges posed by current bills, this thesis argues that a definitive and unambiguous legal framework is necessary to govern the regulation of social media and safeguard the right to freedom of expression. Chapter four recommends a structure that upholds international standards and employs proportionality analysis to defend freedom of expression in Nigeria. While this thesis does not provide a comprehensive legal examination, its aim is to stimulate discourse on the importance of protecting freedom of expression and the role of international law in regulating social media.\textsuperscript{102}

\textsuperscript{101} John M Moses, Tordue Simon Targema and Jesse Ishaku, “Tale of an Ill-Fated Scapegoat: National Security and the Struggle for State Regulation of Social Media in Nigeria” (2022) J Digital Media & Pol’y. [Moses and Targena criticizing the reason for social media regulation, contend that the use of ‘national insecurity’ as a justification for regulating social media is ‘counterproductive’ because social media is not the sole reason for insecurity but rather the lack of employment opportunities, inequality, and poverty].

\textsuperscript{102} There is a lack of discussion on how to safeguard the right to freedom of expression in Nigeria and what the appropriate rules for regulating social media should or should not be in Nigeria.
CHAPTER TWO: FREEDOM OF EXPRESSION IN NIGERIA; LESSONS FROM CANADA AND INTERNATIONAL

2.1 Introduction

Globally, laws have been enacted against false speech and expressions that incite hatred against individuals or groups. These provisions are contained in criminal laws as well as human rights laws of many countries. In 2019, the Nigerian House of Assembly introduced two bills for regulating hate speech and false speech on social media: the Hate Speech (Prohibition) Bill 2019 (HB. 246) and the Protection from Internet Falsehoods and Manipulation and Other Related Matters Bill 2019, (SB. 32). However, a central issue in discourse is how the right to freedom of expression can be balanced with a law restricting the right so as to ensure that the right to freedom of expression is preserved; to put it another way, what is the scope of freedom of expression and to what extent is the law permitted to restrict this right?

It is a common rule that any law enacted in a democratic society must conform to the principle of constitutionality. Therefore, a starting point in discussing the regulation of social media in Nigeria is to determine the constitutional protection of the right to freedom of expression. In Nigeria, the right to freedom of expression is not absolute, and the government can make laws to restrict the right. However, for a law to limit this right, this law must be “reasonably justified in a free and democratic society.” This means that any law enacted must be within a reasonable limit.

Reasonable limits on rights are essential and a way of balancing between restricting laws and protecting the rights so that while the government can make laws, the rights are not overly infringed on. However, an important discussion is interpreting what is reasonably justified under the Nigerian Constitution. This chapter examines how the Nigerian courts have analysed this meaning in the context of freedom of expression. However, the Nigerian courts have not developed

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104 Ibid.
an analytical framework to determine the extent to which these laws can justifiably infringe on the right to freedom of expression. This gap implies that the right to free expression in Nigeria can be easily abused, and judges deciding cases on freedom of expression have no guidance.

The Canadian courts have developed a proportionality analysis known as the Oakes test. This chapter looks specifically at Canada to show how the Canadian courts have analyzed the reasonable limits condition of the Canadian Charter.¹⁰⁹ This chapter shall also consider international norms, which include some norms from the Universal Declaration of Human Rights (UDHR),¹¹⁰ the International Covenant on Civil and Political Rights (ICCPR),¹¹¹ and the African Charter on Human and People’s Rights (ACHPR).¹¹² Aside from support for the proportionality analysis in these international standards, they ground further principles on the restriction of hate speech and false speech to ensure that limitations are proportional.¹¹³

2.2 Constitutional Interpretation of the Nature and Scope of the Right to Freedom of Expression in Nigeria

The term “Constitution” denotes “the fundamental and organic law of a Country or State that establishes the instructions and apparatus of government, defines the scope of governmental sovereign powers and guarantees individual civil and civil liberties.”¹¹⁴ This section aims to determine the constitutionally permissible grounds for the restriction of freedom of expression and the challenges posed by the restriction of freedom of expression. This section shall highlight the challenge of not having expansive judicial jurisprudence protecting freedom of expression under the Nigerian Constitution.

¹⁰⁹ Canadian Charter of Rights and Freedoms, s. 2 (b), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11. [The Charter].
¹¹³ The thesis does not extensively reference social media regulation literature. Instead, it primarily focuses on conducting a comparative analysis of social media regulation from a constitutional law perspective. This intentional emphasis is based on the belief that a comparative examination, grounded in constitutional principles, is a relevant framework for addressing Nigeria’s distinct challenges in regulating social media. The aim is to offer nuanced insights into the interplay between constitutional norms and international standards, providing a valuable perspective on the freedom of expression within the specific context of Nigeria.
¹¹⁴ Black’s Law Dictionary, 11th ed, 2019 op cit @ 388.
2.2.1 General Principles on Interpreting Rights and Freedoms under the Nigerian Constitution

Before discussing Nigerian judicial jurisprudence on the nature and scope of freedom of expression, it is necessary to briefly state the position of Nigerian courts on the rules of interpreting the constitutional protection of constitutional rights. In *Nwali v. Ebsiec & Ors*, the Court of Appeal stated that in interpreting a fundamental right in the Constitution, such interpretation should be done to promote values and ensure an open democratic society. In a judgment by Justice Agim of the Court of Appeal, the Constitution is described as an “organic document” that should speak from time to time and asserts that the fundamental rights and freedoms under the Constitution are often described in broad terms so that the court can interpret these rights in line with the present conditions. The Nigerian Courts are also encouraged not to strictly adopt the literal construction of rights and freedoms, as doing so will only “retard the realization enjoyment and protection of those rights and freedoms.” Therefore, one can argue that when the court is faced with a question on the scope of the right to freedom of expression, rather than a narrow approach, a broad or purposive interpretation should be adopted. The Supreme Court succinctly summarized the interpretative mechanism of the Constitution in *APC & Ors v. Enugu State Independent Electoral Commission & Ors* and stated that:

[I]n the course of interpreting the Constitution, it then behooves the court to consider the Constitution in its entirety – as a whole. That’s to say, the provisions of the Constitution ought to be construed in such a way as to justify the aspirations and hopes of the framers thereof vis-a-vis the laudable objectives of promoting the good government and welfare of the citizens on the principles of freedom, equality, justice, peace, and unity of the people.

Consequently, Nigerian jurisprudence supports using a purposive mechanism where the literal text does not capture the legislature’s intention.

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115 (2014) LPELR-23682(CA) 33-35.
116 Ibid.
117 Ibid.
118 Ibid at Para E-A.
119 (2021) LPELR-55337 (SC).
2.2.3 Freedom of Expression under Nigerian Law

The extent of restricting the right to freedom of expression depends on the text of the Constitution as well as the interpretative meaning given by the court. The Constitution is the ground norm of all laws in the Nigerian system, and this means that the Constitution is supreme and binds every person and body.\(^{121}\) Any other law inconsistent with the Constitution’s provisions is declared void as the Constitution takes precedence.\(^{122}\) Consequently, any restrictions infringing on constitutional rights must be justified in accordance with the provision of the Constitution.

Sections 33 to 44 of the Constitution protect various human rights, which are described as ‘Fundamental Human Rights.’ In *Hassan v. EFCC*,\(^{123}\) the Court of Appeal defines fundamental rights as “a right which stands above the ordinary laws of the land and which are antecedent to the political society itself, and it is a primary condition to civilized existence.”\(^{124}\) These rights include the right to life; the right to dignity; the right to personal liberty; the right to fair hearing; the right to privacy and family; the right to freedom of thought, conscience and religion; the right to freedom of expression and press, etc. Though these rights are described as fundamental, some rights that are qualified, and the law can limit them. The right to freedom of expression is an example of a right that can be restricted.

Section 39 of the 1999 Nigerian Constitution guarantees and protects the right to freedom of expression and the press. It provides that:

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

2. Without prejudice to the generality of subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions.\(^{125}\)

The subsection also provides that no person other than the state or any authorized person shall own, establish, or operate a wireless broadcasting station except in accordance with an act of the

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\(^{122}\) *Ibid*.

\(^{123}\) *Hassan v E.F.C.C* (2014) 1 NWLR {Pt. 1398} page 607 at 610.

\(^{124}\) *Ibid*.

\(^{125}\) The Nigerian Constitution, *supra* note 108.
legislature. The Nigerian Constitution, therefore, protects the freedom to: (1) hold opinions; (2) have ideas and information; and (3) impart ideas and information. People are free to express their opinions, whether they are of an opposing view or not, without any fear of punitive measures or restraints. This right is vital for the protection of the exchange of ideas and has been held to be a fundamental principle in any democratic state. In *Omega Bank Plc v. Government of Ekiti State*, the Court of Appeal noted that section 39 of the Nigerian Constitution guarantees freedom of expression and subsumed in this right, is the right to criticize the government, public bodies and officers.

The Supreme Court of Nigeria has stated on many occasions that the right to freedom of expression is not absolute. While section 39(1) of the Nigerian Constitution guarantees the right to freedom of expression, it also recognizes that there may be circumstances where this right needs to be restricted. Section 39(3)(a) provides for such restrictions in cases where the disclosure of information received in confidence or the maintenance of the authority and independence of the courts necessitates it.

The restriction of the right to freedom of expression under the Constitution can be either a general or a specific limitation. A specific limitation is sometimes contained in the section or a subsection that provides for the protection of the free expression right. On the other hand, some countries’ constitution do not subject their constitutional rights to specific limitations; instead, they are restricted by the general limiting provision. In Nigeria, Section 45 of the Nigerian

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126 *Ibid* at s 39 (3).
129 *Ibid*.
131 *The Nigerian Constitution, supra* note 108.
133 *Ibid*. An example is Article 19 (2) of the Indian Constitution and Article 5 (2) of the German Basic Law. Article 19 (2) of the Indian Constitution provides that; Nothing in sub-clause (a) of clause (1) shall ‘prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence’.
134 Section 1 of the *Canadian Charter* provides that the rights under the charter are guaranteed ‘subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.
Constitution allows for the general limitation of certain fundamental rights outlined in Chapter IV of the Constitution. Section 45 provides:

Nothing in sections 37, 38, 39, 40, 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.\(^{135}\)

2.2.4 **Criticisms from Scholars of the General Limitation Clause in the Constitution**

Some scholars have criticized this general limitation clause and its drafting. Specifically, they question the use of the phrase “reasonably justifiable.” Some argue that the language of the limitation clause is vague and subjective, leaving room for abuse by those in power to justify violations of human rights under the guise of national security or public interest.\(^{136}\) Professor Chude Okonwor, who was a senior lecturer at the department of Mass Communication, University of Nigeria, Nsukka, states in his article, *The Legal Basis of Freedom of Expression in Nigeria*, that in interpreting these provisions, courts must determine whether executive and legislative acts are reasonable and justifiable.\(^{137}\) When interpreting these provisions, courts must assess whether executive and legislative acts are reasonable and justifiable. This requires an approach that does not strictly adhere to statutory interpretation but considers historical conditions and political and social state.\(^{138}\) He further states that the phrases “nothing in this section shall invalidate any law…” and “reasonably justifiable in a democratic society” are manifestly vague and flexible.\(^{139}\) He raises a question: how does one determine the degree of freedom that is compatible with democracy?\(^{140}\) Though Okonkwor wrote his work based on the 1960 and 1963 Constitutions, his criticism still

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\(^{135}\) Article 19 of *International Covenant on Civil and Political Rights* Adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 (entry into force 23 March 1976) ICCPR.

\(^{136}\) *The Nigerian Constitution, supra* note 108 at s 45.


\(^{139}\) Ibid.

\(^{140}\) Ibid at 262.
applies to the 1999 Constitution as these Constitutions contain similarities in the restriction of constitutional rights.\footnote{25}

Apart from criticizing section 45 for using vague and broad laws, it has been argued that the phrase “nothing in the section shall invalidate any law…” places more emphasis on the restriction than the rights themselves.\footnote{141} Ben Nwabueze, in his book, \textit{A Constitutional History of Nigeria}, argues that the phrase seems to impose a presumption in favour of the validity of any law restricting the right.\footnote{142} It places the responsibility of proving that a law is not reasonably justified on the person challenging the law.\footnote{143} Nwabueze suggests that the Constitution should be replaced with the following phrase: “Any law derogating from a guaranteed right shall be invalid unless it is reasonably justifiable.” This change would make it the government’s responsibility to prove that a law is justified.\footnote{144} Basil E. Ugochukwu\footnote{145} has raised concerns about the lack of an interpretative framework for determining the justifiability of a limitation law in a democratic society.\footnote{146} According to Ugochukwu, the Nigerian courts must determine whether a liberal or conservative approach is preferable when interpreting constitutional rights and ambiguous terms, such as the limitation clause in section 45.\footnote{147} However, there are no additional mechanisms available, apart from section 45 of the Constitution, to guide Nigerian courts in their interpretation.\footnote{148} Ugochukwu contends that this lack of guidance creates an unclear standard for effectively balancing rights against governmental interests. As a result, there is a strong likelihood of contradictions and

\footnote{25} Section 25 of the 1963 Nigerian Constitution provides that (1) Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference. (2) Nothing in this section 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; (b) for the purpose of protecting the rights, reputations and freedom of other persons, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating telephony, wireless broadcasting, television, or the exhibition of cinematograph films; or (c) imposing restrictions upon persons holding office under the State, members of the armed forces of the State or members of a police force.

\footnote{141} Benjamin Nwabueze, \textit{A Constitutional History of Nigeria} (Essex: Longman Inc, 1982)

\footnote{142} Benjamin Nwabueze is a professor of law and the first academic to become a Senior Advocate of Nigeria (SAN) based on his published works. He has written over thirty works and has been recognized as a leading scholar of constitutional law in Nigeria.

\footnote{143} \textit{Ibid} at 118.

\footnote{144} \textit{Ibid} at 30.

\footnote{145} \textit{Ibid}.

\footnote{146} Basil Ugochukwu is a Professor of Law and has written many works on Nigerian Constitutional Law especially from an international point of view. >

\footnote{147} Ugochukwu, \textit{supra} note 135.

\footnote{148} \textit{Ibid}.

\footnote{149} \textit{Ibid}.  

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inconsistencies in decisions.\(^{150}\) He also observes that this area of law has not gained much academic attention.\(^ {151}\)

The earliest attempt to define the phrase *reasonably justifiable in a democratic society* within the limitation clause was in the 1960 case of *Cheranci v Cheranci*.\(^ {152}\) This case dates back to 1960 and was presided over by a non-Nigerian Justice, Justice Bates, at the Northern Region of Nigeria High Court.\(^ {153}\) In *Cheranci*,\(^ {154}\) the defendant was accused and convicted of inducing children and young persons to participate in political activities, which was at the time an offence. The defendant sought a declaration before the high court that his conviction violated his right to freedom of expression, peaceful assembly, and association.\(^ {155}\) Upon discovering that the defendant’s rights had been violated, Justice Bates proceeded to evaluate the permissibility of the law.\(^ {156}\) To establish the criteria for determining whether a law was reasonably justified, Justice Bates specified that:

1. There is a presumption that the Legislature has acted constitutionally and that the laws which they have passed necessary and reasonably justifiable.
2. A restriction upon a fundamental human right must before it may be considered justifiable-
   a. be necessary in the interest [in the present case] of public morals or public order; and
   b. must not be excessive or out of proportion to the object which it is sought to achieve.\(^ {157}\)

Aside from this case, the Nigerian court has not included the element of “proportionality” in deciding cases, and this has not helped the development of jurisprudential principles flowing from the text of the Constitution.\(^ {158}\)

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\(^ {150}\) Ibid.
\(^ {151}\) Ibid at 31.
\(^ {152}\) Ibid. The limitation clause is historically recognized to be an invention of the British government. This clause was inserted in the Constitution, and it was handed by the British government to Nigeria at its Independence in 1960.
\(^ {154}\) Ibid.
\(^ {155}\) Ibid.
\(^ {156}\) Ibid.
\(^ {157}\) Ibid
\(^ {158}\) Ugochukwu, *supra* note 135 at 42.
2.2.5 Freedom of the Press and Freedom of Expression

This work argues that the Nigerian Court has provided limited jurisprudence on the limitations of the right to freedom of speech. However, it is worth noting that the court has addressed laws that have been used to restrict the freedom of the press. Nonetheless, the cases presented do not provide any clear tests to which these laws should be subjected to ensure that they do not impede the pertinent freedoms. One of the earliest cases in Nigeria that addressed the right of freedom of the press and protection of public order was Director of Public Prosecutions v. Obi.\(^\text{159}\) In this case before the High Court of Lagos, the defendant was charged with publication of a seditious statement under section 51(1)(c) of the Criminal Code.\(^\text{160}\) The Act prohibited the publication of words that intend to bring hatred or contempt, incite content and dissatisfaction, promote feelings of ill-will and public disorder against the government. The defendant, Chike Obi, was prosecuted on the charge that he distributed a pamphlet called “The People: Facts that you must know” which contained an alleged seditious publication to wit:

“Down with the enemies of the people, the exploiters of the weak and oppressors of the poor....The days of those who have enriched themselves at the expense of the poor are numbered. The common man in Nigeria can to-day no longer be fooled by sweet talk at election time only to be exploited and treated like dirt after the booty of office has been shared among the politicians” which appear on pages 3 and 5 of the copy of the pamphlet ...”\(^\text{161}\)

The High Court proposed a judgment convicting the defendant for a seditious statement. However, the Supreme Court was asked to interpret certain constitutional issues, including determining whether sections 50 and 51 of the Criminal Code are inconsistent with the provisions of section 24 of the Constitution, which protects freedom of expression.\(^\text{162}\)

The Court held that the provisions of sections 50 and 51 of the criminal code were not inconsistent with the provisions of the Constitution relating to the right to freedom of expression and upheld the defendant’s conviction. In this case, there was no framework or clear analysis of how lower

\(^{159}\) Director of Public Prosecutions v. Obi (1961) LCN/0927(SC) [Obi]
\(^{160}\) Ibid
\(^{161}\) Ibid
\(^{162}\) Section 24 of the 1960 Constitution is now section 39 of the 1999 Constitution which is the subject of this work.
courts can interpret laws permissible in restricting freedom of the press, and the court did not explain the meaning of the phrase “reasonably justified in a democratic society”.

The lack of a framework has also contributed to the inconsistent and subjective decisions between courts in the Nigerian legal system, as seen in the case of President of the FRN & Ors v. Isa & Ors. In this case, the defendant asked the Court of Appeal to determine if the Nigerian Press (Council) Act was inconsistent with section 39 of the Nigerian Constitution. The trial court held some provisions of the Act to be unconstitutional, including section 17, which empowers the Council to reprimand journalists because they constituted a gross violation of section 39 of the 1999 Constitution. The trial court also stated that ‘the Act has rather created an illicit ombudsman in the council which will certainly be used to define and tailor the editorial directions and policies of the media.’ The Appellant was dissatisfied with the lower court’s decision and appealed to the Court of Appeal. The court criticized the lower court for broadly interpreting the law and held that mere speculation that a law will violate freedom of expression is insufficient to nullify. The court then held that it is within the state’s power to establish a body in line with the Constitution and that the Act’s objective did not portend any danger to the right to freedom of expression.

This is a significant case concerning governmental agencies and their potential infringement on citizens’ freedom of expression. The lower court was criticized for interpreting the Act’s objective too broadly. However, the Court of Appeal had the opportunity to correct this error by establishing a decision framework demonstrating how the Act’s objective was consistent with the Constitution. Instead, the court simply restated section 45 of the Constitution. While it is not necessary for higher and lower courts to always agree on decisions, having a standard to guide both courts in similar cases would improve the judicial system, especially when there are appeals against the consistency of an act with the Constitution. This would lead to less uncertainty and subjectivity when dealing with Constitutional cases. Nigeria’s legal system has been subject to criticism for its laws regulating freedom of expression, with some arguing that the vague language of these laws could be open to abuse. Despite these criticisms, these laws have yet to be tested in court, leaving the country’s legal system without an established body of jurisprudence on the boundaries of the right

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163 President of the FRN & Ors v. Isa & Ors. (2015) LPELR-25981(CA).
164 Ibid
to freedom of expression. This deficiency was highlighted in the case of Okedara v. A.G. Federation.\footnote{Okedara, supra note 107.}

Okedara, a legal practitioner in Nigeria, instituted an action at the lower court challenging the constitutionality of section 24(1) of the Cybercrimes (Prohibition, Prevention, ETC) Act, 2015.\footnote{Section 24 (1) provides that any person who knowingly or intentionally sends a message or other matter by means of computer systems or network that- (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) he 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…} According to the appellant, the offence lacked a clear and defined statement as it contained vague provisions that would infringe on the constitutional rights of freedom of expression and the press.\footnote{Ibid} The lower court held that s. 24(1) of the Cybercrime Act did not contravene the right to freedom of expression under the Constitution and that the Act was necessary for a democratic society in line with s. 45(1) of the Constitution. The appellant appealed this decision to the Court of Appeal. The court stated that in cases where the provision of an act is contested for conflicting with the provisions of the Constitution, the duty of the court is “to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former…”\footnote{Ibid} The court then held, that considering section 1 of the Cybercrime Act, 2015 and section 45 of the Constitution, the Act was set to protect the privacy of rights of citizens, and therefore, it aligns with the provisions of the Constitution. Additionally, the court rejected the Appellant’s argument that the law’s failure to clearly define grossly offensive, indecent, obscene, or menacing behaviour is incompatible with s. 39 of the Constitution.\footnote{Ibid. See U.S. v. Butler et al (1936) 297 U.S 1; see also Marwa & Ors v. Nyako & Ors (1980) LPELR-2936 (SC)}

This case was an opportunity for the court to discuss two issues confronting the regulation of free speech in Nigeria: (a) the use of unclear and undefined words in laws restricting freedom of speech; and (b) the extent to which a law can be permitted to restrict free expression. To develop jurisprudence in the area of freedom of expression, the court needs to discuss how far laws can be allowed to restrict this right. This discussion should involve creating an analytical framework. In
cases where laws restricting freedom of expression have vague terms, there is a risk of state actors or social media platforms exploiting them to regulate content. Therefore, in determining whether such laws are justified, it is necessary to examine their impact on free expression.

In a recent case, the Court is leaning towards the proportionality test, though this is not clearly stated. In *Aviomoh v. C.O.P. & Anor*,\(^\text{170}\) the appellant, was charged with defaming the respondent by publishing in various newspapers the alleged corrupt practices of the respondent. The appellant appealed the Court of Appeal’s decision to the Supreme Court. One of the issues for determination was whether sections 79, 392, 393, 394 and 395 of the Penal Code, bordering on joint acts of defamation of character, injurious falsehood, printing, or engraving matters known to be defamatory matters, interfered with the right to freedom of expression.\(^\text{171}\) The appellant asked the Court to declare those sections null and void.

The Supreme Court held that the penal code’s provisions were not inconsistent with the Constitution. The Court stated that the offence of defamation of character and injurious falsehood is within the ambit of s 45(1) of the 1999 Constitution which provides for the grounds for restricting freedom of expression. However, in determining whether criminalizing defamation was justified, the Supreme Court established a test in accordance with the Siracusa Principles on the limitation and derogation provisions in the *International Covenant on Civil and Political Rights*.\(^\text{172}\) The test states that the limitation or restriction must be:

1. Provided for and carried out in accordance with the law;
2. Directed toward a legitimate objective of general interest;
3. Strictly necessary in a democratic society to achieve the objective;
4. The least intrusive and restrictive available to reach the objective;
5. Based on scientific evidence and neither arbitrary nor discriminatory in application; and
6. Of limited duration, respectful of human dignity, and subject to review.\(^\text{173}\)

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\(^{170}\) *Aviomoh v C.O.P. & Anor* (2021) LPELR-55203 (SC)
\(^{171}\) Ibid
\(^{172}\) Ibid.
\(^{173}\) Ibid.
Based on this principle, the court held that while criminalizing defamation serves the legitimate purpose of protecting reputation, it is not essential to achieve this goal in a democratic society. Additionally, criminalization is not the least invasive approach to achieving the objective. As a result, criminalizing defamation is not reasonably justifiable in a democratic society and is unconstitutional.

Though the Court’s decision is an improvement on previous Nigerian constitutional rights adjudication, there is still room for improvement. For instance, the first step should have been to discover whether the defamatory statement is protected by s. 39(1) of the Constitution and if the defamation law was a breach of s. 39. This would have given the Court the chance to expand more on the scope or extent of the right to freedom of expression.

The discussion in this section has shown scholarly criticisms against sections 39 and 45 of the Nigerian Constitution, which include the vagueness of these provisions and the lack of a uniform analytical framework for Nigerian courts in deciding constitutional rights cases like the right to freedom of expression. The scope and limit of this right ought to be analyzed to know when its limits are breached, and the suggested way of doing this is by creating a structural test for this purpose. The Nigerian court must ensure that laws are proportionate and fair to protect online and offline freedom of expression, even though the Constitution does not explicitly mention this test.

2.3 The Canadian Charter and the Limitation of Rights

Having established in the previous section that the Nigerian judicial system lacks extensive jurisprudence on constitutional rights limitations, this section examines the Canadian legal system about this issue to draw from their experience. The preliminary research before limiting my scope to Canada explored other jurisdictions like the United States, United Kingdom and

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174 The United States has no limitation clause against the right to freedom of expression which is not the case in Nigeria. The First Amendment provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

175 In the UK, the White Paper makes extensive recommendations to control online media by imposing social media sites with a duty of care and creating a regulator to ensure the duty of care is upheld. The White Paper’s open-ended list of online harms and wide range of firms covered raise specific issues since they risk overtaxing the regulator and resulting in extremely selective enforcement.
Germany. However, our analysis that the Canadian legal system offers a more extensive and helpful jurisprudence on constitutional rights limitations, especially freedom of expression.

The choice of Canada stems from how the Canadian Charter of Human Rights and Freedoms has influenced other countries’ constitutional rights, including the United States, Germany, and Israel. Section 45 of the Nigerian Constitution is similar to s. 1 of the Canadian Charter. Section 1 of the Canadian Charter provides that rights may be limited by law where they are demonstrably justified in a free and democratic society. Section 45 of the Nigerian Constitution provides that rights may be limited by any law if it is reasonably justifiable in a democratic society, and specifically if they are made in the interest of the public and the purpose of protecting the rights and freedoms of other persons. Despite a generally phrased limitations clause, Canada has successfully gone deeper by establishing a framework that addresses infringement on constitutional rights like freedom of expression while also looking out for their protection. Also, this framework aligns with the provision of international standards like the International Covenant on Civil and Political Rights.

The Canadian Charter of Rights and Freedoms protects liberal democratic rights, including the right to free expression. Section 2 (b) states that:

Everyone has the following fundamental freedoms…freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication…

Section 1 of the Canadian Charter of Rights and Freedoms provides for the limitation of rights and freedoms. It provides that the Charter “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” For a law to limit the right to freedom of expression, it must be justified as reasonable and necessary in a democratic society.

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176 The German Network Enforcement Law requires social media sites to set up effective, prompt, and transparent complaint management processes. When illegal content (as defined by the German Criminal Code) is discovered, it must be deleted or banned within a certain time frame. The precise timeframe depends on whether the content is obviously unlawful or just prohibited and if the social media platform works with a recognized organization for industry self-regulation. Systemic violations of the complaints management system, such as persistently missing the dates for deletion and disobeying reporting and transparency standards, can result in fines of up to 50 million euros.


178 Ibid.

179 The Charter, supra note 109 at s 1.
Section 1 of the Canadian *Charter* has dual functions. The section guarantees rights and states the standards by which limitations are justified.\(^{180}\) It is a separate section that provides for a general limitation on the rights guaranteed in the *Charter*. In determining reasonable limits, the Canadian courts have developed a structure for understanding section 1 of the *Charter* and how it applies to rights and freedom. This structure is similar to what is called “proportionality analysis.”\(^{181}\) What this analysis means is that if a law is shown to infringe on a right protected by the *Charter*, then the government seeking to justify this infringement must prove that the law is justified under section 1 of the *Charter*.\(^{182}\)

Any limit against the right is evaluated to determine whether the limitations are reasonable in relation to the impact on individual rights, the policy goal, or protecting the rights of others.\(^{183}\) In other words, the government has the onus to prove that the limit is “demonstrably justified in a free and democratic society”. The standard of proof here is a balance of probability and this can be shown using the word “demonstrably justified” in section 1 of the Charter. So, the court engages in discussions about whether the limit is necessary and sustainable.

In Canadian law, the *Oakes* test is a crucial tool for evaluating whether limitations on rights are constitutional. The Supreme Court of Canada established it in the landmark case of *R v Oakes*.\(^ {184}\) The test consists of two parts, both of which must be satisfied for the limitation to be considered justifiable. The test requires that the objective of the limitation be significant enough to outweigh the right that is being limited. In other words, the purpose of the limitation must be important enough to justify infringing on an individual’s rights. The second test involves three distinct elements that must be considered to determine whether the limitation is proportional. Firstly, there must be a rational connection between the limitation and the objective pursued. This means that the limitation must be directly related to the goal that it is intended to achieve. Secondly, the degree of impairment caused by the limitation must be minimal. In other words, the limitation must be no greater than necessary to achieve the objective. Any additional restrictions beyond what is required

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\(^{183}\) Ibid.  
\(^{184}\) Oakes, *supra* note 3.
are not proportionate and will not pass the test. Lastly, the detrimental effects of the limit must be proportionate to its beneficial effects. This requires balancing the costs and benefits of the limitation, considering both the impact on individual rights and the benefits to society. For a limitation on rights to pass the Oakes test, it must meet all parts of the test.185

Each of the steps are discussed in detail below:

1. The Substantive Objective

In Oakes, the Supreme Court of Canada stated that the objective must “relate to concerns which are pressing and substantial in a free and democratic society.”186 The standard required here must be high, as this is to ensure that objectives that are trivial or not in accordance with the principles of a free and democratic society are not protected under section 1.187 This stage is very important, as the subsequent stages of the proportionality test depend on the properly recognizing the objectives.188 Therefore, any legislation that restricts the right under s. 1 should be precise in defining the objective and less vague. It should also be noted that the relevant objective to be proved is not the entire legislation’s objective but the infringing measure’s objective.189

2. The Rational Connection Test

This test suggests that there must be a rational connection between the restriction and the legislative objective. The limitation must not be irrational or arbitrary.190 The court has described this test as not onerous.191 The connection may be proved by scientific evidence, but in some cases involving “political or social considerations,” it cannot.192 In order to prove a causal link in such cases, the government must prove that the restriction is justified and effective in achieving its goal. In R v Butler,193 the court held that despite inconclusive social evidence, there was a connection

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185 Regimbald & Newman, supra note 179 at 590.
186 Oakes, supra note 3 at 69.
187 Ibid.
192 Sauve v Canada (Chief Electoral Officer), [2002] 3 SCR 519 at 18.
between the law sanctioning the distribution of materials that victimizes women and the objective of protecting women and children from violence.\textsuperscript{194}

### 3. Minimal Impairment.

This step requires that the restriction impair the right ‘as little as reasonably possible’ or be ‘least intrusive.’ It must be proven that there is no other less intrusive impairment to attain the objective.\textsuperscript{195} The description of as little as possible will depend on the government’s objective and the means to achieve it.\textsuperscript{196} A law that had the effect of banning the total expression of a right has been held not to be minimally impairing. In \textit{Ford},\textsuperscript{197} the Court stated that the Quebec law, which forbade the use of the English language in commercial advertisements, was not a minimal impairment.\textsuperscript{198} It is not in all cases where there is an alternative option that the court would interfere with. In the \textit{City of Montreal},\textsuperscript{199} the Supreme Court of Canada stated, “…[t]he court will not interfere simply because it can think of a better, less intrusive way to manage the problem. It is required that the law [government concerned] establish that it has tailored the limit to the exigencies of the problem in a reasonable way.”\textsuperscript{200}

### 4. The Balancing Test

This is the final stage in the proportionality analysis. Here, the court is asked to consider the objective of the legislature and the overall effect such a law would have on the right.\textsuperscript{201} It aims to determine whether the benefits gained from the limitation of the rights justify the infringement.\textsuperscript{202} Therefore, the limitation on the constitutional right must be justified by reference to the benefits of some other interest, value, or principle.\textsuperscript{203} The measure is proportionate if the benefits are sufficient to offset the loss on the side of the right engaged by the measure; otherwise, it is

\textsuperscript{194} Ibid.
\textsuperscript{195} \textit{Ford v. Quebec (Attorney General)}, [1988] 2 SCR 712
\textsuperscript{196} \textit{Irwin Toy Ltd. v. Quebec (Attorney General)}, [1989] 1 SCR. 927
\textsuperscript{197} Ford, \textit{supra} note 194.
\textsuperscript{198} Ibid at 54.
\textsuperscript{199} \textit{Montréal (City) v. 2952-1366 Québec Inc.}, [2005] 3 S.C.R. 141, 2005 SCC 62.
\textsuperscript{200} Ibid at 94.
\textsuperscript{201} Sharpe & Roach, \textit{supra} note 187 at 78.
\textsuperscript{202} Francisco J Urbina, \textit{A Critique of Proportionality and Balancing} (Cambridge: Cambridge University Press, 2017) at 18
\textsuperscript{203} Ibid.
disproportionate.\textsuperscript{204} This, however, does not mean that the proportionality framework is without criticism.

### 2.3.1 Criticisms of the Proportionality Test

While the proportionality test requires the court to weigh the value or interest of a right against the goal the measure seeks to achieve, there have been different scholarly arguments on what the balancing test should entail.\textsuperscript{205} Some argue that the test is a technical, structured, neutral and fact-dependent tool, while others view it as a means for judges to use the test to participate in free-form moral reasoning without being constrained by legal precedent.

Some scholars have argued that the use of the proportionality test or balancing is a form of legal reasoning that can result in true meaning.\textsuperscript{206} Endicott, on the other hand, views this test as the court deciding between two incommensurable interests.\textsuperscript{207} Jeremy Waldron’s position is more revealing as a balance between the two views.\textsuperscript{208} He argues that though there is no common metric for balancing values, that does not mean that values cannot be related. This means that though the test of balancing lacks a measure that can be used in weighing values or interests, values can be related through reasoning. He argues that putting values in order and assigning them priorities is also a way of reasoning about more ordinary courses of action.\textsuperscript{209} Tsakyrakis has put forward the idea of using moral reasoning to create a balance.\textsuperscript{210} He believes that the test of proportionality may appear objective and neutral, but it is not entirely detached from moral reasoning. Instead, he suggests that the court should concentrate on the actual moral issues involved in each case.\textsuperscript{211}

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\textsuperscript{204} Ibid at 20.

\textsuperscript{205} The proportionality test is said to have historically developed from Germany. It was developed before the German Constitution by the German Administrative courts in the late nineteenth century and applied to cases where police infringed upon the individual liberty or property.


\textsuperscript{207} Timothy Endicott, “Proportionality and Incommensurability” in Grant Huscroft, Bradley W Miller & Grégoire Webber, eds, \textit{Proportionality and the Rule of Law: Rights, Justification, Reasoning} (Cambridge: Cambridge University Press, 2014) at 311. He states: “The proportionality doctrine requires the judges to reconcile incommensurable interests. The judges and many commentators call the reconciliation ‘balancing,’ but the interests at stake cannot be weighed with each other on any sort of scales.”

\textsuperscript{208} Jeremy Waldron, “Fake Incommensurability: A Response to Professor Schauer” (1994) 45:4 Hastings LJ 813

\textsuperscript{209} Ibid at 821. Waldron maintains that “often when people talk about weighing or balancing one value, principle, or consideration against another, what they mean is not necessarily Benthamite quantification but any form of reasoning or argumentation about the values in question.”

\textsuperscript{210} Stavros Tsakyrakis, “Proportionality: An Assault on Human Rights” (2009) 7:3 Intl J Const L 474 [Tsakyrakis]

\textsuperscript{211} Ibid.
Moller describes Tsakyraki’s position as an “unfortunate interpretation of the proportionality principle.”\(^{212}\) He claims that proportionality analysis operates at a high level of abstraction; however, it is not void of moral analysis.\(^{213}\) He argues that it is a moral analysis if the steps of the test are followed accordingly, as it assists the judges in their moral reasoning.\(^{214}\) For example, the requirement that an interference must be suitable, necessary and proportionate are moral statements under which the interference will be justified.\(^{215}\) According to him, this requirement also releases judges from interpretative constraints and directs them to develop moral arguments about the acceptable balance of reasons.\(^{216}\) He goes further to define proportionality to simply mean “a structure that guides judges through the reasoning process as to whether a policy does or does not respect rights.”\(^{217}\) In my opinion, the principle of proportionality requires a certain level of moral discernment. Citizens are allowed to voice their concerns regarding how a particular policy has affected their rights, either mentally or socially. At the same time, the government is responsible for justifying the necessity of said policy. Ultimately, resolving the dispute will depend on whether the law is within its reasonable limit and not overreaching.

Another criticism of the proportionality test is the “balancing stage,” which is the last step of the test. Scholars have said that the name “balancing” makes it look like all judges do is simply place one interest or right against another on a scale.\(^{218}\) However, this metaphor does not describe how interests are weighted, and this omission hides the impossibility of weighing incommensurable values.\(^{219}\) It gives the idea that the process of adjudication is a mathematical exercise, with judgment being arrived at mechanically.\(^{220}\) It is argued that the proportionality test does not explicitly describe how the balancing or weighing should be done.\(^{221}\) The issue of the vagueness of this test may also lead to a situation where it allows for different accounts of proportionality.\(^{222}\)

\(^{212}\) Kai Möeller, “Proportionality: Challenging the critics” (2012) 10:3 Intl J Const L 709 at 711. Moller describes the proportionality test as a moral analysis, and it is simply a “structure that guides judges through the reasoning process as to whether a policy does or does not respect rights.”

\(^{213}\) Ibid at 718.

\(^{214}\) Ibid at 726.

\(^{215}\) Ibid.

\(^{216}\) Ibid.

\(^{217}\) Ibid.

\(^{218}\) Ibid at 718.

\(^{219}\) Tsakyrakis, supra note 209 at 471.

\(^{220}\) Ibid at 475.


\(^{222}\) Ibid
However, there are views that the proportionality test is a constitutional principle. The proportionality test has been argued to give constitutional judges the ability to acquire a coherent, practical means of responding to legitimacy questions. It provides judges with a comprehensive “checklist” of those “individually necessary and collectively sufficient criteria that [must] be met for [state acts] to be justified” in a constitutional democracy. As Sweet and Matthews put it, the test of balancing makes it clear that: “(a) each party is pleading a constitutionally-legitimate norm or value; (b) a priori, the court holds each of these interests in equally high esteem; (c) determining which value shall prevail in any given case is not a mechanical exercise, but is a difficult judicial task involving complex policy considerations; and (d) that future cases pitting the same two legal interests against one another may well be decided differently, depending on the facts.”

The proportionality test is also seen as an “argumentation framework” for discursive structures: first, how litigants should plead their case and also their opponent’s arguments; second, how courts should frame their decisions. Cohen-Eliya and Porat argue that the balancing test gives room for flexibility and growth of the law, as it does not bind the court to a particular path in law.

Admittedly, the proportionality test may not provide an exact guide for how interests and rights are weighed. However, one cannot disregard the immense significance of the principle of proportionality in fostering a comprehensive dialogue regarding what is considered reasonable and essential within a democratic society. By considering the nature of any given issue, this principle can help ensure that the acts are justifiable and proportional to the circumstances at hand. In other words, it provides a framework for balancing the competing interests of individuals, groups, and society, thereby promoting fairness, reasonableness, and accountability.

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225 Sweet and Mathews, supra note 222 at 87.
226 Ibid.
2.3.2 Free Expression and Proportionality Analysis: Lessons from Canada

As discussed earlier, Nigeria has an existing problem with limitation of rights; there is no established guide for understanding what the reasonable limit in a democratic society is. This gap has resulted in a lack of discussion on the scope and restriction of the right to free expression and unclarity in determining whether certain limits of the right are appropriate. It is only when there is a clear understanding of the reasonable limits that it becomes easier to deal with the discussion on regulating hate speech and false speech in Nigeria.

The Canadian courts have employed the proportionality test to determine whether a legislative measure is justified, including cases on restricting false speech and hate speech. The discussion here does not delve into the correctness of decisions made by the courts but rather shows that the proportionality test provides a structured and established means for the court to arrive at clear decisions and engage in discussions regarding what law is acceptable or unacceptable in restricting free expression.

Using the proportionality test in the Nigerian Court will clearly show what kind of speech is protected by the Constitution and produce a clear understanding of whether a law is within its reasonable limit. It ensures that restrictions are appropriately tailored and not overly impairing while engaging the theories of free expression to justify its decision. This was evidenced when the court applied the Oakes analysis in the case of *R v. Keegstra*.\(^{228}\) In this case, the Supreme Court was faced with determining whether a law prohibiting the expression of hateful comments was demonstrably justified under s. 1 of the Canadian Charter. The defendant, under s. 319(2) of the Criminal Code, was accused of wilfully promoting hatred against a group by communicating antisemitic statements to his students. By a 4-3 majority, the Supreme Court held that the relevant provision of the criminal code was constitutionally justified.

First, the Court determined if the expression of the accused was indeed infringed upon. The majority applied a two-step analysis for section 2(b). The first step was to find whether the expression conveyed a meaning protected by section 2(b). Here, the Court stated that an expression that conveys a meaning excluding violence falls within the scope of the word expression. Second,
the Court had to find whether the law infringed the right to free expression. The Court found that hate speech expression falls within the meaning of an expression in section 2(b). The Court distinguished hate speech from violent activity, which the Constitution does not protect. The Court also rejected the argument that hate propaganda, like threats of violence, is not protected. The Court found that even threats of violence are protected by section 2(b).

Second, the Court determined if section 319(2) of the criminal code is justified under section 1 of the Charter. It was held that the parliament’s objective in preventing harm and reducing racial, ethnic, and religious tension caused by hate propaganda was a pressing and substantial concern given the pain it causes to targeted group members. The Court found that the code is also proportional to the objective of the parliament because there is a rational connection between the criminal prohibition of hate speech and the objective of protecting targeted group members while fostering multiculturalism and equality. Also, the Court stated that section 319(2) of the criminal code did not unduly impair freedom of expression as the section contained no overreaching or vague provisions. The words “wilfully” require a high standard of mens rea and the word “hatred” also restricts context to only the most severe cases. Finally, the majority found that there was a proportionality between the effects of section 319(2) of the Criminal Code and the objective. The Court found that hate speech does not connect with the values underlying the protection of freedom of expression, which include the quest for truth, the promotion of individual development and the protection of democracy.

*R v Zundel*²²⁹ is another case where the Court used the Oakes test to determine whether a restriction on free expression on the ground of protecting against false statements was justified under section 1 of the Charter. A unique feature of proportionality analysis is its flexibility, so that the test can be applied on a case-by-case basis. The lower court convicted the appellant for publishing a pamphlet titled *Did Six Million Really Die?* In this booklet, he argued that there was no evidence to prove that six million Jewish people died and that it was only a worldwide Jewish conspiracy. The trial court and Court of Appeal convicted the appellant. He then appealed to the Supreme Court. The majority affirmed that s. 181 of the criminal code infringed on the right to freedom of

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expression as protected under s. 2(b). The court also found that false statements are also protected under the Constitution.

In determining whether the limitation was justified under section 1 of the Charter, the Court applied the *Oakes* test and held that Parliament had given no substantial reason or pressing concern for the enactment of the law. The court distinguished this case from the *Keegstra* case. In this case, the objective of the parliament was to combat hate propaganda or racism, but this same objective cannot be applied to section 181 of the *Criminal Code*. The Court explained further that the justification under section 1 requires a more specific purpose that is pressing and substantial than the general goal of protection from harm, which applies to all criminal legislation. The Court also found that even if the court concluded that the objective of the section 181 of the Code was to promote racial and social tolerance, it would still fail to pass the proportionality test. This is because there is no link between section 181 and the objection to protecting social harmony. The use of the phrase “statement, tale or news” is so broad that it encompasses a broad range of social speech, and the undefined phrase “injury or mischief to a public interest” extends to all controversial statements of fact that are claimed to be false and cause mischief to the public interest even if they promote the values of section 2(b). Second, due to the use of criminal prosecution sanctions, s. 181 may have a chilling effect on minority groups and individuals who may be scared to express their opinions for fear of being prosecuted. Third, s. 181 was also found to be disproportionate when balanced against its invasive potential.

In *Saskatchewan (Human Rights Commission) v Whatcott*,230 Bill Whatcott was charged with promoting hate after distributing flyers in mailboxes and affixing them to signposts in Regina and Saskatoon, where he, amongst other things, called homosexual men sodomites, child molesters, filthy, and dirty sex addicts. He also called homosexuality a sin. Four complaints were filed with the Saskatchewan Human Rights Tribunal. The Saskatchewan Human Rights Tribunal held that the flyers constituted publications which are contrary to section 14 of the Saskatchewan Human Rights Code (the “code”).231 The Tribunal held that the flyers’ publications, contravened section 14

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231 S 14(1): No person shall publish or display, or cause or permit to be published or displayed, before the public any statement, publication, notice, sign, symbol, emblem or other representation: (a) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons, on the basis of a prohibited ground, of any right to which that person or class of persons is entitled under the law; or (b) that exposes or tends to expose to
of the Saskatchewan Human Rights Code because they exposed persons to hatred and ridicule and that section 14 of the Code was a reasonable restriction on the defendant’s rights to freedom of expression guaranteed by section 2(a) and (b) of the Charter. The Court of Queen’s Bench upheld the tribunal’s decision, while the Court of Appeal accepted that the provision was constitutional but held that the flyers did not contravene it. The Supreme Court was called upon to decide whether the hate speech provisions in the Saskatchewan Human Rights Code were constitutional.

The Supreme Court allowed the appeal in part. The word “hatred” was defined as expressions that, in the mind of a reasonable person, are likely to expose a person or persons to detestation or vilification on the ground of discrimination. This was to filter out words that are repugnant and offensive but do not incite the level of hatred that causes discrimination or other harmful effects. The Supreme Court also determined the effect the expression was to have on its audience, keeping in mind the objective of the legislature to reduce or eliminate discrimination.

Also, the Court found that the activity described in s. 14 (1)(b) falls within the scope of s. 2(b) and infringes on the right to free expression. The Court also found that s. 14(1)(b) is lawfully prescribed pursuant to section 1 of the Charter. They balanced the fundamental values of freedom of expression with other values essential to a free and democratic society, such as the protection of equality and respect for group identity and dignity owed to all human beings.

The Oakes analysis was used to determine if the restriction was within its reasonable limits. The Court held that the objective, which is to tackle causes of discriminatory activity to reduce the harmful effects and social costs of discrimination, is “pressing and substantial.” The Court considered the negative effects of allowing hate speech in society, including marginalizing individuals and delegitimizing a group’s ability to respond to substantive ideas under debate.

Second, s. 14(1)(b) was stated to be rationally connected to its objective because it did not restrict hateful speech between private communications of individuals, nor did it restrict hate speech on personal characteristics; rather, it restricted hate speech on characteristics shared by others.

hatred any person or class of persons on the basis of a prohibited ground. (2) Nothing in subsection (1) restricts the right to freedom of expression under the law on any subject.

232 Ibid
233 Ibid
However, the Court held that the words “ridicules, belittles or affronts the dignity of” do not raise extreme hate, so they are constitutionally invalid and struck out from s. 14(1)(b).

Third, it was held that s. 14(1)(b) met the minimal impairment. The Court decided that the prohibition in s. 14(1)(b) was not overbroad, and the legislature used it as a reasonable alternative. Lastly, the Court held that the benefits of suppression of hate speech and its harmful effects outweigh the detrimental effect of restricting expression, which promotes the values of freedom of expression.

2.3.3 Lessons from Canada

It has been established that there is a gap in the Nigerian legal system when it comes to restricting rights and freedom and the Oakes test, which is applied in Canada, provides an answer to this gap. The discussion has shown that if the Nigerian courts use this kind of analysis, there will be a growth in understanding of what a reasonable limit means as a condition for government restriction.

Right now, there is uncertainty as to the scope of the protection of freedom of expression in Nigeria. As seen in Keegstra, the Canadian analysis would enable the Court to engage in a detailed conversation about the extent to which people can exercise this right. As the test has shown, it is not enough to know if the expression is protected by the Constitution. The test takes it further by determining whether the limiting law is, in fact, justified for infringing on the right. Consequently, this test would serve as an excellent tool for Nigerian courts to expand their jurisprudence on protecting the right to freedom of expression.

This test has rendered some form of certainty on how the court arrived at its decision. If one claims such a decision was erroneous, the error can be clearly identified with this test. Therefore, the test allows judges to develop a judicial precedent or method of making decisions that guides lower courts. Also, when reasons are offered for decisions, there is coherence and clarity.

Using the proportionality framework does not guarantee that a particular pattern or decision will be arrived at in all cases. The use of the test is subject to the context and circumstances of each case and the evidence offered in each case. The test can also be applied based on the unique facts of each case (R v. Zundel). This would be a great advantage to Nigeria, as discussion on limiting
rights and freedom is a developing one and courts can examine the right to freedom of expression more broadly.

Furthermore, the reasonable limit test will ensure that the laws enacted by the legislature do not contain provisions that are unjustified, unnecessary, and overly impair the right to freedom of expression. The minimal impairment test encourages the government to use clear and precise words which show a specific objective for restricting freedom of expression. For instance, provisions of a law that contain vague and broad terms do not show a specific objective and can be expunged from the law. It encourages thorough research on the effect of regulations by the legislatures when making laws such as the Hate Speech Bill and the False Speech Bill.

To sum it up, the Supreme Court of Canada has shown, using proportionality analysis, the importance of making laws that are not overreaching while promoting the theories of free expression.

2.4 **International Legal Norms on the Protection of Freedom of Expression**

Freedom of expression is a fundamental right that is protected and an essential principle in preserving a democratic government. This right is protected by both international norms and national laws. The previous section already discussed national laws. This section examines the protection of the right to freedom of expression by international standards, specifically the *Universal Declaration of Human Rights* (UDHR), the *International Covenant on Civil and Political Rights* (ICCPR), and regional norms like the *African Charter on Human and Peoples’ Rights*.

The discussion of international norms is important because it reinforces the argument for proportionality analysis, just as we have seen in Canada. Considering the analysis of the hate speech bill and false speech bill in this study, international standards provide specific jurisprudence on the regulation of hate speech and false speech such that these bills are appropriately drafted in a way that the protection of freedom of expression is still guaranteed. International norms also contain rules on restrictions on speech like hate speech and false speech to ensure they are not overreaching on freedom.
It should be noted, however, that this chapter is focused on international standards rather than a full analysis of international laws.

2.4.1 Universal Declaration of Human Rights

The *Universal Declaration of Human Rights* (UDHR) is a significant declaration in the history of protecting fundamental human rights.\(^{234}\) The UDHR was for the protection of human rights in response to the “barbarous acts which…outraged the conscience of mankind”, especially after World War I and II, which ended in 1918 and 1945.\(^{235}\) Thereafter, the United Nations General Assembly adopted the *Universal Declaration of Human Rights* by an overwhelming vote in 1948.\(^{236}\) It was the first time that different countries in the world came together to agree on the protection of fundamental human rights.

The UN General Assembly described the UDHR as “a common standard of achievement for all peoples and all nations” that contains fundamental rights that are universally protected.\(^{237}\) The UDHR has served directly and indirectly as a model for many international conventions and treaties, as well as many regional conventions and domestic laws.\(^{238}\)

The UDHR, among other things, guarantees the right to freedom of expression. Article 19 of the UDHR provides that:

> Everyone has the right to freedom of opinion and expression: this right includes freedom to hold opinions without interference and to see, receive and impart information through any media and regardless of the frontiers.

This article provides for the universal protection of the right to freedom of speech, irrespective of race or location.\(^{239}\) The UDHR has a non-binding force on states and, therefore, cannot be legally

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\(^{234}\) The Universal Declaration of Human Rights (UDHR); the International Covenant on Economic Social and Cultural Rights (ICESCR); and the International Covenant on Civil and Political Rights (ICCPR) are referred to as the International Bill of Human Rights.


\(^{236}\) UDHR, *supra* note 110.

\(^{237}\) *Ibid*.


\(^{239}\) *Ibid*.
enforceable against member states. However, it is still regarded as a declaration with great ‘ethical force.’

Though Article 19 of the UDHR protects the right to freedom of expression, Articles 29 and 30 of the Declaration provide a general limitation on the provision of the rights protected under the UDHR. Articles 29 and 30 state as follows:

Article 29

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

and Article 30

Nothing in this Declaration may be interpreted as implying for any State, group, or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

2.4.2 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) is a principal international human rights treaty that guarantees the protection of civil and political rights, including freedom of expression. The ICCPR has similar content to its antecedent, the UDHR, but there is one significant distinction between the two instruments: “while the Declaration enumerates fundamental rights that ought to be enjoyed by all human beings, the Covenant actually binds governments that ratify it under international law”. The ICCPR has been used as a basis for

\[240\] \textit{Ibid.}
\[241\] UDHR, \textit{supra} note 110.
\[242\] ICCPR, \textit{supra} note 111.
many regional human rights laws, particularly when it comes to the restriction of rights.\textsuperscript{244} Nigeria ratified the ICCPR on July 29, 1993, and thereafter the Covenant became legally enforceable against it as a member state.\textsuperscript{245}

Article 19(1) of the ICCPR provides that “everyone shall have the right to hold opinions without interference.”\textsuperscript{246} This provision protects the right to freedom of opinion and does not contain any restrictions or exceptions. The United Nations Human Rights Committee (UNHRC)\textsuperscript{247} notes that under the covenant, “all forms of opinions are protected, including political, scientific, historical, moral, or religious nature.”\textsuperscript{248} The UNHRC notes that the right to free opinion “necessarily includes freedom not to express one’s opinion.”\textsuperscript{249}

Article 19 (2) of the ICCPR guarantees the right to freedom of expression and it states:

\begin{quote}
Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
\end{quote}

There is a notable similarity between Article 19 of the UDHR and Article 19 (1) and (2) of the ICCPR. However, the difference lies in the fact that the ICCPR provides that freedom of expression includes ideas that are oral or in writing or in the form of art, thereby expanding the scope of protected expression. It is worth noting that the ICCPR can be seen as an implementation of the UDHR, as it guarantees freedom of expression as a fundamental human right. Nevertheless, the ICCPR is more detailed and enforceable against states, thereby providing a stronger legal framework for the protection of freedom of expression. The UNHRC affirmed that Article 19(2) embraces all forms of expression, either spoken or written, sign language, and non-linguistic

\begin{footnotesize}
\begin{footnote}{\textsuperscript{244} ICCPR, \textit{supra} note 111.}
\end{footnote}
\begin{footnote}{\textsuperscript{245} \textit{Ibid.}, Article 2 (1). It provides that each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.}
\end{footnote}
\begin{footnote}{\textsuperscript{246} \textit{Ibid.}}
\end{footnote}
\begin{footnote}{\textsuperscript{247} The UN Human Rights Committee’s General comment is an authoritative interpretation of the right to freedom of opinion and expression protected under Article 19 of the ICCPR. It was adopted by the UNHRC in July 2011 and has provided an explanatory guide on the protection as well as limitation of the right to freedom of expression. States Parties are also required to submit report to the UN Human Rights Committee whenever it is requested.}
\end{footnote}
\begin{footnote}{\textsuperscript{248} \textit{General Comment No.34, Article 19: Freedom of Opinion and Expression}, UNHRC, 102nd Sess, UN Doc CCPR/C/GC/34 9 (2011) [General Comment 34]}
\end{footnote}
\begin{footnote}{\textsuperscript{249} \textit{Ibid} at 10.}
\end{footnote}
\end{footnotesize}
expressions like images or art. This means that it extends to the freedom to seek and impart information and views of all kinds, whether offline or online. The UN Special Rapporteur emphasizes that the right includes information or ideas that may shock, offend, disturb, or has true or false content, ill-founded parody, and satire. The Human Rights Committee, which is the expert monitoring body for the Covenant, has emphasized that these freedoms are “indispensable conditions for the full development of the person … [and] constitute the foundation stone for every free and democratic society”. They “form a basis for the full enjoyment of a wide range of other human rights.”

Under the ICCPR, the right to freedom of expression is not absolute and can be limited in some instances to prevent harmful content like hate speech, terrorism, incitement to violence, pornography, etc. However, any restrictions must strictly be in accordance with the provisions of Article 19(3) so that the right to free expression is not jeopardized. Article 19(3) of the ICCPR states restrictions against the right to freedom of expression, and it provides that:

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

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

General Comment No. 34, supra note 247 at 12 citing UNHRC, views: Communication No. 926/2000, Shin v. Republic of Korea (16 March 2004) Here, the government confiscated a painting of Shin, and the Seoul District Criminal Court indicted him. They believed that the art expression was an “enemy-benefiting expression”, and it was capable of “actively and aggressively” damaging the security and democracy of the country. The committee found that the picture painted by the complainant was very much within the scope of the right to freedom of expression, especially as article 19 (2) mentions ideas imparted in the form of art. Therefore, the state must be justified under Article 19 (3) in restricting this right.


Ibid at 38. The United Nation Special Rapporteur on Promotion and Protection of the Right to Freedom of Opinion and Expression is an independent experts appointed by the UN Human Right Council who are charged with the duty to monitor, investigate and report on issues concerning Freedom of expression. Their mandate is to gather information concerning the violations of the right to freedom of opinion and expression; to seek, receive and respond to credible and reliable information from governments and persons who have information about these violations; to make recommendations and suggestion on how to protect freedom of opinion and expression. This mandate is to protect and promote freedom of expression both online and offline in line with international standards.

General Comment No. 34 (11) citing UNHRC, Views: Communication No. 736/97, Ross v Canada (18 October 2000).

(b) For the protection of national security or of public order (ordre public), or of public health or morals.255

The conditions for restriction of free expression in Article 19(3) are similar to section 45 of the Nigerian Constitution, which also provides that the grounds on which free expression can be restricted is if it is in the interest of defence, public order, public morality or health and for the purpose of protecting the rights and freedoms of other persons.

The UNHRC has interpreted this provision to include a three-part test, which most international, regional, and national laws have adopted in interpreting the restriction against freedom of expression.256 This test also supports proportionality analysis, just like the Canadian Oakes test. The three-part test provides that:

(a) The limitation is provided by law.

(b) The limitation must serve a legitimate aim pursuant to Article 19(3).

(c) The limitation must be necessary to achieve the aim.

1. Provided by Law

The first part of the test requires that any limitation be provided by law. The phrase provided by law means that the limitation of the right shall only be in accordance with the national law that is in force at the time the limitation is made.257 The condition of legality entails that the meaning, scope, and effect of the law must be precisely tailored to a particular need and adequately clear.258 A law should not confer unfettered discretion for restriction of freedom of expression on those who are charged with executing it. Vague laws give enormous powers to the government to make decisions that are incompatible with Article 19(3) of the ICCPR.259

255 ICCPR, supra note 111.
256 The European Court of Human Rights has also specified that any interference with the right must: be prescribed by law; be in protection of stated interest or values as contained under the provision; and necessary in a democratic context.
258 Ibid
259 General Comment No. 34: supra note 247
In Velichkin v. Belarus, the complainant was restricted from sharing a ‘picket’ relating to the text of the UDHR in the centre of the breast. He was arrested for violating the provisions of the law because he did not conduct his meeting at another venue selected by the authority. The courts described this act as ‘participation in an unauthorized meeting.’ The UDHR held that this restriction was a limitation of the complainant’s right under Article 19 of the ICCPR. However, the state failed to justify the limitation by providing ‘specific grounds’ for why there was a restriction on the activities of the complainant, especially as there was no threat to public order. Therefore, the onus is on the state to prove that the restrictions are not unnecessary and ‘restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.’

The Siracusa Principles stipulate that laws imposing a limitation on the exercise of human rights must be consistent with international human rights laws and not be arbitrary or unreasonable. These laws must be clear and accessible to everyone while providing adequate safeguards and effective remedies against any abusive application of the limitation. It is also within the duty of the state party to provide details of the law and demonstrate how it falls within the scope of the law.

2. Pursue a Legitimate Ground for Restriction

The second part of the restriction on freedom of expression is that the restriction must be for pursuing a legitimate interest. Article 19(3) contains certain reasons why the government should restrict freedom of expression. That is, they must be pursuant to the rights or reputation of others.
or for national security or public order. These legitimate grounds include restriction of information regarding hate speech, child pornography, incitement to commit genocide, and advocacy of racial, national, or religious hatred that leads to incitement. A limitation on human rights based on the reputation of others should not be used as an excuse to protect the state and officials from public opinion or criticism. The use of national security or public order as a ground for restriction of freedom of speech has also been adjudged to be vulnerable to abuse. A law based on the objective of national security must not contain any vague or arbitrary limitations to suppress the public from expressing any information.

3. Necessary and Proportionate

The principle of necessity is to ensure that restrictions are not overbroad. Any restrictive measure against freedom of expression must: be appropriate in achieving the goal; the law must be the least intrusive instrument amongst those that can achieve the goal; and the measure must be proportionate to the interest protected. The principle also takes into account the form of expression and the means of its dissemination. For instance, there is a high value placed on public debate or expression against public figures or politicians in a democratic society. The state must state the precise nature of the threat and the necessity and proportionality of the measure must be directly connected to the threat. This test sets a high standard for justifying restrictions against freedom of expression, as limitations must be narrowly interpreted to achieve their goal. This particular stage of the test has a similarity with the Canadian analysis requirement that laws must be minimally impairing and must be proportionate to the objective pursued.

2.4.3 International Norms on Restriction of Hate Speech and False Speech

International standards have put forward specific principles that can guide the Nigerian legislative body in regulating hate speech and false speech. The Special Rapporteur has advocated that before

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270 Ibid
271 Siracusa, supra note 256 at 32.
272 General Comment No. 34, Supra note 247 at 34.
273 Ibid.
274 Ibid.
275 Ibid at 35.
restricting freedom of expression, it is important to make a clear distinction between three types of expression:

1. Expression that constitutes an offence under international law and can be prosecuted criminally (hate speech that incites violence or discrimination).

2. Expression that is not criminally punishable but may justify a restriction and a civil suit (false statement); and

3. Expression that does not give rise to criminal or civil sanctions but still raises concerns in terms of tolerance, civility, and respect for others. These different categories of content pose different issues of principle and call for different legal and technological responses.277

1. Prohibition of Speech on the Ground of Hatred

In addition to the principles of legality, necessity, and proportionality, international laws have clearly distinguished between hate speech and other forms of speech. Article 20(2) of the ICCPR provides that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”278 Frank La Rue, a former special rapporteur, explained that this article includes two elements of the kind of expression that should be prohibited.279 First, it covers only advocacy of hatred, and second, it must constitute an incitement to one of the three stated results (discrimination, hostility, or violence).280

Also, Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) provides that:

[states shall] declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

278 ICCPR, supra note 111.
279 UN Doc A/66/290, supra note 276 at 28.
280 Ibid.
Consequently, only when such advocacy of hatred amounts to incitement of discrimination, hostility, or violence is it considered illegal; in other words, when the speaker intentionally attempts to elicit an audience member’s response (a perlocutionary act) and there must be a direct link between the speech and the possibility of discrimination, hostility, or violence occurring.\textsuperscript{281} In this respect, context plays a crucial role in determining whether or not a particular statement qualifies as incitement.

It is crucial to differentiate between hate speech and other forms of speech to ensure the safeguarding of free expression. Only hate speech, not offensive speech, should be considered a criminal offense to avoid excessive legislation. In light of this, the special rapporteur has emphasized that any government restrictions must not impede the right to freedom of expression, including the ability to openly scrutinize, debate, and criticize ideas, opinions, belief systems, and institutions, including religious ones. However, this must not promote hatred that incites hostility, discrimination, or violence towards any individual or group.\textsuperscript{282}

International standards have also advocated the inclusion of definitions of words used in drafting limiting laws for restricting free expression. For instance, in clarifying the interpretation of this section, Frank La Rue, a former special rapporteur, has developed definitions of keywords that can also guide in interpreting hate speech.\textsuperscript{283} It provides:

(a) “\textit{Hatred}” is a state of mind characterized as intense and irrational emotions of opprobrium, enmity and detestation towards the target group;

(b) “\textit{Advocacy}” is explicit, intentional, public and active support and promotion of hatred towards the target group;

(c) “\textit{Incitement}” refers to statements about national, racial, or religious groups that create an imminent risk of discrimination, hostility or violence against persons belonging to those groups;

\textsuperscript{281} \textit{International Convention on the Elimination of All Forms of Racial Discrimination}, 21 December 1965, 660objectyoutube UNTS 195; UN Doc A/66/290, Supra note 276 at 28.

\textsuperscript{282} \textit{Ibid}.

(d) "**Discrimination**" is understood as any distinction, exclusion or restriction made on the basis of race, colour, descent, national or ethnic origin, nationality, gender, sexual orientation, language, religion, political or other opinions, age, economic position, property, marital status, disability, or any other status that has the effect or purpose of impairing or nullifying the recognition, enjoyment exercise, on an equal footing, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field of public life;

(e) "**Hostility**" is a manifestation of hatred beyond a mere state of mind. As highlighted by an expert at the regional workshops on the prohibition of incitement, this concept has received scant attention in jurisprudence and requires further deliberation.

(f) "**Violence**" is the use of physical force or power against another person, or against a group or community, which either results in or has a high likelihood of resulting in, injury, death, psychological harm, maldevelopment or deprivation.\(^{284}\)

The inclusion of well-defined and precise terms is crucial when drafting laws that place restrictions on rights and freedoms, such as the Nigerian social media bills. This serves two important purposes. Firstly, it ensures that the law is interpreted with complete clarity, avoiding any ambiguity or confusion. Secondly, defining terms within legal frameworks promotes consistent enforcement, providing judges, lawyers, and other legal professionals with a standard framework to follow and a clear understanding of the precise meaning of the terms used in the legislation. By defining key terms within a law, its effectiveness is strengthened and proper implementation is ensured.

In October 2012, the Rabat Plan of Action established a six-part high threshold test for defining the advocacy of national, racial, or religious hatred that incites violence, discrimination, or hostility. This test is used to determine the severity of incitement to hatred under international standards for expressions considered criminal offences:\(^{285}\)

\(^{284}\) *Ibid.*

(a) **Context:** Context can have a direct bearing on both intent and causality. The context analysis should place the speech act in the social and political context prevailing at the time the speech was delivered and disseminated;\(^ {286}\)

(b) **Speaker:** The speaker’s position or status in society should be considered, particularly the individuals or organizations standing in the context of the audience to which the speech is addressed;\(^ {287}\)

(c) **Intent:** Article 20 of the International Covenant on Civil and Political Rights requires intent. Negligence and recklessness are not sufficient to render an act punishable under Article 20 of the Covenant, as this article provides for incitement and advocacy rather than the mere dissemination or circulation of material. In this regard, there is a triangular relationship between the object and subject of the speech act as well as the audience;\(^ {288}\)

(d) **Content and form:** The content of the speech is one of the main focal points of the court’s deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, and type of arguments used in the speech, or the balance between the arguments used;\(^ {289}\)

(e) **Extent of the speech act:** The scope of the speech act includes factors such as the speech’s reach, its public nature, and the severity and size of its audience. Other factors to consider include if the speech is public, what means of distribution are used, such as a single leaflet or broadcast in the mainstream media, the frequency, quantity, and scope of the communications, whether the audience could act on the incitement, and whether the statement (or work) is circulated in a restricted or widely accessible environment;\(^ {290}\)

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\(^{286}\) Ibid.

\(^{287}\) Ibid.

\(^{288}\) Ibid.

\(^{289}\) Ibid.

\(^{290}\) Ibid.
Likelihood, including imminence: The likelihood, including imminence, of the speech act includes factors such as whether the speech is likely to succeed in inciting actual action against the target group while keeping in mind that such causation should be fairly direct.\textsuperscript{291}

This shows that international standards require a high threshold when restricting free expression on hate speech grounds, and expressions outside of Article 20(2) of the Covenant should not be criminalized. Although some expressions are not punishable by criminal law, they can still result in a civil lawsuit.

2. Impermissible online offences (No criminal prohibition)

   a. Hate speech that may not amount to advocacy or incitement.

Some speech may not fall within the Article 20(2) or Article 4 definitions or thresholds because of the absence of incitement, but it may nonetheless advocate hatred. States may impose restrictions on the promotion of hatred that do not amount to an incitement to discrimination, hostility, or violence.\textsuperscript{292} This includes the statement “that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender, or other identity factor.”\textsuperscript{293} Such kinds of speech “may justify a civil suit or administrative sanctions” or give rise to no sanctions but “still raises concern in terms of tolerance, civility and respect for the rights of others.”\textsuperscript{294} Therefore, it is acknowledged by international human rights law that freedom of expression may be constrained in cases where it poses a severe risk to the safety of others or to their ability to exercise their human rights.\textsuperscript{295}

In such a situation, Article 19(3) is still applicable. The grounds for limiting these kinds of hate speech, online and offline, must be strictly interpreted in line with the conditions of legality,

\textsuperscript{291} Ibid.
\textsuperscript{292} Promotion and Protection of the Right to Freedom of Opinion and Expression: Note by the Secretary-General, UNGA, 74th Sess, UN Doc A/74/486 (2019) para 19. [UN Doc A/74/486]
\textsuperscript{293} Ibid
\textsuperscript{294} UN Doc A/HRC/22/17/Add.4, supra note 284 at para. 20
\textsuperscript{295} UN Doc A/74/486, supra note 291 at 20.
necessity, and proportionality.\textsuperscript{296} In proving legality, such limitation must be grounded in one of the specific reasons laid down in Article 19(3): (a) for the respect of the rights or reputations of others; and (b) for the protection of national security, public order, public health, or morals.\textsuperscript{297}

\textbf{b. False Speech}

The lack of a universal definition of disinformation makes it challenging to regulate false statements. This is because there is no consensus on the nature of the concept and the impossibility of clearly defining between fact and falsehood and between the absence and presence of intent to cause harm.\textsuperscript{298} Also, false content that is spread with the intent to cause harm (disinformation) may be mixed up with false content shared without an intent to cause harm (misinformation).\textsuperscript{299}

There is a concern that disinformation online, coupled with real-world political, social, and economic issues, can significantly impact democracy and human rights, as seen in recent elections. It can disrupt politics by hindering people from exercising their rights and damaging trust in institutions and governments. On the other hand, public information flourishes in areas where media quality and freedom of expression are safeguarded. This environment allows for opposing opinions to challenge falsehoods.\textsuperscript{300}

International law requires the government to carefully draft laws to ensure that they are compliant with Article 19(3) of the ICCPR. These laws can be subjected to limitations, but only those that are permitted by law and essential to upholding others’ rights or reputations, maintaining public order (ordre public), protecting national security, or upholding public morality or health.\textsuperscript{301}

Also, state parties are not recommended to make false statements a criminal offence.\textsuperscript{302} If deemed necessary, criminal charges should only be used in extreme cases, and imprisonment should never be the go-to punishment.\textsuperscript{303} In the same vein, an important consideration when drafting laws is the

\textsuperscript{296} Ibid
\textsuperscript{297} Ibid
\textsuperscript{298} Ibid at paras 9 -10
\textsuperscript{300} Ibid at para 4
\textsuperscript{301} UN Doc A/67/357, supra note 282 at 37.
\textsuperscript{302} General Comment No. 34, supra note 247 at 47.
\textsuperscript{303} Ibid
protection of political speech. Restricting disinformation is difficult, and if there is a need to restrict political speech on the ground of falsehood, it should be done within legal and legitimate boundaries and with a high standard of necessity and proportionality.  

For instance, election rules may prohibit the spread of false information about electoral integrity, but these restrictions should be carefully defined, limited in time, and not hinder political discussions. Even when there is a legitimate public interest purpose, the risks inherent in the regulation of expression require a carefully tailored approach that complies with the requirements of legality, necessity, and proportionality under human rights law.

2.4.4 African Charter on Human and Peoples’ Rights

The African Charter on Human and Peoples’ Rights (ACHPR), also known as the Banjul Charter, was adopted in 1981 and entered into force on October 21, 1986. The African Commission on Human Rights was established by Article 30 of the ACHPR with the specific objective of promoting human and people’s rights and ensuring their protection in Africa. Article 9(1) provides that ‘every individual shall have the right to receive information,’ and Article 9(2) states that every individual shall have the right to express and disseminate his opinions within the law. The ACHPR protects freedom of speech, though the condition for restriction of this right is that such limitation must be ‘within the law.’ This condition may be broad in restricting this right as it may be used to subject this right to unhealthy limitations. However, the Commission has, in some cases, commented on the scope of this provision. The Commission has noted that as a general principle, authorities are not to create laws limiting the exercise of the right to free expression under the Constitution or international human rights standards. Notably, the right to free speech should be protected because it is “vital to an individual’s personal development, his political consciousness, and participation in the conduct of public affairs in his country.” Similar to the ICCPR, the African Commission has observed that for a ‘restriction to be acceptable, it does not

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304 Ibid.
305 Ibid.
306 Ibid.
307 ACHPR, supra note 113 at 11.
308 Ibid.
309 Ibid.
310 Jawara v Gambia (Communication No. 147/95, 149/96) [2000] ACHPR 17; (11 May 2000) para 59.
suffice for it to be provided by law and written precisely; it must serve a legitimate purpose.\textsuperscript{312} Consequently, a law to restrict the right to freedom of speech under the African Charter must have a legitimate purpose.

The African Commission adopted the \textit{Declaration of Principles on Freedom of Expression and Access to Information in Africa} in 2019, which further explains the conditions for restricting freedom of expression.\textsuperscript{313} This Declaration replaces the Declaration of 2002 as it includes the protection of free speech online and provides a detailed provision on the protection and limitation of freedom of expression.\textsuperscript{314} Notably, Principle 5 of the Declaration states that ‘the exercise of the rights to freedom of expression and access to information shall be protected from interference both online and offline, and States shall interpret and implement the protection of these rights in this declaration and other relevant international standards accordingly.’\textsuperscript{315} The Declaration also provides for broad protection of the right to freedom of expression, similar to the ICCPR. It states that the right shall include the right to seek, receive, and impart information and ideas, whether orally, in writing, or in form of art, through any means of communication across frontiers.

Principle 9 of the Declaration gives detailed grounds for restricting freedom of expression. It provides that states may only limit the exercise of the rights to freedom of expression and access to information if the limitation meets a set of justification-related requirements:

\textbf{Principle 9. Justifiable limitations}

1. States may only limit the exercise of the rights to freedom of expression and access to information, if the limitation:
   a. is prescribed by law;
   b. serves a legitimate aim; and
   c. is a necessary and proportionate means to achieve the stated aim in a democratic society.

2. States shall ensure that any law limiting the rights to freedom of expression and access to information:
   a. is clear, precise, accessible and foreseeable;
   b. is overseen by an independent body in a manner that is not arbitrary or

\textsuperscript{312} Konate v Burkina Faso (Application No. 04 OF 2013) [2018] ACHPR 10; (4 October 2013) para 132.
\textsuperscript{313} ACHPR, Declaration of Principles on Freedom of Expression and Access to Information In Africa, 65th Sess held from 21 October to 10 November 2019 in Banjul.
\textsuperscript{314} Ibid.
\textsuperscript{315} Ibid.
discriminatory; and

c effectively safeguards against abuse including through the provision of a right of appeal to independent and impartial courts.

3. A limitation shall serve a legitimate aim where the objective of the limitation is:
   a. to preserve respect for the rights or reputations of others; or
   b. to protect national security, public order, or public health.

4. To be necessary and proportionate, the limitation shall:
   a. originate from a pressing and substantial need that is relevant and sufficient;
   b. have a direct and immediate connection to the expression and disclosure of information, and be the least restrictive means of achieving the stated aim; and
   c. be such that the benefit of protecting the stated interest outweighs the harm to the expression and disclosure of information, including with respect to the sanctions authorised.\textsuperscript{316}

This Declaration also recognizes the importance of judicial review. An exciting addition is that the law provides a qualification for restricting free speech on the ground of public order. Principle 22(5) provides that freedom of expression shall not be restricted on specific grounds of ‘public order’ or ‘national security’, ‘unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.’

The examination of these international standards has shown that though the law guarantees the right to free expression, they are not absolute. The ICCPR and the ACHPR contain a similar broad provision for the protection of freedom of expression and its limitations. However, aside from the provisions in both articles on restriction, the international bodies have developed a further three-part test that should guide the bodies and state parties in interpreting the consistency of restricting laws to the provision of the international norms and constitutions of nations. These tests are that the law must: (a) be provided by law; (b) pursue a legitimate interest; and (c) be necessary and proportionate to the aim. The three-part test under international standards is similar to the proportionality test used by the Canadian court in interpreting the \textit{Charter}.

\textsuperscript{316} \textit{Ibid.}
2.5 Conclusion

In this chapter, we have examined the limitations on the right to freedom of expression and the concept of reasonable limits on rights. Firstly, we reviewed the Nigerian Constitution’s restrictions on this right and the criticisms of the phrase “reasonably justifiable.” We then highlighted the main gap in Nigerian constitutional law: the lack of a framework for defining “reasonable limits.” Moving forward, we discussed the Canadian concept of reasonable limits on rights and freedom, including the Oakes test, which has guided the court in interpreting the concept of reasonable limits while engaging in some criticisms of the test. We further illustrated how the adoption of this analysis could be of potential assistance to Nigerian constitutional law. Lastly, we examined the protection of freedom of expression under international norms. We highlighted their support for the proportionality/Oakes test and specific rules on restricting hate speech and false speech to protect free expression.

As Nigeria is a developing and multicultural country with diverse opinions, it is essential to ensure that discussions on rights and freedoms are clear and understandable. With a specific framework for defining these limitations, freedom of expression is protected. Proportionality analysis can provide a robust legal framework that clearly defines what constitutes an acceptable limitation in Nigerian constitutional law. It is a crucial tool in evaluating the constitutionality and legality of laws and government actions by weighing their benefits against their potential harms or intrusions on individual rights and freedoms. Therefore, it is necessary to discuss the reasonable limit clause for freedom of expression to ensure that people can express themselves and that laws on hate speech and false speech minimally impair the right.

The judiciary plays a pivotal role in upholding the principles of proportionality by reviewing and assessing the constitutionality of laws and government actions. They ensure that the state’s power is not abused and that individual rights are protected. On the other hand, the legislature is responsible for enacting balanced and equitable laws. By utilizing proportionality analysis, lawmakers can ensure that the laws they pass are fair and do not unduly infringe upon the rights and freedoms guaranteed to individuals. Therefore, the collaboration between the judiciary and the legislature in employing proportionality analysis is essential for a just and democratic society.
Regarding the restriction of hate speech and false speech, the Nigerian legislature should only criminally prohibit hate speech that incites violence or discrimination. For other kinds of speech that do not give rise to criminal prohibition, like false speech, the Nigerian government should promote better education on disinformation and encourage more speech. This approach avoids imposing unreasonable limits on free expression.
CHAPTER THREE: A SURVEY OF THE LAWS REGULATING FALSE AND HATEFUL SPEECH ON SOCIAL MEDIA IN NIGERIA AND THE INTERNATIONAL SPHERE

3.1 Introduction

The previous chapter shows that the right to freedom of expression in Nigeria is not absolute, and laws can be enacted to limit the exercise of the right only on certain grounds. This implies that the examination of the laws is important in justifying the regulation of freedom of expression. Determining the appropriateness of these laws depends on whether they align with the Constitution.

Regulation of false speech and hate speech is an issue that has led to international and national debates. The increased use of social media has now made the effects of these expressions even more harmful and challenging to regulate. According to Statista, social media platforms, as well as user-generated content, enable online communities to ‘create and share information, ideas, and interests.’

Social media platforms are constantly advancing and expanding all over the world, and it is predicted that by 2025, the number of individual social media users is expected to reach 4.4 billion. As of January 2022, Nigeria has over 200 million people, of whom approximately 31 million are social media users. The number represents a significant percentage of people who use social media platforms to express themselves.

Numerous benefits are associated with social media platforms, yet these same platforms have been found to serve as a means of disseminating harmful content, such as hate speech and false information. It is not surprising that this has motivated a lot of attempts by different countries to enact rules that can regulate free speech on social media. Nigeria has yet to develop legislation regulating free speech on social media, and there has been no case law to formally address the issue of hate speech as a ground for restricting free speech. The right to freedom of speech can be limited in certain situations if it is justifiable and reasonable.

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318 Ibid.
320 Ukegbu V NBC, (2017) 14 NWLR (PT 1055) 551 [NBC].

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reasonable justification can differ depending on the circumstances. Therefore, finding a balance between regulating social media platforms and protecting freedom of speech is a challenge.

This chapter begins with a brief discussion of the nature of social media and the general issues surrounding the regulation of hate speech and false speech on social media. As a result of hate speech and false speech on social media, some legal issues have arisen, such as what constitutes hate speech or false speech, who should regulate expressions on social media, and how much free speech should be regulated. When hate speech or false speech is not controlled, it can lead to crimes and endanger people. On the other hand, excessive regulation of social media can adversely affect people’s right to political dissent and oppress minorities in society. Therefore, it is essential to look at the issues surrounding the regulation of social media.

Though Nigeria has yet to develop a legal standard on what constitutes a reasonable limit. This section analyses the proposed bills on regulation of freedom of expression using the Constitution, proportionality analysis, and international standards and concludes that both the hate speech bill and the false speech bill unduly restrict the right to freedom of expression.

This thesis does not advocate against the regulation of social media, as we acknowledge the negative impact of false news and hate speech on various platforms. However, our argument is that Nigeria’s current social media bills do not effectively protect and regulate freedom of expression. Not only do the bills contain broad and vague grounds for limiting free expression (thereby subjecting expression to abuse by the state), but they also use disproportionate measures to achieve this. Also, the imposition of liability on social media platforms and the shutting down of the internet or blocking of access to online platforms have a chilling effect on free expression. This section identifies the gaps in the current proposed bills and show how they can effectively

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322 See full discussion in chapter two of this research work.
324 This should form the basis for any restriction of freedom of expression. There should be an understanding of the values, and principles of freedom of expression. It is based on these values that restrictions would be made.
strike a balance between protecting freedom of expression and addressing the harm caused by hate speech and false speech.

3.2 The Nature of Social Media and How it Differs from Traditional Media Platforms.

Social media platforms are a means through which people can exercise and protect their personal views or political ideologies. The growing use and acceptance of social media also impacts the ongoing conversation about regulating free speech online. Unlike traditional media platforms, social media platforms have the peculiar nature of giving users the freedom to access content and interact instantly from any part of the world. This implies that people can communicate irrespective of nationality, boundaries, or culture. Consequently, social media platforms may well be described as a means of unifying people despite their differences in culture and traditions.

Regan has identified five reasons in which digital platforms differ from traditional media. Firstly, due to the vast amount of digital information being published on social media, any regulation of hate speech would need to effectively manage an enormous amount of speech acts. Second, unlike traditional media platforms, social media has a transnational nature and is not limited to one jurisdiction or country. As a result, one nation’s domestic law cannot regulate content on this platform. Thirdly, as previously mentioned, social media publications can reach millions of followers within a matter of minutes. Regan rightly asserts that the instantaneous nature of these publications means that rules limiting free speech often only take effect after the speech has already reached a wide audience.

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327 Ibid.
328 Ibid.
329 Ibid.
331 Ibid.
332 Ibid at 15.
333 Ibid.
334 Ibid.
335 Ibid.
In contrast to social media platforms, traditional media outlets typically have an editorial process in place whereby content is reviewed and edited by someone other than the author before it is published. Conversely, on social media platforms, the author has direct control over the content they post. As a result, traditional media outlets are more likely to take editorial steps to remove objectionable material, such as hate speech, prior to publication. Additionally, because most social media platforms are owned by a small group of internet service providers, it would be easier to hold them accountable for regulating online speech, as argued by Regan.

### 3.2.1 Challenges with Regulation of Free Speech on Social Media Platforms

**Social Media Platforms as Content Regulators.**

Social media refers to computer-based technology interactions between people creating, sharing, and/or exchanging information and ideas in virtual communities and networks. Therefore, social media presents an avenue for people to engage in public discourse, which is the fundamental principle in a democracy. Recently, hate speech and false speech on social media have increased. There are several concerns about social media companies serving as content regulators. Social media platforms make use of content moderation to determine what users’ content should or should not be removed from their platforms. The process of content moderation includes “editorial review”, “automatic detection”, and “community flagging”. Each of these methods has its own complexities when used to regulate content.

**a. Private Companies as Editors.**

Social media platforms use editorial reviews to determine whether the contents that have been posted on their platforms are in line with their policies or community standards. However, these platforms’ policies may vary. This creates a complex situation where different media outlets have varying provisions on the definition of certain expressions that are not permitted on the platform.

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336 Ibid.
337 Ibid.
340 Ibid at 123.
341 Ibid at 124.
The implication of social media platforms defining these expressions is that they can determine how these policies can affect the exercise of freedom of expression.

For instance, Facebook defines hate speech as a direct attack against people based on race, ethnicity, national origin, disability, religious affiliation, caste, sexual orientation, sex, gender identity, and serious disease. Facebook defines these attacks as violent or dehumanizing speech, harmful stereotypes, statements of inferiority, expressions of contempt, disgust or dismissal, cursing and calls for exclusion or segregation.\textsuperscript{342} Twitter, on the other hand, bans “hateful conduct” and “hateful imagery and display name”\textsuperscript{343}. According to their community standard, users are banned from promoting violence or the use of threats against people based on their race, ethnicity, national origin, sexual orientation, gender identity, age, disability, or religion.\textsuperscript{344} Any content that also incites harm to others is prohibited.\textsuperscript{345} It is argued that Twitter gives more protection to freedom of speech than other platforms. This is because Twitter clearly states that the only categories of speech that are exempted include violent threats, mass murder or violence towards a group of people who wish to harm others seriously, and the use of slurs or racist comments.\textsuperscript{346}

A contributing factor to the inconsistency in private companies’ policies is the absence of a universal and acceptable definition of both hate speech and false speech. The term hate speech, as we have seen, is mostly described with specific attributes, which may not be universal to all social media platforms. Even though we can all agree that certain characteristics of hate speech, such as religion and ethnicity, are frequent in multicultural countries like Canada and Nigeria, there are times when these characteristics have different meanings in these two countries. For instance, how political hate speech manifests itself in Canada may differ from how it manifests itself in Nigeria.

Also, false speech may not only include disinformation but also encompass a wide range of content, including opinions, satire, memes, jokes, etc.\textsuperscript{347} Where false speech is not clearly defined, it is challenging for social media companies to make fair decisions on the removal of content that

\textsuperscript{342} Carlson, \textit{supra} note 338 at 125.
\textsuperscript{343} \textit{Ibid}.
\textsuperscript{344} \textit{Ibid}.
\textsuperscript{345} \textit{Ibid}.
\textsuperscript{346} \textit{Ibid} at 126.
\textsuperscript{347} \textit{Ibid}.
constitutes false speech and content that is simply controversial.\textsuperscript{348} This would lead to a situation where rules that control social media platforms end up restricting broader forms of speech, which may be provocative or counter-productive limits on kinds of speech that would ordinarily be protected under human rights.\textsuperscript{349}

b. Use of Automatic Detection

Social media companies also use automatic detection to regulate content on their platforms. This involves the use of algorithms or artificial intelligence in screening content before it is posted on these platforms, which violates their community standards.\textsuperscript{350} This method has, however, been criticized for its bias against the regulation of hate speech content.\textsuperscript{351} This argument suggests that engineers who make this algorithm have the power to make a subjective decision on whether a speech is hate speech or not.\textsuperscript{352} Private companies’ use of automatic detection is tied to their power to make editorial reviews of content.

The use of an algorithm in differentiating between speech that is hateful and speech that is merely offensive presents a significant challenge.\textsuperscript{353} There may be instances where words categorized as hate speech by some are not detected by the algorithm, or where content is unnecessarily removed under the pretext of “hate speech”.\textsuperscript{354} Defining hate speech or false speech is a difficult task, which raises the question of how effectively these algorithms can be used to eliminate hate speech. Algorithms may struggle to identify hate speech, especially when it is disguised within political activism or satire, for example.\textsuperscript{355} Additionally, hate speech is constantly evolving and takes on various forms, making it challenging for algorithms to assess and detect it accurately, particularly in languages it is not familiar with, unless reported.\textsuperscript{356}


\textsuperscript{349} Ibid.

\textsuperscript{350} Ibid at 130.

\textsuperscript{351} Ibid.

\textsuperscript{352} Ibid.

\textsuperscript{353} Ibid at 131.

\textsuperscript{354} Ibid.

\textsuperscript{355} Topidi, supra note 390 at 147.

\textsuperscript{356} Ibid at 148.
At times, users may report statements or content that they deem to be in violation of a company’s community standards policy. The platform will then review the report and decide whether or not to keep the reported content. This process involves employees who must carefully assess whether the content is hateful or not. However, it can be challenging to determine the line between hateful and offensive speech as it requires nuanced decision-making and specialized training.

c. Private Companies as Transnational Entities

The global nature of private companies also hampers the regulation of the media. The absence of clear definitions for hate speech and false speech poses a significant issue, especially for social media companies that operate on a global level. Social media platforms are independent and universal, meaning businesses may need to adjust their definition of hate speech to fit the requirements of a specific country. However, this goes against the fundamental purpose of these platforms, which is to enable people to freely interact and exchange information without any unjust constraints.

d. Wrong Removal of Post and Lack of Transparency

People have also criticized social media companies for wrongfully removing their posts because of their political views. This criticism is not far-fetched as some social media companies are not transparent in their decisions when removing speech. Some users fear that social media companies are not clear enough about their policies and the reasoning behind content removal. In a recent study, it was found that out of 311 pieces of content that were reported for containing hate speech, only 47 percent were removed. Carlson and Rouselle suggest that a likely reason for this inconsistency is the lack of contextual analysis when social media platforms make decisions on whether to remove a hateful comment. The transparency and accountability of social media platforms can be improved by providing clearer and more consistent guidelines for content removal.

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357 Carlson, supra note 338 at 132.
358 Ibid.
359 Ibid at 133.
360 Ibid at 135.
361 Ibid at 136.
companies are still a major concern, as transparency reports are usually given to the government when they request data and information rather than individuals.\textsuperscript{363}

**The Extent of Speech Regulation**

An important problem that faces regulation of expression by either private companies or state actors is determining what extent of speech on these platforms can be constitutionally protected.\textsuperscript{364} Harel notes that, as against other constitutional debates where they agree, there are divergent views amongst liberals on the treatment of hate speech.\textsuperscript{365} One of the challenges in regulating expression on private or government-run platforms is determining the extent to which speech can be protected under the Constitution. For instance, there is difficulty in accurately defining the different categories of hate speech that require regulation while preserving core liberal values such as liberty, self-realization, autonomy, dignity, and equality.\textsuperscript{366} Freedom of speech is essential to a liberal society, making it challenging to regulate hate speech without impinging on this value.\textsuperscript{367} Harel identifies two key reasons why hate speech is difficult to regulate legally, and these include (a) differentiating speech into different categories, for instance, political speech (which is more protected) and commercial speech (which is less protected); and (b) the constitutional requirement to prohibit viewpoint discrimination.\textsuperscript{368}

Harel presents a compelling case for the difficulties of regulating hate speech, given the constitutional protection of political discourse and viewpoint discrimination. This is due to the fact that hate speech often has political undertones and conveys specific viewpoints, it could potentially receive two levels of constitutional protection if identified as such.\textsuperscript{369} The special status afforded to political speech and viewpoint discrimination is justifiable, as free expression in political contexts is crucial for a democratic society and discriminating against viewpoints goes against the principles of liberty, autonomy, and self-actualization.\textsuperscript{370}

\begin{itemize}
\item \textsuperscript{363} *Ibid* at 146.
\item \textsuperscript{364} Magarian, *supra* note 325 at 356.
\item \textsuperscript{366} *Ibid*.
\item \textsuperscript{367} *Ibid*.
\item \textsuperscript{368} *Ibid*.
\item \textsuperscript{369} *Ibid* at 458-459.
\item \textsuperscript{370} *Ibid*.
\end{itemize}
The effect of hate speech on the autonomy of the targeted group is that it further diminishes their already fractured mindset about their status, especially if the targeted group is a minority group, subjecting them to further alienation and discrimination. Their dignity is equally impugned, with the consequent effect of reducing their self-esteem and self-worth. Finally, liberals who advocate for the legal regulation of hate speech contend that hate speech is detrimental to equality, and if not legally regulated, it may become institutionalized and conventional, resulting in established stereotypes that drive inequality, discrimination, and subordination.

**Religion as a Challenge to Regulating Speech.**

Religion is also an aspect of hate speech and false speech that proves challenging for free speech regulation offline and online. Hate speech regulation on religion means that the state must be able to distinguish between a religious view that amounts to hate speech and a view that should be protected as the individual’s faith even when it is offensive. Moon argues that there are two ways in which religion further complicates the regulation of hate speech. First, it is difficult to know and understand what a person or group means when they use religious faith or belief to oppose the faith of another group. For instance, if Christians or Muslims can use the text of their Bible or Koran to defend their views against homosexuality, can that then count as hate speech? Second, it is challenging to regulate religious speech as the court and the state are committed to “religious neutrality”.

Regulating religion in Nigeria is a complex issue because Nigeria is home to over 250 ethnic groups speaking more than 400 different languages, with diverse cultures and faiths. This diversity causes social unrest and hate speech as the North has most Muslims, while the South has a majority of Christians.

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371 *Ibid* at 460.
372 *Ibid*.
373 *Ibid*.
374 Richard Moon, *Putting Faith in Hate: When Religion is the Source or Target of Hate Speech* (Cambridge: Cambridge University Press, 2018) at 18
375 *Ibid* at 21.
376 *Ibid*.
377 *Ibid*. For instance, section 10 of the Nigerian 1999 Constitution prohibits the adoption of any religion as the state religion.
Government regulation of private companies and its effect on freedom of expression

Although social media companies face challenges in regulating freedom of expression, there are times when governments call upon these platforms to restrict certain prohibited speech. Legislation has been passed in some states holding intermediaries responsible for filtering, removing, or banning user-generated content deemed illegal. This is known as the “notice and takedown” system, designed to protect private companies from liability.

Critics refer to this method as “indirect regulation” as the government restricts online speech by issuing fines and incentives to social media platforms to regulate their content. Some democratic governments use this approach to ensure that expressions on social media platforms are consistent with those protected. For example, Germany requires social media platforms to remove unlawful content within 24 hours of receiving a complaint about hate speech. Failure to do so may result in a fine of up to 50 million euros.

While indirect regulation can protect freedom of expression online from private companies that overly restrict it through their policies, it also threatens the right to free expression. Users whom the service provider informs that their content has been reported as illegal frequently have limited options or resources to fight the takedown. Additionally, intermediaries may over-censor potentially illegal content to avoid financial or legal penalties.

This section has discussed the challenges of regulating freedom of expression on social media and highlighted important issues to consider when state actors attempt to regulate these platforms. The following section will focus on the laws regulating freedom of expression in Nigeria, particularly the proposed bills for regulating false speech and hate speech on social media.

379 Ibid.
380 Magarian, supra note 325 at 357.
381 Ibid.
382 The Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act).
383 Ibid.
3.3 Theory of Freedom of Speech in Nigeria and the Regulation of Social Media

In this thesis, various theoretical arguments for freedom of expression have been presented, including truth theory, autonomy theory, and democracy theory. However, in Nigeria, the most cited reason for protecting free speech is its fundamental role in safeguarding democracy. The Constitution of the Federal Republic of Nigeria guarantees the right to freedom of expression, which encompasses the ability to hold opinions, receive, and impart ideas and information. However, it is important to note that this right is not absolute and may be restricted. These restrictions must be reasonably justifiable in a democratic society and in the interest of defence, public safety, public order, public morality, public health, or the rights and freedoms of other persons.

While some may argue that freedom of speech should not be regulated, even when it includes false or hateful speech, the Nigerian courts have clearly stated that such speech may be restricted to uphold the values of democracy. The restriction of hate speech is vital for promoting free expression and is in line with the principles of truth, autonomy, and democracy. While free expression is essential for the pursuit of truth, hate speech cannot be justified in the name of truth. It is difficult to distinguish between hateful statements that are true and those that are false, and permitting hate speech would only lead to unbridled speech that goes beyond the limits of the free exchange of information.

Autonomy is an integral part of free expression, but it is not absolute. The exercise of autonomy must not harm the autonomy of others. When balancing competing interests, it is difficult to see how making hateful statements outweighs the right of a group to protection from discrimination and equality. Nigeria is committed to democracy, and free expression is crucial to the protection of diverse opinions and political preservation. However, hate speech undermines democratic values such as equality, the dignity of persons, and respect for others’ reputations. Therefore, it cannot be protected, and restrictions on hate speech are necessary to uphold democratic principles.

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384 Ibid.
385 Agbakoba v A-G Federation & Anor (2021) LPELR-55906(CA)
386 Ibid
The next section shall now examine the laws on the restriction of freedom of expression on social media in Nigeria.

### 3.4 Laws on the Regulation of Hate Speech and False Speech in Nigeria

Having examined the challenges with the regulation of free speech on social media and the harm that may result from hate speech and false speech, it is important for there to be a regulation of these forms of speech. However, as stated earlier, a challenge has been how states can restrict hate speech or false speech without infringing on the constitutionally protected right of freedom of speech. In Nigeria, after the #EndSARS protest in 2020, during which citizens protested the actions of government officials, the government attempted to regulate social media. However, some have argued that the timing of these regulations is suspicious and that the government intends to restrict citizens from demanding accountability and transparency.

Two major bills are in the Nigerian House of Assembly for regulating free speech on social media: the Protection from Internet Falsehood and Manipulation Bill 2019 (False Speech Bill) and a bill to establish the Independent National Commission for the Prohibition of Hate Speech Bill (Hate Speech Bill).

#### 3.4.1 Proposed Laws for the Regulation of social media in Nigeria

Having understood the nature of social media and its challenges, especially with the regulation of social media, the Nigerian government has made a few attempts to regulate the use of social media in Nigeria. The section continues with the analysis of the Nigerian social media regulatory bills.

1. **Protection from Internet Falsehoods and Manipulation and Other Related Matters Bill 2019**

This bill, also known as the “social media bill”, was introduced in the House of Senate on November 5th, 2019. As of May 2023, the bill is in its second reading.\(^\text{387}\) The purpose of this bill includes the prevention of falsehoods or false statements of facts in Nigerian internet transmission and the suppression of the financing, promotion, and other ‘online locations’ that transmit false

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\(^{387}\) False Speech Bill, *supra* note 1.
information in Nigeria. The government intends to take measures for the detection, control, and protection against ‘inauthentic behaviour’ in such an online location.

Part 2 of the bill provides for the criminalization of the transmission of a false statement of fact. Section 3(1)(a) of the bill provides that no person should perform any act in or outside Nigeria to transmit a statement that he knows or has a reason to believe that such statement is false, and the transmission of false statement is prejudicial to the security of Nigeria; prejudicial to the public health and safety; prejudicial to the friendly relations of Nigeria with other countries; influence the outcome of an election to any office either in a general election or referendum; incite feelings of enmity or hatred towards a person or a group of persons; diminish the confidence of the public in the duty or function of the Nigerian government. The sanction for offenders is a fine of up to N300,000, a term of imprisonment of up to three years, or both: in any other case, a fine not exceeding N10,000,000.

On regulation of the transmission of false statements in Nigeria, the draft provides that the ‘Law Enforcement Department’ (the department) can make regulations where ‘a false declaration of fact has been or is being transmitted in Nigeria’. According to the interpretative section, a declaration is false if it is “false or misleading whether wholly or in part and whether on its own or in the context in which it appears”. A declaration here refers to any word, number, image, sound, symbol or any other representation or a combination of either of these. However, a condition for such regulation is that the department must have the opinion that such regulation is necessary for the ‘public interest’.

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*388 Ibid at Part 1, Section 1 (a) (b).*
*389 Ibid at s 1(c)*
*390 Ibid at s 3 (1) (a) (b) (I)*
*391 Ibid at s 3 (1) (b) (II)*
*392 Ibid at ss (III)*
*393 Ibid at ss (iv)*
*394 Ibid at ss (v)*
*395 Ibid at ss. (vi)*
*396 Ibid at 2 (a)(b)*
*397 Ibid at s 6 (1)(a)*
*398 Ibid at s 35*
*399 Ibid. The Law Enforcement Department means the Nigeria Police Force.*
*400 Ibid at s 6 (1)(b)*
However, it should be noted that social media platforms are not held responsible for the transmission of false declarations on their service. The bill states that a ‘person does not transmit declaration in Nigeria merely by doing any act for, or that is incidental to, the provision of an internet intermediary service’. Therefore, this section absolves internet intermediary services of any liability that may arise from the dissemination of false declarations.

A section that has been criticized is section 12 of the bill, which provides for an ‘Access Blocking Order.’ This section states that where any person fails to adhere to Part 3 of the bills, the department can direct the Nigerian Communications Commission (NCC) to order internet service providers (ISPs) to take reasonable steps to restrict access by end-users and issue an ‘access blocking order’ to the ISP. An ISP that does not comply with this order shall be guilty of an offence and is punishable upon conviction with a fine not exceeding N10,000,000 for each day that the order is not complied with. An ISP is also free from any liability that results from not taking reasonable care to comply with the access blocking order.

The bill also makes provision for judicial oversight. Section 13 provides that an appeal can be made to the high court to oppose a regulation. However, a condition for the appeal is that an application must have first been made to the department to vary or cancel the regulation, and the application was refused. The high court can set the regulation aside if it is found that the person did not make such a declaration in Nigeria, or the declaration is a fact, or it is technically not possible to follow the regulation.

2. Hate Speech (Prohibition) Bill 2019 – HB. 246

Another bill that has been proposed for the regulation of social media and specifically hate speech is the establishment of the National Commission for the Prohibition of Hate Speech Bill (Hate Speech Bill). On the November 5, 2019, the hate speech bill was introduced by Abdullahi Sabi at the House of Representatives, Federal Republic of Nigeria. As of May 2023, the hate speech bill

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401 Ibid at s 7 (5)(b)
402 Ibid at s 12 (1)
403 Ibid.
404 Ibid.
405 Ibid.
406 Ibid.
The stated objective of the bill is to promote national cohesion and integration by outlawing unfair discrimination and hate speech and establishing an Independent National Commission for the prohibition of hate speech and connected matters. The senator argued that hate speech is the newest threat to global peace and, therefore, there should be new legislation regarding this threat. The bill prohibits the act of ethnic discrimination, hate speech, and harassment based on ethnicity, ethnic or racial contempt, and discrimination by way of victimization.

Under Part II, the bill makes it an offence for a person to discriminate against another person without lawful justification. The law provides:

…a person discriminates against another person if on ethnic grounds the person without lawful justification treats another Nigerian citizen less favourably than he treats or would treat other person from his ethnic or another ethnic group and/or that on the grounds of ethnicity a person puts another at a particular disadvantage when compared with other person from other ethnic nationality in Nigeria.

This means that if a person discriminates against another by unfavourably treating that person or places a person at a disadvantage when compared to another person of his ethnicity, he would be in breach of this provision. Section 4 of the bill provides for the prohibition of hate speech. It states as follows:

A person who uses, publishes, presents, produces, plays, provides, distributes and/or directs the performance of, any material, written and/or visual which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behavior commits an offence if such person intends thereby to stir up ethnic hatred, or having regard to all circumstances, ethnic hatred is likely to be stirred up against any person or person from such an ethnic group in Nigeria.

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407 Hate Speech Bill, supra note 2.
409 Hate Speech Bill, supra note 2.
410 Ibid at s 3(1).
411 Ibid.
412 Ibid at s 4.
Any person who commits an offence under this section shall be liable to life imprisonment, and where the act causes any loss of life, the person shall be punished with death by hanging.413

As can be seen, section 4(1) and (2) seek to criminalize hate speech act and prescribe a punishment of life imprisonment, and in cases where such a hate speech act leads to death, the punishment is death by hanging. The definition of hate speech here includes threatening, abusive, or insulting statements. For an act to lead to an offence under hate speech, such an act must have intended to, or there is a likelihood that such an act would stir ethnic hatred. It prescribes a punishment of life imprisonment for any person found liable for committing this offence and a penalty of death by hanging where such an act causes any loss of life.

Section 5 of the hate speech bill provides for the prohibition of harassment of a person based on his ethnicity. The act states that where a person unjustifiably engages in conduct that has the purpose or effect of violating another person’s dignity or creates an intimidating, hostile, degrading, humiliating, or offensive environment, it subjects that person to harassment and is guilty of an offence, and liable to imprisonment for a term not less than five years.414 The bill makes ethnic or racial contempt an offence and defines it as when a person utters words to incite the feeling of contempt, hostility, hatred, violence or discrimination against any person, group or community on the ground of his race or ethnicity.415

The Bill declares an act of discrimination by way of victimization an offence when a person does an act that is injurious to the wellbeing and esteem of another person by treating such person less favourably than he would treat others either because the person has lodged a complaint under the Bill or has given evidence or information in connection with the actions brought by any person against any other person under the Bill.416

Section 19 of the Bill seeks to establish an independent national commission for the prohibition of hate speech. The purpose of establishing the commission is to promote peaceful co-existence amongst the different ethnic or racial groups in Nigeria and, more importantly, eliminate all forms

413 Ibid.
414 Ibid at s 5.
415 Ibid at 6.
416 Ibid at s 7(1).
of hate speech in Nigeria.\textsuperscript{417} The commission shall plan, supervise, and promote educational and training programs for the advancement of peace and harmony among ethnic groups and promotion of religion, cultures and linguistic diversity in the society, and the arbitration and mediate of disputes to enhance ethnic peace.\textsuperscript{418} The commission also has the authority to investigate a complaint of ethnic or racial discrimination, investigate on its own accord, an institution, office or any issue relating to racial discrimination.\textsuperscript{419}

The Bill also gives the commission broad powers.\textsuperscript{420} The Bill states that the commission is not subject to any authority or control of any other persons and may publish the names of person or organizations whose words or conduct may undermine peaceful ethnic relations or who are involved in the propagation of ethnic crime.\textsuperscript{421} The commission also has the freedom to enter into any association within or outside Nigeria to carry out its purpose.\textsuperscript{422}

The Bill allows the Commission to perform quasi-judicial duties.\textsuperscript{423} It provides a procedure for any natural or legal person to complain to the Commission, alleging that another natural or legal person has violated the provisions of the draft law.\textsuperscript{424} Complaints must be submitted in writing or electronically and sent to the Commission.\textsuperscript{425} The Commission must acknowledge receipt of written complaints.\textsuperscript{426} The Commission has the discretion to reject any complaint it deems frivolous or malicious if, in its opinion, it concerns issues that should have been better dealt with by the courts or issues that have been satisfactorily dealt with by the courts\textsuperscript{427} or if the infringements occurred more than 12 months before the filing of the complaint. If the Commission rejects the complaint, he must notify in writing both the complainant and the person allegedly violating the provisions of the Bill within 45 days of receiving the complaint.\textsuperscript{428}

\textsuperscript{417} Ibid\textsuperscript{418} Ibid at ss 19 (2) (a-g)\textsuperscript{419} Ibid at ss 19 (h-i)\textsuperscript{420} Ibid at s 20.\textsuperscript{421} Ibid.\textsuperscript{422} Ibid.\textsuperscript{423} Ibid at s 37.\textsuperscript{424} Ibid.\textsuperscript{425} Ibid at s 38.\textsuperscript{426} Ibid.\textsuperscript{427} Ibid at 39.\textsuperscript{428} Ibid.
3.4.2 Constitutionality of the Social Media Bills.

Having set out the provisions of the hate speech bill and the false speech bill, a central question then is whether these bills are within reasonable limits. A simple answer is that they are not. The right to freely express oneself is protected by section 39(1) of the Nigerian Constitution, which states that “every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference”.

Section 45 (1) of the Nigerian Constitution goes on to guarantee the rights and freedom laid down in the Constitution, subjecting them only to limits that are 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 or other persons

The limit on freedom of expression is not only based on the conditions explicitly stated but must also be reasonable in a free and democratic society. However, there needs to be more clarity on what defines the law as being within its reasonable limits, leading to difficulties in determining whether social media bills are justified in limiting free expression. In the previous chapter, this thesis advocated for using the proportionality test. When this test is applied to these Bills, it becomes clear that they contain several provisions that unreasonably restrict the right to free expression.

Before looking at some provisions of the Bills, an important question is whether these Bills have the purpose of interfering with freedom of expression. Section 1(a)(b) of the false speech bill states that the Bill’s objective is to prevent the transmission of false facts in Nigeria online, whether through financing or promoting this false statement. Also, the Bill authorizes the government to take measures to detect, safeguard and control online accounts. These objectives prohibit certain kinds of speech and interfere with free expression. The government’s objective behind the hate speech bill is to eliminate all forms of hate speech against any person or ethnic group in Nigeria. This objective prevents communication of expression and therefore infringes on the right.
As we have established that these Bills infringe on the right to freedom of expression, the next question is whether their purpose unreasonably limits free expression using proportionality analysis. The elements of the proportionality test are: “pressing and substantial objectives,” “rational connection,” “minimal impairments,” and “final balancing.” These tests will be used to evaluate the constitutionality of the Bills.

3.4.2.1 False Speech Bill

a) Pressing and Substantial Objective

The first step of the proportionality analysis is to define if the objective of the law is pressing and substantial. Section 3(1) and (2) of the bill provide that:

(1) A person must not do any act in or outside Nigeria to transmit in Nigeria a statement knowing or having reason to believe that:
   (a) it is a false statement of fact; and
   (b) the transmission of the statements in Nigeria is likely to:
      i. be prejudicial to the security of Nigeria or any part of Nigeria;
      ii. be prejudicial to public health, public safety, public tranquillity or public finances;
      iii. be prejudicial to the friendly relations of Nigeria with other countries;
      iv. influence the outcome of an election to any office in an election or a referendum;
      v. incite feelings of enmity, hatred directed to a person or ill-will between different groups of persons; or
      vi. diminish public confidence in the performance of any duty or function of, or as it relates to the ability to influence negatively any public function, business, property or other economic interests, and can be shown to have caused financial loss and or personal injury or collective injuries directed at a person or entity.

(2) Other online harms:
   These include other online contents and activities and malicious falsehoods capable of causing harm to individual users, particularly minors, or threatens our way of life in Nigeria, either by undermining national security or by reducing trust and undermining our shared rights, responsibilities, and opportunities to foster the Country’s unity and integration.

The above provisions show that section 3 of the Bill aims to prevent harm caused by the intentional transmission of harmful lies. This is evident from the provision’s wording, which prohibits the
publication of a statement that a person knows to be false and is likely to be prejudicial on the
grounds stated above. The objective of the provision is, amongst other things, to promote national
security, public safety and further racial tolerance. This is a pressing and substantial goal because
the intentional transmission of lies can cause public damage, and protecting the vulnerable in
society is a pressing and substantial concern in Nigeria. Nigeria is a signatory to two relevant
instruments. The International Covenant on Civil and Political Rights (ICCPR) and the
International Convention on Eliminating All Forms of Racial Discrimination (ICERD). Both laws
provide for the prohibition of national or racial hatred, which can lead to incitement to
discrimination or violence, and they emphasize the critical objective of restricting harm caused by
intentional falsehood.

Other provisions of the Nigerian Constitution also emphasize Nigeria’s commitment to values that
promote national security and the country’s unity and integration. This includes sections 21 and
41(1)(a) of the Nigerian Constitution.

Section 21(a) provides that the State shall – “protect, preserve and promote the Nigerian cultures
which enhance human dignity and are consistent with the fundamental objectives as provided in
this Chapter…”

Also, section 42(1) of the Constitution provides that:

(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a
person:-

(a) be subjected either expressly by, or in the practical application of, any law in
force in Nigeria or any executive or administrative action of the government to
disabilities or restrictions to which citizens of Nigeria of other communities,
ethnic groups, places of origin, sex, religions or political opinions are not made
subject;

This section highlights the significance of safeguarding multiculturalism in Nigeria, which fosters
democracy. International standards also recognize that tolerance and dignity of individuals are
crucial. Article 27 of the ICCPR mandates that states with ethnic, religious, or linguistic minorities
must not deny their members the right to enjoy their own culture, religion, or language.
b) **Rational Connection**

Spreading false information with the intent of promoting the unequal treatment of individuals goes against the values of a democratic system, which requires the full participation of society. Intentional lies can cause discrimination and division among groups with distinct cultures. Section 3 of the Constitution prohibits deliberate harmful falsehoods, thus furthering the Constitution’s goals. Therefore, a strong objective is to prevent the intentional spread of false statements that harm individuals and national security.

The goal of trying to suppress the publication of deliberate and injurious falsehoods is rationally connected to the aim of section 3 of the bill, which is to protect the nation from harm caused by intentional falsehoods, which would promote security. Now for the minimal impairment test.

Even though the law is rationally connected to the objective, it must undergo a minimal impairment test to ensure that it does not have a chilling effect on expression. Although it may be challenging to evaluate this test with a particular case currently, an examination of the bill reveals that some sections do not meet the minimal impairment stage as they overreach.

c) **Minimal Impairment**

The principle of the minimal impairment test mandates the adoption of the least intrusive measures when it comes to limiting freedom of expression. A notable parallel exists between the Canadian *Oakes* test’s emphasis on the minimal impairment requirement and the broader international norms that advocate for laws to be necessary and proportional. The central aspect of the *Oakes* test, the minimal impairment stage, closely aligns with the principle of avoiding unnecessary restrictions on speech while effectively achieving the goal of safeguarding others.

Likewise, the concept of necessary limitation resonates with various theories of free speech, as it upholds the fundamental right to express oneself freely while balancing it with the need to protect societal interests. By applying this principle, free expression can be protected while also addressing the potential harms arising from false speech.

However, despite these principles and norms, the false speech bill fails to pass the minimal impairment test due to various reasons. The phrase “*knowing or having reason to believe that*”
shows that the government must prove that the statement was false and was made intentionally, thereby removing those who unintentionally transmitted false statements. In defining false statements, the Bill states that a declaration is false if it is “false or misleading whether wholly or in part and whether on its own or in the context in which it appears”.

In other words, the law criminally prohibits false and partly false statements. While a false statement can harm society, a greater challenge would be criminalizing a false or partly false statement, as such a prohibition can have an overreaching effect on the right to freedom of expression. The reason for this is the need for a clear understanding of what constitutes false speech. Also, false speech is subjective, and drawing a line between a statement of fact and a falsehood may be difficult. This implies that the issue of false speech regulation must be handled with extreme caution so that it does not unnecessarily infringe on the right to free expression.

Also, international bodies have criticized countries with similar definitions of false statements to the Nigerian bill. For instance, Singapore’s bill - Protection from Online Falsehoods and Manipulation Bill. In a report made by the Special Rapporteur, it was stated that this definition of “false statements of fact” raises questions as to the possibility of authorities removing part of a statement from a context and ordering its removal or correction as a result. The overly expansive definition can also result in the criminalization of various expressions, such as criticism of public officials and expressing unpopular or minority views.

Section 3 of the Bill is another provision that restricts the right to freedom of expression. The section criminalizes the transmission of false statements of fact and lists several grounds on which false speech would not be protected under the law. The grounds are that the transmission of a false statement (1) is prejudicial to the security of Nigeria; (2) is prejudicial to the public safety, health, tranquillity or finances; (3) is prejudicial to the friendly relations of Nigeria with other countries; (4) influences the outcome of an election to any office either in a general election or referendum; (5) incites feelings of enmity or hatred to a person or a group of persons; and (6) diminishes the

429 False Speech Bill, supra note, 1 at s 35
430 UN Doc.A/HRC/47/25, supra note 298 at 10.
430 Ibid.
431 Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, OL SGP 3/2019, 24 April 2019
432 Ibid.
433 Ibid at 6.
434 Ibid.
confidence of the public in the duty or function of the Nigerian government in relation to any public function, business property, or economic interests.\textsuperscript{435} Subsection 3(2) of the Bill also regulates online contents and activities that are malicious and can cause harm to individuals, minors, or threaten the security of Nigeria.

Freedom of expression encompasses all types of content, including those that may be considered controversial, offensive, or unsettling. The accuracy of the content being expressed is not a prerequisite for the exercise of this fundamental right. International human rights laws permit individuals to voice opinions and make statements that may not be fully substantiated, as well as engage in satirical or parody works if they so choose.\textsuperscript{436} Individuals enjoy the right to express their opinions and make statements, even if they are not fully substantiated. Moreover, they are free to create satirical or parody works as a means of artistic expression or social commentary.\textsuperscript{437} If the law can be interpreted in a way that restricts people from criticizing government actions, it could indeed infringe upon freedom of expression, a cornerstone of democratic societies. The exchange of information is a vital component of preserving this right, and governments must ensure that this exchange is facilitated and protected.

The act of criminalizing false speech by the government has been a topic of widespread debate. The potential for arbitrary and subjective interpretations of such restrictions is a major concern. The broad and extensive nature of the reasons for criminalizing false speech creates a possibility of misuse, allowing authorities to determine for themselves which forms of digital expression would be in violation of its terms. The difficulty in defining what actions may cause harm to public health and security or when false information may reduce trust in the government’s responsibilities adds additional complexity to the matter. International human rights law recognizes the importance of protecting expressions on matters of public interest, including criticism of governments, political leaders, and speech by politicians and public figures, as well as media freedom. Freedom of expression plays a crucial role in promoting open and informed public discourse, holding those in power accountable, and facilitating the exchange of diverse ideas and viewpoints.

\textsuperscript{435} False Speech Bill, supra note 1.  
\textsuperscript{436} Ibid.  
\textsuperscript{437} Ibid.  

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A practical response to disinformation is always to address the root cause of such disinformation, and this can be done either by enabling a more independent news outlet, educating the people on the effects of spreading disinformation or requesting social media platforms to submit a transparency report. This argument is also supported by the special rapporteur, who suggested that “to tackle the root causes of intolerance, a much broader set of policy measures is necessary, for example, in the areas of intercultural dialogue – reciprocal knowledge and interaction – education on pluralism and diversity, and policies empowering minorities and indigenous people to exercise their right to freedom of expression.”

Section 3(3) of the document states that transmitting false information can result in a fine of up to N300,000 or a prison sentence of three years. However, this punishment seems unwarranted for several reasons. The broad language of Section 3 leaves room for government criticism to be unfairly targeted, which violates the right to free speech. Furthermore, individuals who may not have intended to incite violence or discrimination could still face criminal charges under this section. Employing criminal sanctions carries the potential of deterring individuals and journalists from exercising their fundamental right to freely express ideas and disseminate information. In order to evade punishment, people may engage in self-censorship. Given the broad definition of a false state of fact in the bill, it is possible for anyone to unwittingly transmit erroneous information and become a victim of such sanctions. Therefore, the Nigerian government must distinguish between a statement that necessitates criminal sanctions and those that can be regulated by civil sanctions. Essentially, criminal law should only be utilized in exceptional and egregious circumstances that involve incitement to violence, hatred, or discrimination.

In a report by the United Nations Special Rapporteur addressed to the Singapore government regarding the enactment of the falsehood bill, it was stated that the use of criminal sanctions had increased concerns about government overreach and censorship. It was noted that:

> The criminal penalties that may be imposed for the communication of a “false statement of fact” or the failure to comply with a direction also heighten the risk of censorship and government overreach. The broad discretion afforded to select

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438 UN Doc A/HRC/22/17/Add.4, supra note 284.
439 UN Doc. A/HRC/47/25, supra note 298 at 89; General Comment 34, supra note 247 at 47.
executive officials to police “false statement[s] of fact,” coupled with the threat of heavy fines and custodial sentences, is likely to create a significant chilling effect on freedom of expression.

In addition, the Bill allows government agencies to enforce regulations that limit free speech in the name of public interest and even block access to social media platforms. However, blocking the internet is an extreme measure to take against false speech. While it is reasonable for the government to take appropriate measures to achieve its goals, falsehoods that do not incite violence can be better addressed through education and information. This provision not only violates legal, necessary, and proportional principles, but also has a significant impact on constitutional rights, including freedom of expression, thought and conscience, privacy, and the economic stability of the country.440

Moreover, it has been stated by the Organization for Security and Cooperation in Europe Representative on Freedom of Media that “the answer to counter disinformation can never be found in a blanket ban; a complete shutdown of the Internet; or fully blocking media outlets from their possibility to disseminate information”.441 It is difficult to see a causal link between the offence of falsehood and the measure of internet shutdown.

The Human Rights Council, based on its resolution to continuously protect freedom of expression on the internet and communication platforms,442 has outlined a set of principles that can be used to determine when internet blocking is justified. Implementing these principles would protect the right to freedom of expression and place a high limitation on the state. The resolution states that any internet shutdown must be:

(a) Clearly grounded in unambiguous, publicly available law;

(b) Necessary to achieve a legitimate aim, as defined in human rights law;

442 Ibid at 67.
(c) Proportional to the legitimate aim and the least intrusive means to achieving that end; accordingly, they should be as narrow as possible, in terms of duration, geographical scope and the networks and services affected;

(d) Subject to prior authorization by a court or another independent adjudicatory body, to avoid any political, commercial or other unwarranted influence;

(e) Communicated in advance to the public and telecommunications or Internet service providers, with a clear explanation of the legal basis for the shutdown and details regarding its scope and duration;

(f) Subject to meaningful redress mechanisms accessible to those whose rights have been affected by the shutdowns, including through judicial proceedings in independent and impartial courts; court proceedings should be carried out in a timely fashion and provide the possibility to obtain a declaration of the unlawfulness of shutdowns carried out in violation of applicable law, even after the end of the shutdown in question.443

Therefore, blocking the internet should only be used as a last resort and in exceptional circumstances. What this means is that the government must have explored all other practical options to address the situation before resorting to such a drastic measure.

In addition, the Nigerian government has implemented strict penalties for private intermediaries who fail to comply with blocking orders. Section 12 of the False Speech Bill allows the department to instruct the NCC to require private companies to take appropriate measures to restrict user access through an “access blocking order.” If an internet intermediary fails to comply with this order, they face a daily fine of N10,000,000 unless they can demonstrate that their non-compliance was done in good faith.

The implementation of access blocking orders can lead to the complete suspension of websites or platforms, representing an extreme measure of disinformation control. While it is reasonable for the government to safeguard the country from harm, mandating private companies to restrict internet access or communication can trigger tensions between the state and private entities. Furthermore, this condition places these businesses in a predicament where they have to navigate the delicate balance between upholding freedom of expression and complying with domestic

443 Ibid.
requests. This is especially demanding for the preservation of the right to freedom of expression as states frequently make sweeping demands that could potentially lead to misuse.

d) Final Balancing

The proportionality analysis requires that there be an assessment of the importance of the state objective balanced against the effect of limits imposed upon freedom. The UN Human Rights Committee, which is a body charged with monitoring the implementation of the ICCPR, has set out clear principles that should guide states in the imposition of restrictions on the right to freedom of expression. For the right to freedom of expression to be protected in accordance with international standards, the state must ensure that such measures must be prescribed by law and must conform to the tests of necessity and proportionality.

To buttress, any restriction of free expression:

(a) must be sufficiently precise and made to the public, that is, the laws must not grant unlimited discretion to bodies charged with the execution of the law;

(b) must be on legitimate ground: the state must clearly show the objective of the measure: and

(c) must not be disproportionate in achieving its objective.

This means any “restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument

444 The Human Rights Committee comprises of 18 independent experts in the field of human rights who are nationals of the state parties to the covenant. The Committee has four primary duties in carrying out its monitoring and oversight roles. The Committee first receives and scrutinizes the States Parties’ reports on the actions they have taken to put the rights outlined in the Covenant into practice. Second, the Committee elaborates on what are known as general comments, which are meant to help states parties implement the Covenant’s provisions by laying out in greater detail the substantive and procedural responsibilities of states parties. Finally, the Committee accepts and examines individual grievances, sometimes known as “communications,” made under the Optional Protocol by those who assert that a state party has violated their Covenant rights.

amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected."**446**

As we have argued, not all ‘expression’ covered by the bill is inimical to the values of freedom of expression. The Bill criminalizes both falsehoods that are extreme and those that are not. Limiting false speech in extreme cases of inciting violence or discrimination also promotes democratic values such as the safety of the people, protecting vulnerable groups and equality. Also, the Bill is not narrowly defined to minimally impair section 39 of the Constitution. In summary, some provisions of the bill do not show that restricting freedom of expression is a proportionate way of prohibiting false speech. In light of these considerations, section 3 of the Bill does not violate the right to free expression in a significant way.

### 3.4.2.3 Hate Speech Bill

We shall now turn to the requirement of proportionality analysis in deciding whether the infringement of free expression by the hate speech bill is justified in a free and democratic society.

The first aspect is to examine the objective of the Bill. If the Bill’s objective is pressing and substantial in a free and democratic society, our next step is to evaluate whether the Bill is rationally linked to the government’s objective and assess the extent to which it restricts the right to freedom of expression.

**a) Pressing and Substantial Objective**

When it comes to the hate speech bill, one must ask whether the amount of hate propaganda in the world today causes sufficient harm to justify legislative intervention. Hate speech in Nigeria has manifested through two major streams: religion and politics.

In July 2023, the National Human Rights Commission (NHRC),**447** said that hate speech promotes discrimination, and division as well as incites violence, which should be avoided in the interest of

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**446** General Comment No. 27, Freedom of Movement (Article 12), UNHRC, 67th Sess, UN Doc. CCPR/C/21/Rev.1/Add.9 (1999).

**447** The National Human Rights Commission of Nigeria was created in accordance with Resolution 48/134 of the United Nations General Assembly, which calls on all member states to establish independent national institutions to promote, protect, and enforce human rights. The Commission serves as a non-judicial means of ensuring that human
peace and unity in Nigeria. In a two-day roundtable discussion on the *Role of Media in Countering and Reporting Hate Speech*, the commission observed that there is a surge of hate speech and that while social media has been used to “engage people around the world in our pursuit of peace, dignity and human rights on a healthy planet”, it is being misused to spread disinformation and hate to billions of people.

Nigeria is a country with a population of over 165 million people and 250 ethnic groups, which makes it very diverse in terms of cultural practices and religious beliefs. This has led to polarization along ethnic, regional, and religious lines, with news media editors, reporters, and owners belonging to different sides of the divide.

As discussed earlier in this chapter, the use of hateful language and propaganda is a significant societal issue that cannot be ignored. The effects of such words can be severe and long-lasting, causing emotional trauma and psychological distress for members of targeted groups. This can lead to social repercussions that further marginalize already vulnerable individuals. Hateful language directed at specific racial or religious groups can leave individuals feeling attacked, isolated, and marginalized.448 The sense of belonging and acceptance within society is closely linked to how one is perceived by others and hate propaganda can deeply impact a person’s sense of self-worth and identity. This can lead to individuals withdrawing from society and avoiding any interactions with individuals outside of their own group.

Also, one of the most detrimental effects of hate propaganda is that it influences society.449 The act undermines the unity of society and weakens commonly held beliefs, hindering the progress of peace, stability, sustainable development, and the realization of human rights for everyone.450

International human rights instruments have also expressed a deep concern for the spread of hate speech especially online, as it “has become one of the most common ways of spreading divisive rhetoric on a global scale, threatening peace around the world.”451 To highlight the urgency and

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rights are respected and enjoyed. It also offers opportunities for public education, research, and dialogue to increase awareness of human rights issues.

448 Keegstra, *supra* note 227.

449 *Ibid*

450 UNESCO, “What you need to know about hate speech”, (May 11, 2023) online: <https://www.unesco.org/en/countering-hate-speech/need-know>

451 United Nations, “Hate speech is rising around the world”, online: <https://www.un.org/en/hate-speech>
importance of addressing hate speech, international organizations have made it a fundamental principle to combat hatred, discrimination, racism, and inequality. This principle also reflects Nigeria’s commitment to having a free and democratic society, and this is a key value of the Constitution. The assessment of these international norms also helps show what constitutes a pressing concern of the legislature in enacting the bill.

This concern has led to two international instruments that prohibit the circulation of hate speech. The *International Covenant on Civil and Political Rights*\(^\text{452}\) (“ICCPR”), which was adopted by the United Nations in 1966 and entered into force in Nigeria October 29, 1993, provides articles that prohibit the advocacy of hatred:

**Article 20**

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Furthermore, the International Convention on the Elimination of All Forms of Racial Discrimination contains a resolution by state parties to:

. . . adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination.

**Article 4** of the CERD particularly provides:

(a) States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or other ethnic origins or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

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\(^{452}\) ICCPR, *supra* note 111.
(b) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

These two instruments show that international bodies do not protect expression that advocates discrimination or hatred, which is incompatible with other human rights. Also, other provisions of the Nigerian Constitution also emphasize the elimination of hate speech in Nigeria.

Several sections of the Constitution represent Nigeria’s strong principle of equality and diversity and are therefore crucial to the legislature’s objective of eliminating hate propaganda. Also, in determining whether a limit is reasonably justified in a free and democratic society, it is important that these people be taken into consideration.

Section 10 of the Nigerian Constitution provides that “the Government of the Federation or a State shall not adopt any religion as State Religion.” This shows that the religion in Nigeria is neutral, and this is to avoid a state where a particular religion is claiming superiority over another religion. Section 14(1) also states that the Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice. Section 15(1) provides that the motto of the Federal Republic of Nigeria shall be Unity and Faith, Peace and Progress, and subsection 2 states that “national integration shall be actively encouraged, while discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited.”

On the promotion of equality, section 17(1) asserts that “the State social order is founded on ideals of Freedom, Equality and Justice.” Subsection 2 provides:

2. In furtherance of the social order-
   a. every citizen shall have equality of rights, obligations and opportunities before the law;
   b. the sanctity of the human person shall be recognised, and human dignity shall be maintained and enhanced;

Section 42 affirms the legislative objective to prohibit the willful transmission of group hate or discrimination. It provides:
(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

As contained in the bill, the objective of the bill is to promote national cohesion and integration by prohibiting unfair discrimination and hate speech. In light of the sections which has shown the Constitution’s allegiance to equality, national unity of all and cultural diversity in society, hate speech threatens these principles, and thus, it displays pressing and substantial harm to society.

b) Rational Connection

In determining if the law is rationally connected to the objective, one thing we must make clear here is that hate speech does not promote the Nigerian Constitution’s key values which are equality, social justice, and democracy. Rather, it is a form of distraction for attaining these values. Section 4 of the hate speech bill provides that a person commits the offence of hate speech if:

(1) A person who uses, publishes, presents, produces, plays, provides, distributes and/or directs the performance of any material, written and/or visual, which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behaviour commits an offence if such person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up against any person or person from such an ethnic group in Nigeria.
(2) Any person who commits an offence under this section shall be liable to life imprisonment and where the act causes any loss of life, the person shall be punished with death by hanging.

(3) In this section, “ethnic hatred” means hatred against a group of persons from any ethnic group indigenous to Nigeria.

The rationality test requires that the government demonstrate that this section is connected to a pressing and substantial objective. We have already concluded that the bill has a pressing and substantial purpose. The bill’s criminal prohibition of hate speech is connected to the legislative objective to promote equality amongst ethical groups and national cohesion. The essence of criminal prohibition is for the public’s protection and to maintain society’s values. Therefore, prohibiting hate speech through criminal law shows that it is harmful to society and, therefore, rational in application.

c) Minimal Impairment

The third step of the analysis demands that there be minimal impairment on the right. What this entails is that the criminal nature of the bill and the measures used in the bill are the appropriate course to prohibit hate speech. The argument here is that the hate speech bill should be amended to exclude terms that are not overly broad and include words that clearly show with precision that the objective of the legislature is to prohibit hate speech.

Therefore, the main question here is whether section 4 differentiates between expressions that show the legislature’s objective to criminally prohibit harmful hate speech and those that do not need criminal sanctions. To examine how minimally impairing this section is, the nature and impact of the provision must be discussed. Section 4 of the hate speech bill prohibits anyone who:

uses, publishes, presents, produces, plays, provides, distributes and/or directs the performance of any material, written and/or visual, which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behaviour commits an offence if such person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred.

A close look at the section shows that the statement is not only restricted to those who publish or produce it but also extends to third parties who distribute it. This suggests the legislation intends
to encompass a broad range of hate speech dissemination. Additionally, the hate speech bill prohibits any use or dissemination of material that is _threatening, abusive or insulting_, which intends or is likely to stir up ethnic hatred. This implies that threats, abuse, and insulting words all fall within the scope of hate speech. Section 39(1) of the Nigerian Constitution provides for the protection of the right to freedom of expression, which includes the right to hold opinions and to receive and impart ideas and information without interference. When enacting legislation, it is vital to consider how it may affect the right to free expression. Democracy is founded on the principle that individuals can openly discuss and exchange ideas, regardless of how disturbing or offensive they may be to some people.

Not all insulting or abusive statements can be classified as hate speech that warrants criminal sanction. However, the terms of section 4 of the bill indicates that it applies to various forms of communication without distinguishing between offensive statement and hate speech that should be restricted. This makes the prohibition vague and lacks precise clarification as to the meaning of “insult,” “abuse” “threat” or hate speech.

There is no definition of the word hatred in the bill, however, a group of high-level United Nations and other officials, including civil society and scholars in International human rights law on freedom of expression, have taken steps to explain the meaning of hatred and hostility, incitement. Principle 12 of the Camden Principles defines “hatred” and “hostility” as intense and irrational emotions of opprobrium, enmity, and detestation toward a particular group, while “incitement” refers to statements that create an imminent risk of discrimination against national, racial, or religious groups. This underscores the importance of restricting hate speech only when it involves extreme emotions directed at a specific group, and not just any form of expression. However, the current bill does not reflect this intention. The Nigerian government could draw upon

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454 Different countries may have different grounds upon which a statement could be said to have incited either hatred or racial discrimination, however, some of these regulations contain broad grounds that could lead to incitement without subjecting them to any test.

455 Article 19, _Camden Principles on Freedom of Expression and Equality_, (London, April 2009) These Principles represent a progressive interpretation of international law and standards, accepted State practice (as reflected, inter alia, in national laws and the judgments of national courts), and the general principles of law recognized by the community of nations.

456 It should be noted that states are not bound by these principles as it is not a document within the formal sources of international law but a soft law document.
the definitions stated in the Camden Principles, which would guide the stakeholders, and it must be expressly stated in the legislation.

International standards place an obligation on state parties to prohibit the advocacy of hatred which incites discrimination, hostility, or violence. The word “incitement” connotes that the kind of hate speech that should be restricted are only those with serious implications. In establishing the seriousness of hatred, the following factors can be considered: a. the context; b. the content and form; c. the extent of the speech; and d. the imminence of such action. As a result, the government should take out words like abuse, or threat, or insult, as they do not match the level of egregiousness required by international standards to criminalize hateful speech. Section 4 of the hate speech bill must reflect the limitation of hate speech to only hateful statements with the risk of causing incitement, which could lead to violence, hostility, or discrimination.

According to Section 4 (2) of the hate speech bill, anyone found guilty of committing hate speech could face life imprisonment and death by hanging if the act causes loss of life. However, it is unclear how such severe punishment would effectively address the issue of hate speech. This sanction also raises questions as to whether it would constitute a minimal infringement on the right to freedom of expression. Additionally, the absence of any defences in the bill raises concerns about the scope of the restriction and potential infringement on the right to freedom of expression. It is crucial to strike a balance between preventing hate speech and preserving individuals’ rights by avoiding overly broad and vague provisions and including necessary defences.

Furthermore, imposing a criminal sanction for statements that may be insulting or abusive unreasonably impairs section 39 of the Constitution, especially where there is no defence to such an offence. The government can take non-punitive measures in response to non-extremist statements. Education is a valuable tool in raising awareness about the risks of discriminatory

457 See chapter 3.
458 For instance, section 319 (3) of the Canadian provides for defence to the offence of wilful promotion of hate speech. It states that no person shall be convicted of an offence under subsection (2): (a) if he establishes that the statements communicated were true; (b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text; (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.
remarks and fostering a culture of mutual respect among diverse communities. In support of this perspective, some experts caution against including the death penalty in the legislation, citing its potential impact on freedom of speech and the potential for a dangerous precedent to be set. In this regard, Professor Ajokwu states that “…the extremely punitive capital punishments proposed in the Bill should be reviewed and the wording of the Bill should be redrafted to avoid falling into a slippery slope with precarious consequences…”459 Section 4 of the Bill, therefore, contains language that is vague, ambiguous, and overreaching. Consequently, it lacks the necessary clarity required for effective implementation. If passed, this section has the potential to unduly restrict freedom of expression in an unjust manner.

Based on the analysis above, it is concluded that:

i. The Nigerian government can impose restrictions on the right to freedom of expression, but such restrictions must be stated by law in furtherance of a legitimate interest known to the law and must be necessary and proportionate to protect the interest.

ii. Section 3 of the false speech bill should be amended to include the three-part test, and the grounds for restriction of false speech must be clearly stated and precise. The definition of words like “hatred,” “incitement,” “prejudicial,” “diminish public confidence in government”, “false statement of fact”, and “public interest” must be provided in the law.

iii. The provision on the criminalization of hate speech offences must be amended to reflect the extreme nature of the hateful statement in line with international law and the protection of freedom of expression. The Nigerian government can replace it with “prohibition of advocacy of hatred on protected grounds that constitutes incitement to violence, discrimination, or hostility”.

iv. The state can impose civil liability where it chooses to make disinformation an offence.

459 Idachaba M Ajogwu, “A Critical Examination of Hate Speech in Nigeria” (2022) 1:1 Am J Soc & L 1 at 27
v. The death penalty should be removed from the hate speech bill.

vi. The use of blocking websites must be justified in line with the three-part test: legality, necessity, and proportionality.

That said, the implementation of international standards is one of many steps in identifying the appropriate rules for restricting freedom of speech online. Though there is a global problem of regulating freedom of expression on social media, the regulation of false speech and hate speech also plays out in different ways in different countries, depending on each country’s culture, history, religion, and ethnicity. Therefore, to complement and domesticate the implementation of international laws and jurisprudence in protecting the right to freedom of speech, the independence of the judiciary is needed. According to international standards, the test for restriction of free speech, whether false speech or hate speech, is that it must be legal, necessary, and proportionate. However, because the Nigerian court has yet to create an extensive framework for restricting this right, we have yet to see how these will play in the Nigerian context. The Nigerian court needs to set up a framework for interpreting restrictions on the right to freedom of speech in line with the examined international standards.

3.5 Conclusion

Despite the apparent benefits of social media platforms, there is an increasing fear of harm because of hate speech and false speech. This chapter began by discussing the challenges with the regulation of social media and highlighting its complexities. This includes the nature of social media, a lack of universal consensus on the definition of hate speech and false speech, excessive regulations that infringe on the right to freedom of expression, and difficulty in determining the extent to which free speech can be restricted. Thereafter, it discussed the provisions of the false speech bill and the hate speech bill, which are the bills proposed by the government to regulate freedom of expression. However, these bills were examined to determine their constitutionality using proportionality analysis and international standards. The proportionality test and international standards help understand how the bills cannot pass the reasonable limit of the law because they contain provisions that have unnecessarily and disproportionately infringed on free expression. Consequently, the chapter concludes that the proposed bills need to be revised to
restrict free speech online because their provisions are overly impairing and vague, and the bill shows a lack of distinction between speech that should or should not be protected.
CHAPTER FOUR: CONCLUSION

4.1 Introduction

Social media regulation is a multifaceted and evolving topic that has gained significant attention in recent years. As social media platforms have become central to communication, information dissemination, and public discourse, concerns have arisen about their impact on individuals, society, and democracy.

This chapter begins with a summary of the issues addressed in previous chapters and the arguments in each chapter. It restates the importance of this research and why the Nigerian government needs to draw from the proportionality analysis as seen in Canada and enhance the regulation of social media through the proportionality analysis and international standards.

4.2 Summary of Findings

This thesis is based on the protection of free expression and how the importation of proportionality analysis and international standards are necessary to restrict hate speech and false speech in Nigeria. Hence the research question: Can the Nigerian bills on restriction of social media legally restrict false speech and hate speech without overreaching on the right to freedom of expression? If not, what measures can be taken to improve these bills?

The regulation of social media presents a unique set of challenges and considerations due to the country’s diverse cultural, political, and socio-economic landscapes. Some countries in the global South have faced problems with government censorship and control over the media. Nigeria is a good example of a country where the government has taken controversial and concerning approaches to regulating social media. For instance, in 2021, the Nigerian government ordered the indefinite suspension of Twitter in the country following the platform’s removal of a tweet by President Muhammadu Buhari. This move was widely criticized for infringing on freedom of expression and limiting citizens’ ability to access information and engage in public discourse. This issue has not gained so much academic attention in Africa, specifically Nigeria. This thesis is significant at this time as it shows the need to protect freedom of expression and innovatively
describes how drawing from Canadian law and international standards could enhance Nigeria’s regulation of free speech on social media.

Social media platforms expose vulnerable users, such as children and marginalized communities, to various risks, including cyberbullying, exploitation, and radicalization. Also, social media’s influence on political discourse and elections has sparked debates about disinformation. One of the most critical considerations in social media regulation is the delicate balance between preserving freedom of expression and addressing harmful content, such as hate speech and false information.

This thesis begins by discussing three key theories for the justification of freedom of expression. These theories show that freedom of expression is essential to the discovery of truth, self-autonomy, and the role of free speech in promoting open and vibrant democratic discourse. However, it is shown that these theories are not absolute justifications and may be restricted.

In Nigeria, just as in Canada, the condition for justifying a breach of freedom of expression is that the law must be shown to be within reasonable limits in a democratic society. This implies that for a law restricting free expression to be valid, the laws or rules must be reasonably justified in a democratic society. Section 45 of the Nigerian Constitution states specific grounds for the restriction of freedom of expression. The section states that laws can be enacted to infringe on the right where it is in the interest of the public, public safety, public order, public morality, public health, or to protect the rights and freedom of others. States are often in the habit of using these grounds to justify laws enacted. However, this section is vague as it gives no further direction as to how Nigerian courts should balance competing interests, such as freedom of expression on the one hand and public interest on the other hand.

The first and only case that shows what reasonably justified means in a democratic society is Cheranci v. Cheranci. In Cheranci, the case was on the right to freedom of expression and the right to peaceful assembly and association. The court held that the standards for determining whether a law is reasonably justified are: (a) it must be in the interest of public morals or public order; and (b) it must not be excessive or out of proportion to the object it seeks to achieve. Despite

460 S 1 of the Canadian Charter; S 45 of the Nigerian Constitution
461 Ibid
the mention of a test in Cheranci, the Nigerian court, since 1960, has not made mention of this test in subsequently deciding cases related to freedom of expression.

There have been limitations on freedom of the press; however, the court has not subjected laws that have been challenged to any rigorous test. The absence of any interpretative mechanism or established framework for assessing whether a law is within reasonable limits concerning the right to freedom of expression is challenging. This means that the extent of the right is unclear to the state and the people exercising their right to freedom of expression. A well-defined test helps ensure consistency, transparency, and accountability in assessing the legitimacy of limitations on freedom of expression.

However, this research endorses the approach of the Supreme Court of Canada in interpreting cases having to deal with balancing freedom of expression against the law enacted for the public interest. This thesis explains how the Supreme Court, in the case of R v. Oakes, established a standard for balancing public interests and individual rights, such as freedom of expression. This standard is commonly known as the Oakes test and is similar to a proportionality analysis. This test states that such a law must: have a substantive objective; be rationally connected to the objective; minimally impair the right; and there must be proportionality between the effect of the measure and the objective of that measure. This provides a clear and structured framework for courts to evaluate the constitutionality of laws that limit rights. It is important to state that the Canadian law examined in Chapter two of this research does not bind the Nigerian system. However, this jurisdiction is examined because it has established a deducible principle that can be a persuasive authority for the Nigerian courts.

Notwithstanding the criticism of the proportionality analysis, this thesis showed how the proportionality test offers several advantages in ensuring that limitations on rights are justified and proportionate. As a result, this research recommends the use of the proportionality test in Nigeria.

The thesis also discussed how international standards offer guidelines that help shape the understanding of permissible restrictions on free speech. International standards also support the use of the proportionality test in developing constitutional rights and protecting freedom of

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462 Oakes, supra note 3.
expression. The “three-part test” (legality, necessity, and proportionality) is often used to assess the legitimacy of limitations. It continued with discussing specific international laws that provide some guidance and principles concerning regulating hate speech and false speech.

Having discovered that there is a need for a stringent legal standard like proportionality analysis, this thesis examines the regulation of freedom of expression, especially online. Examining these challenges shows that the regulation of false speech and hate speech on social media is complex. The reasons for this include first the use of private companies as content regulators, which creates a problem due to the transnational nature of media platforms; a lack of conceptual clarification of false speech and hate speech; use of an algorithm to remove certain kinds of speech; and a lack of transparency in removing speech. Second, the absence of the extent or scope of speech regulation also poses a challenge to regulating free speech. States, on the other hand, seek to regulate free expression online and are usually in the habit of using vague laws to request the removal of certain speech online. Nigeria has proposed two bills to address the regulation of free expression on social media. These bills are “the Protection from Internet Falsehood and Manipulations Bill” and “the Independent National Commission for the Prohibition of Hate Speech Bill.”

This thesis then briefly discussed the theories of free expression in Nigeria, where it highlighted that the theories do not present absolute justification for the protection of this right, especially the protection of hate speech. Thereafter, the hate speech and false speech bills were analyzed using the proportionality test and international norms, which thus illustrates how the bills do not pass the minimal impairment test. The lawmakers’ use of vague and overreaching words in drafting the bills and the inclusion of disproportionate means of regulating freedom of expression all violate the protection of freedom of expression. It is therefore concluded that these bills are not carefully drafted to restrict only serious harm while safeguarding the principles of democracy, pluralism, and individual rights.

4.3 Possible Solutions for Developing an Appropriate Framework for Regulating Freedom of Expression on Social Media Platforms

This part offers a proposal setting out possible solutions for both lawmakers and the courts for the approaches that Nigeria should adopt in developing an appropriate legal principle for regulating freedom of expression in Nigeria. The thesis, as has been stated, concludes that: (1) there needs to
be a clear and comprehensive legal standard to determine when a law is within its reasonable limit; (2) the amendment of the bills to restrict hate speech and false speech should be carried out in a manner that shows a balance between protecting free speech and restricting harmful speech. The recommendations here draw upon the lack of constitutional parameters for the limitation of freedom of expression in Nigeria and the inclusion of international perspectives on the regulation of social media.

4.3.1 Development of an Analytical Framework by Courts regarding Limitations on Free Speech

The permissible test for restricting freedom of expression is that a law must be ‘reasonably justified,’ however, the lack of a clear and precise definition of what constitutes “reasonably justified” can lead to inconsistent application and potential abuse of power by those in authority. The principle of proportionality has been recognized as one of the most important principles at this time, and it has been widely accepted by different jurisdictions, including Canada, Germany, South Africa, India, countries in Europe, and international bodies. Implementing a formal analytical structure, such as the proportionality test used in Canada, would ensure consistency and predictability when interpreting legal cases involving Freedom of expression. The idea is not to have a legal framework that will reflect the exact test in Canada, rather, such a framework should be created in such a way that it reflects the particularities of Nigeria’s constitutional rights. The proportionality analysis is important for Nigeria due to the following reasons:

a. **Balancing of Nigeria’s Constitutional Rights**: Nigeria’s constitutional framework includes provisions on the limitation of constitutional rights, necessitating a system of balancing and proportionality. Adopting the proportionality test, tailored to Nigeria’s unique constitutional context, ensures a harmonized approach to evaluating limitations on freedom of expression while considering the specific needs and interests of the country.

b. **Consistency and Uniformity**: Establishing a formal analytical structure, such as the proportionality test, similar to what is used in jurisdictions like Canada, ensures consistency and uniformity in interpreting legal cases related to freedom of expression.

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This promotes legal certainty and predictability in judicial decisions, enhancing the rule of law.

c. **Consistent Mechanism for Justifying Restrictions**: The proportionality test provides a consistent mechanism for states to justify the infringement of constitutional rights, including freedom of expression. It requires the government to demonstrate that any restrictions are necessary and proportionate to the legitimate interests being protected.

d. **Development of Jurisprudence**: By adopting the proportionality test, Nigerian courts can develop robust jurisprudence on the enforcement of freedom of expression. This jurisprudence evolves through a structured and principled analysis, contributing to a deeper understanding and application of rights in the country.

e. **Reduced Reliance on Traditional Interpretation**: By facilitating a balancing regime, the test enables Nigerian courts to rely less on traditional constitutional canons of interpretation, empowering judges to comprehensively evaluate competing values and interests. This approach avoids rigid and formulaic approaches, promoting a balanced approach to constitutional rights that safeguards individual liberties and promotes democratic values.464

f. **Protection According to International Standards**: The proportionality test aligns with the clear principles on restrictions to freedom of expression outlined by the UN Human Rights Committee.465 By adopting this test, Nigeria can ensure that measures to limit freedom of expression conform to international standards, upholding the country’s commitments to human rights.466

465 The Human Rights Committee comprises of 18 independent experts in the field of human right and are nationals to the state party of the Covenant. The Committee has four primary duties in carrying out its monitoring and oversight roles. The Committee first receives and scrutinizes the States Parties’ reports on the actions they have taken to put the rights outlined in the Covenant into practice. Second, the Committee elaborates what are known as general comments, which are meant to help States parties implement the Covenant’s provisions by laying out in greater detail the substantive and procedural responsibilities of States parties. Finally, the Committee accepts and examines individual grievances, sometimes known as “communications,” made under the Optional Protocol by those who assert that a state party has violated their Covenant rights.
466 General Comment No. 22. This test has also been confirmed by other international treaties such as the European Convention on Human Rights. See: Dominika Bychawska-Siniarska, “Protecting the Right to Freedom of Expression Under the European Convention on Human Rights.” (2017), Council of Europe, online: <https://rm.coe.int/handbook-freedom-of-expressioneng/1680732814>.
g. **Coherent Balancing Mechanism:** The proportionality test creates a coherent mechanism for judges to balance competing values and interests when reaching decisions. This fosters a balanced approach to constitutional rights, promotes democratic values, and safeguards individual liberties.

h. **Accountability of the Government:** By employing the proportionality principle, Nigeria’s democratic state can hold the government accountable for its actions and policies concerning freedom of expression. The test requires the government to demonstrate the necessity and proportionality of any limitations, ensuring that rights are respected even in challenging circumstances.

In conclusion, adopting the proportionality test in Nigeria is a pivotal step towards enhancing the protection of freedom of expression in a democratic society. It provides a structured framework for evaluating restrictions, respecting international standards, and promoting the development of robust jurisprudence. By balancing between competing interests and upholding democratic values, the proportionality principle empowers Nigerian courts to safeguard the essential right of freedom of expression while fostering a fair and rights-respecting legal environment.

### 4.3.2 Adopting the International Law Approach to the Regulation of Social Media in Nigeria

The previous chapter outlined the regulatory laws surrounding social media in Nigeria, shedding light on some key points. Firstly, ‘hate speech’ and ‘false speech’ are defined by state governments in a vague manner, making it challenging to discern the actions that fall under these categories. Secondly, the practice of shutting down the internet and blocking websites poses a significant threat to the exercise of freedom of expression. Lastly, states impose excessive and disproportionate sanctions on social media platforms in cases where they fail to remove content deemed criminal.

Based on these challenges, in enacting a law regulating social media, it is important to look to a human rights approach that would serve as a universal standard in the protection of the right to freedom of expression. As highlighted by a former United Nations Special Rapporteur David Kaye, “human rights standard, if implemented transparently and consistently with meaningful user
and civil society input, provide a framework for holding both states and companies accountable to users across national borders.” The subsequent section shall propose principles that will guide both states and private companies in protecting freedom of expression within a regulatory framework for social media. Other legal jurisdictions can also consider these principles when making their regulations.

4.3.2.1 Removal of Internet Blocking

Internet blocking as a regulatory measure to combat misinformation or disinformation on social media is indeed a concerning trend with significant implications for fundamental rights and the stability of a country. While states may seek to protect their citizens, such regulatory measures often fail to meet essential principles such as legality, necessity, and proportionality. There is a risk that content will be restricted arbitrarily and unnecessarily since the specific circumstances that justify blocking are either not specified by law or are provided by law but in an unduly and unclear manner. They have a profound impact on the rights to freedom of expression, freedom of thought and conscience, privacy, and economic stability. Suppose users are restricted from using internet services because of false speech. In that case, the probability of this infringing on the right to freedom of speech and other rights is greater than the prohibition of false speech.

In the rare cases where the state deems it necessary to block the internet, it should be employed as a last resort and only under exceptional circumstances. In such situations, I strongly recommend that the state ensure the following nuanced measures are in place:

a. **Clear and Transparent Reasoning:** The state must provide explicit and transparent reasons for shutting down the internet or social media. This helps citizens understand the necessity and proportionality of the measure, fostering trust and accountability in government actions.

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468 *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UNHRC, 32nd Sess, A/HRC/32/38, (2016) Para. 48*
b. **Limited Time Frame**: Any internet blockage should be strictly time-limited and imposed only for a short period. This prevents prolonged disruptions and allows for a swift return to normalcy once the exceptional circumstances cease.

c. **Establishment of an Appeal Mechanism**: An effective and accessible appeal mechanism empowers citizens to challenge the internet shutdown if they believe it to be unjust or unnecessary. This ensures a check on potential abuses of power and reinforces the protection of the right to expression.

Furthermore, I propose excluding extreme sanctions on internet intermediaries for failure to comply with the state’s demands for internet shutdowns. While it is vital for the state to protect the country from harm, imposing such stringent obligations on private companies may lead to conflicts between states and these intermediaries. Moreover, it puts these companies in a difficult position of balancing the preservation of the right to expression with adhering to domestic demands, which can be challenging and prone to abuse.

### 4.3.2.2 Limiting the Scope of Hate Speech

The lack of conceptual clarity surrounding terms like hate speech and false speech poses a significant challenge when it comes to imposing restrictions on free speech. While it may be difficult to precisely define hate speech due to differing interpretations, there is a pressing need to clarify the scope of hate speech to distinguish between protected and unprotected speech.

To address this issue, I assertively recommend that the state revise section 4 of the hate speech bill to narrow the limitation of hate speech strictly to hateful statements that have the potential to incite violence, hostility, or discrimination. By rephrasing this section, the bill should criminalize only those expressions that pose a genuine risk of incitement to violence or hatred against specific racial, ethnic, or religious groups.

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470 The question “what is hate speech” or “what is false speech” lies at the foundation of all arguments or questions raised against laws seeking to regulate these terms on social media. People fear that these laws can be used to infringe on their right to free speech.
The existing hate speech bill includes imprecise and overly general language that diverges from globally recognized norms. Terminology like “threatening,” “abusive,” and “insulting” is open to interpretation and could be exploited, as it fails to provide specific criteria for distinguishing between offensive remarks and those that actually propagate hatred. As a result, it is essential for the government to eliminate these ambiguous phrases and establish a transparent and objective standard to govern limitations on speech. For instance, the grounds for restricting hate speech should be limited to cases of racial, ethnic, or religious hatred that directly incites discrimination or violence against specific groups. This approach aligns with international standards and ensures that limitations on hate speech are precisely defined and focused on addressing urgent social needs.

By adhering to this explicit and principled approach, the state can ensure that restrictions on hate speech are proportionate, effectively addressing societal concerns while safeguarding freedom of expression. The revised hate speech bill should avoid overly broad restrictions that could impede free speech rights and instead focus on precisely targeting speech that poses a real and immediate risk of incitement to violence or discrimination.

**4.3.2.3 Non-Criminalization of False Speech**

Apart from the issue of regulating hate speech on social media, another kind of expression that is concerning is the restriction of false speech. While disinformation can pose harm to society, a greater challenge would be criminalizing false speech, as such restrictions can have an overreaching effect on the right to freedom of expression. This is because of the need for conceptual clarification of what disinformation or false speech is; there is no agreement as to what false speech means. Also, false speech is subjective, and drawing a line between a statement of fact and a falsehood may be difficult.\(^{471}\)

The False Speech Bill states that a declaration is false if it is “false or misleading whether wholly or in part and whether on its own or in the context in which it appears.”\(^{472}\) This provision is vague, and its interpretation will be subject to whoever is acting on it. This provision should be removed.


\(^{471}\) *Ibid*.

\(^{472}\) False Speech Bill, *supra* note 1 at s 35.
from the bill as it is against the tests of legality, necessity, and proportionality that are required when restricting false speech.

The Nigerian government must distinguish between a statement that can only be deterred by imposing criminal sanctions and one that can be controlled by civil sanctions. In essence, criminal law should be used only in very exceptional and most egregious circumstances of incitement to violence, hatred, or discrimination. The proposed false speech bill is problematic as it broadly defines what constitutes a false statement of fact and allows for vague grounds that could lead to harmful consequences. Criminalizing disinformation based on false speech is unlikely to be effective and may infringe upon freedom of expression. Instead of restricting speech, it is better to promote more speech in order to regulate disinformation.

4.3.2.4 Addressing Expression of Hatred and Disinformation through Non-Legal Measures

The Special Rapporteur reiterates the view that for the types of expression that do not rise to criminal or civil sanctions but still raise concerns in terms of civility and respect for others, effort should be focused on addressing the root causes of such expression, including intolerance, racism, and bigotry by implementing strategies of prevention. A wide range of policy measures are required to achieve this and to effect genuine changes in mindsets, perceptions, and discourse, for instance, in the areas of intercultural dialogue or education for diversity, equality, and justice, as well as in bolstering freedom of expression and promoting peace.

Education initiatives are a crucial part of any effort to stop hate speech and misinformation. To accomplish this, it is crucial to disseminate information about human rights, false information, tolerance, and respect for all cultures and religions. Citizens must be able to recognize, critically analyze, and challenge misinformation fully and effectively. This requires sustained investment in social resilience building, media literacy, and information literacy.

Instead of placing more restrictions, fostering a climate of open discourse in which individuals may speak candidly about their experiences without fear of repercussion is critical. The first step

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473 UN Doc. A/HRC/47/25, supra note 298 at 89.
474 UN Doc A/HRC/22/17/Add.4, supra note 284 at para. 20
475 UN Doc A/66/290, supra note 276 at 41.
476 A/77/287, 60

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is to address the powerlessness and/or alienation that many groups and individuals suffer. In order to promote pluralism and diversity of ideas and perspectives in mainstream media, it is important for the Nigerian government to ensure that all populations in multicultural societies have equal opportunities to participate in public discourse and have their stories and points of view included in national discussions. As a diverse nation, it is imperative that the Nigerian government ensures equitable participation in public discourse for all members of multicultural communities. This includes the recognition and incorporation of diverse perspectives and narratives into national discussions, as well as promoting pluralism and fostering a range of ideas and viewpoints within mainstream media.

4.4 Conclusion

The regulation of freedom of expression on social media is important to protect people from online harm, which has increased with the various engagements on social media. A unique nature of the right to freedom of expression is that it enhances the exercise of other rights like the right to thought and conscience, the right to privacy, and the right to peaceful assembly. As a result, this right has been defended for three reasons: 1. it allows people to speak without fear; 2. it enhances the autonomous nature of humans; and 3. it is a vital principle for people to engage in safe government. Therefore, any law restricting this right must show it has duly considered these factors.

Different states have made laws to regulate social media, especially since there is an increase in the dissemination of online harm on the platform. They are obligated to do this for the protection of the people within their jurisdiction, and it is for this reason that they make laws prohibiting expressions online on the grounds that they are hateful and false. However, for a law to properly regulate these harms, it must not unnecessarily restrict the exercise of the right to freedom of expression on social media.

Therefore, Nigeria should adopt proportionality analysis and the provisions of international standards in making laws that regulate online expression. Addressing the absence of a standardized test to determine reasonable limits on freedom of expression is a challenge that requires ongoing dialogue, collaboration, and adherence to international human rights standards to ensure that

477 Ibid at 62
478 UN Doc A/67/357, supra note 282 at 73
limitations on freedom of expression are genuinely necessary and proportionate to protect the broader interests of society while upholding democratic principles. Understanding how the court balances competing rights/values and the protection of freedom of speech can provide guidance on how laws regulating content on social media platforms can protect the right to freedom of speech. If this is not ascertained, then these laws can unjustly be used to restrict people from expressing themselves.
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