

CYBERSTALKING LAW AND THE RIGHT TO FREEDOM OF EXPRESSION IN NIGERIA: A DEAD RINGER OR A CONSTITUTIONAL SNAG?

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ABSTRACT

Freedom of Expression is one of the most essential human rights which is entrenched in several legal documents in the world, be it local, regional or international. It is a cornerstone upon which the very existence of a democratic society rests. Due to its important nature, any restriction placed or imposed on this right must be impartial and reasonably justifiable in a democratic society. With technology evolving through the use of text messaging, email, and social media, instantaneous communication has increased the risk of unwanted and repeated harassment. Cyberstalking is the act of threatening, harassing, or annoying someone through multiple email messages, as through the Internet, especially with the intent of placing the recipient in fear that an illegal act or an injury will be inflicted on the recipient. Cyberstalking is criminalised by section 24 of the Cybercrime (Prohibition, Prevention, etc) Act 2015 by the Nigerian government. This paper examines the fate and status of the right to freedom of expression as entrenched under the Nigerian Constitution in the light of the provision of the said section of the Cybercrime Act. The paper x-rays the arguments of some scholars that the provision of the Cybercrime Act violates the constitutional provision of the right to freedom of expression. The paper concludes that the Nigerian Cybercrime Act provision on cyberstalking is a legal restriction on the right to freedom of expression in Nigeria.

Keywords: Freedom of Expression, Cyberstalking, Cybercrime, Cybercrime Act, Free Speech.

INTRODUCTION

Freedom of expression refers to the ability of an individual or group of individuals to express their beliefs, thoughts, ideas, and emotions about different issues free from unnecessary governmental interference. Freedom of expression is essential to individual liberty and contributes to political development of a democratic society. Freedom of expression covers freedom of speech, freedom of the press, and gives individuals and communities the right to articulate their opinions without fear of retaliation, censorship or punishment. It is an indispensable tool for human development. The right to freedom of expression is guaranteed by legal documents all over the globe, be it international, regional or local. As beautiful and important as this right is, it is not an absolute right. There are several limitations placed on the right at the various level of governance. In accordance with international practice, there are several limitations to this right under the laws. In the US case of *Masses Publishing Co. v. Pattern*,ⁱ the court noted “that words are not only keys of persuasion, but triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic society”.ⁱⁱ Traditionally speaking, the limitations to the right to freedom of expression includes sedition, defamation, copyright infringement, criminal intimidation and insult, disclosure of official secrets, censorship, perjury, the law of contempt.

The Nigerian Federal Government in the year 2015 enacted the Cybercrime (Prohibition, Prevention, etc.) Act (Cybercrime Act) to promote cyber-security and the protection of computer systems and networks, electronic communications, data and computer programmes, intellectual property and privacy rights. Section 24 of the Cybercrime Act makes provision for Cyberstalking as a criminal offence with a punishment of up to three years imprisonment or a fine of not more than 7 million Naira. Cyberstalking is a serious predatory behavior that arrives from the evolutionary need for control in the pursuit of resources and reputation. Originally, stalking involved behavioral invasion and referred to non-electronic means of intrusion (e.g., physical surveillance, mailing letters).ⁱⁱⁱ Cyberstalking can have major psychosocial impacts on individuals. Victims report a number of serious consequences of victimization such as increased suicidal ideation, fear, anger, depression, and post-traumatic stress disorder (PTSD). Since the enactment of the Cybercrime Act, there has been series of arguments regarding the constitutionality of the section 24 of the Act.^{iv} This argument even resulted into a case being

filed challenging the constitutionality of the said provision.^v This article examines the various arguments emanating from this subject.

THE INTERNATIONAL PROTECTION OF THE RIGHT TO FREEDOM OF EXPRESSION

The right to the freedom of expression is an essential human right that promotes democratic governance in a political setting. The right is protected at various governmental levels including under international law. This article examines the protection of the right to freedom of expression at the international level. Some of the international legal instruments which protect the right to freedom of expression are discussed hereunder.

The Universal Declaration of Human Rights

Since its inclusion in Article 19 of the Universal Declaration of Human Rights (UDHR),^{vi} the right to freedom of expression has been protected in all of the relevant international human rights treaties. In international law, freedom to express opinions and ideas is considered essential at both an individual level, insofar as it contributes to the full development of a person, and being a foundation stone of democratic society. Free speech is a necessary precondition to the enjoyment of other rights, such as the right to vote, free assembly and freedom of association, and is essential to ensure press freedom. 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 seek, receive and impart information and ideas through any media and regardless of frontiers. Freedom of opinion and expression are fundamental rights that contain both a personal and a social dimension. They are considered “indispensable conditions for the full development of the person”, “essential for any society” and a “foundation stone for every free and democratic society”.^{vii} The UDHR provides for the right to freedom of expression without placing any limitation on the right.

The International Covenant on Civil and Political Rights

The United Nations International Covenant on Civil and Political Rights (ICCPR)^{viii} guarantees the right to freedom of expression.^{ix} Article 19 of the Covenant provides that 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. The right to freedom of expression is both individual and collective, and imposes both positive and negative obligations on States. The European Court of Human Rights (ECtHR) noted in the foundational case of *Lingens v Austria*^x that “freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfillment.” However, this right is not absolute and can be subject to legitimate restrictions and limitations. It is supported by and can come into conflict with the other rights that are protected by the International Covenant on Civil and Political Rights (ICCPR) or other treaties and conventions, including the right to a fair trial, the right to freedom of conscience and religion, and the right to privacy. When these interests come into conflict, they need to be weighed and balanced in light of the surrounding context.^{xi}

The International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination^{xii} guarantees freedom of expression under Article 5(d)(vii) and (viii) as the rights to freedom of thought, conscience and religion and the freedom of opinion and expression, respectively. Article 5 states:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following right:

(d) Other civil rights, in particular:

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression.

The Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC) protects the freedom of expression of children under Article 12 and Article 13. Article 12 states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13 on the other hand states:

1. The child 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 the child's choice.

The second paragraph to Article 13 of the Convention provides for the restrictions placed on the right to the freedom of expression. The paragraph provides that the exercise of this right may 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; or
- (b) For the protection of national security or of public order (order public), or of public health or morals.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

The International Convention on the Protection of All Migrant Workers and Members of their Families (ICMW)^{xiii} protects the freedom of expression under Article 13. Article 13 states:

1. Migrant workers and members of their families shall have the right to hold opinions without interference.
2. Migrant workers and members of their families 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 their choice.

3. The exercise of the right provided for in paragraph 2 of the present 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 reputation of others;
- (b) For the protection of the national security of the States concerned or of public order (order public) or of public health or morals;
- (c) For the purpose of preventing any propaganda for war;
- (d) For the purpose of preventing any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

THE REGIONAL PROTECTION OF THE RIGHT TO FREEDOM OF EXPRESSION

Regional intergovernmental organizations, including the Organization of American States (OAS), Council of Europe (COE), African Union (AU), and Arab League each have Charters that generally share the principles and fundamental human rights protections championed in the UDHR and the UN Charter, including the right to freedom of expression. Each of these organizations has reporting bodies and/or judicial/quasi-judicial mechanisms that consider human rights issues more specifically.^{xiv}

The American Convention on Human Rights

The American Convention on Human Rights (ACHR) is the multilateral human rights treaty of the Organization of American States. Article 13 of the Convention defines the right to freedom of thought and expression, and includes the freedom to seek, receive, and impart information of all kinds, regardless of frontiers, through any medium. Subsections 2 through 5 outline the permissible limits to this right. Article 13 of the American Convention on Human Rights states:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

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

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

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law. Considering the principles of Article 13, the Inter-American Commission on Human Rights (IACHR) issued the Declaration of Principles on Freedom of Expression in 2000. This Declaration further details the components and limitations of this right, such as privacy laws, confidentiality of journalistic sources, and ownership and control of media sources.

The European Convention on Human Rights

The Council of Europe (COE) oversees the European Convention on Human Rights (ECHR). This Convention recognizes the right to freedom of expression under Article 10. This includes the right to hold opinions, and to receive and impart ideas and information without interference regardless of frontiers, as well as the duties and restrictions that may also be imposed on the right. Article 10 of the European Convention on Human Rights states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The African Protection of the Right to Freedom of Expression

The African Charter on Human and Peoples' Rights (ACHPR; also known as the "Banjul Charter") was adopted in 1981 and entered into force in 1986, articulate the right to freedom of expression under Article 9. The article simply states that "(1) Every individual shall have the right to receive information; (2) Every individual shall have the right to express and disseminate his opinions within the law." In 2002, the 32nd session of the ACHPR outlined the Declaration of Principles of Freedom of Expression, which reaffirms and elaborates on the rights described in Article 9. It contains sections on the interference with the right to freedom of expression, the promotion of diversity within freedom of expression, freedom of information, the stance of private and public broadcasting, regulatory bodies, and print media, and various protections for media professionals, reputations, and journalistic sources.

Further, the **African Charter on Values and Principles of Public Service and Administration** was adopted in 2011. It is one of the several laws adopted by the African Union that respect the right to freedom of expression. Article 6 of the Charter affirms the right to information and expression when it provides that Public Service and Administration shall establish effective communication systems and processes to inform the public about service delivery, to enhance access to information by users, as well as to receive their feedback and inputs.

Similarly, the **African Charter on Democracy, Elections and Governance** was adopted in 2007. The Charter promotes rule of law, democratic principles and good governance in Africa.

Article 13 of the Charter provides that State Parties shall take measures to ensure and maintain political and social dialogue, as well as public trust and transparency between political leaders and the people, in order to consolidate democracy and peace.

In the case of *Lohe Issa Konate v. Burkina Faso*,^{xv} the applicant was sentenced to 12 months imprisonment and directed to pay huge amount of money for his post which was alleged to have been defamatory and insulting to a Magistrate. The judgment was communicated to the African Court on Human and Peoples' Rights (African Court), the Court held that Burkina Faso infringed on the right of the applicant as contained Article 9 of the African Charter, Article 19 of the ICCPR, and Article 66 (2) of the Revised ECOWAS Treaty.

THE RIGHT TO FREEDOM OF EXPRESSION UNDER THE NIGERIAN LAW

The most important document protecting the human rights of the Nigerian citizens is the Constitution. The extant Constitution of Nigeria is the 1999 Constitution which has been amended and altered several times.^{xvi} The Constitution is supreme and it remains the most important legal document in Nigeria as its superiority has been upheld in plethora of judicial authorities.^{xvii} Chapter IV of the Constitution comprising of sections 33 to 46 guarantees various human rights. These rights are however termed 'fundamental' suggesting that they are not mere rights. The Nigerian Constitution provides for the right to freedom of expression by stating that everyone shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.^{xviii} This provision literally means that all persons, natural or artificial, Nigerians and foreigners do have a right to express themselves freely, to hold any opinion whatsoever, to receive and divulge any ideas and any information, without anybody's interference in accordance with the provisions of the constitution. To complement the enjoyment of the right guaranteed under sub section (1) of section 39, sub section (2) provides for the right of every person to be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions. The wording of the provision is very similar to the one adopted in the UDHR.^{xix} Ben Nwabueze, a constitutional law scholar, had commented on the said provision when he stated that the right to freedom of expression is an essential and irrepressible attribute of

humans.^{xx} In the case of *Inspector General of Police v. All Nigeria Peoples Party*^{xxi} the Court of Appeal held:

“The police have no powers to stop or restrict the fundamental rights of Nigerians to freedom of expression and assembly once those rights are exercised within the ambit of the law. If the demonstrators or marchers breach any law in the course of exercising their freedom of expression and assembly the Criminal Code is there to take care of the infraction.”^{xxii}

Freedom of expression refers to the right to speak, write, or to do anything in order to show one's feelings, opinion and ideas without any one restricting the freedom. Paul Adole defined the right to freedom of expression as the right to speak, seek, receive and impart information or ideas.^{xxiii} In the case of *Din v. African Newspaper Ltd*,^{xxiv} the Supreme Court ruled that the right to comment freely on matters of public interest is one of the fundamental rights of free speech guaranteed to the individual in our constitution. Also, in *Omega Bank Plc v. Government of Ekiti State*^{xxv} the Court of Appeal held that section 39 of the Nigerian Constitution of the Federal Republic of Nigeria, 1999 guarantees freedom of expression and that criticism of the government/public bodies and officers is part of the freedom of expression granted and guaranteed under the Constitution. It has been conceded that the right to freedom of expression is the bone of any democratic form of government.^{xxvi}

LIMITATIONS TO THE RIGHT TO FREEDOM OF EXPRESSION: THE INTERNATIONAL AND NIGERIAN PERSPECTIVE

As important as the right to freedom of expression is, it is never an absolute right. There are limitations placed under the right under both international and national laws. Article 19(3) of the ICCPR permits limitations on the rights recognised in article 19(2), but those limitations must be:

- (1) provided by law and
- (2) necessary for respect of the rights or reputations of others, for the protection of national security, public order, or public health or morals.

The United Nations Human Rights Committee (HRC) in its General Comment 34 has emphasised that when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself the relation between right and restriction and between norm and exception must not be reversed.^{xxvii} The HRC further stated that Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality...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.^{xxviii} The permissible grounds for restrictions listed in article 19(3) include restrictions on the grounds of public health or national security, where those limitations can be demonstrated to be necessary for ensuring ‘respect for the rights and reputations of others, for the purpose of protecting public morals, and public order. By reason of those parameters, defamation and hate speech laws can be justifiable as protecting the reputation and rights of others, so long as they are not overbroad. However laws, for example, that restrict door-to-door canvassing in an election or activities such as blocking access to media sources are likely to violate the freedom.^{xxix}

In Nigeria, the right to freedom of expression guaranteed by the Constitution is not absolute. In accordance with international practice, there are several limitations to this right under Nigerian law. These limitations are geared towards entrenchment of an order society.^{xxx} The Constitution^{xxxi} qualifies the right to freedom of expression in certain respects. It provides that nothing in the section shall invalidate any law that is reasonably justifiable in a democratic society for the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of courts or regulating telephony, wireless broadcasting, television or the exhibition of cinematograph films; or Radio, Telecommunications, Television and imposing restrictions upon persons holding office under the Government of the Federation or of a State, members of the armed forces of the Federation or members of the Nigeria Police Force or other Government security services or agencies established by law. In the case of *Ukegbu v N.B.C.*,^{xxxii} the Court of Appeal held that the rights contained in section 38 and 39 of the Constitution are not absolute rights and that the rights can be regulated when it comes to wireless broadcasting, television or films.

However, any limitation placed on the right to freedom of expression in Nigeria must be justifiable in a democratic society as provided in section 45 of the Constitution. In the case of *Archbishop Okogie v. A.G. Lagos State*,^{xxxiii} held that while it is conceded that the Constitution permits the imposition of reasonable restrictions on the exercise of the right to freedom of expression, it is difficult to conceive a reasonable restriction that would be justifiable in a democratic society in refusing to allow private primary schools to operate. The generally accepted restrictions to freedom of expression in Nigeria are the offence of sedition,^{xxxiv} criminal intimidation and insult,^{xxxv} the law of defamation,^{xxxvi} disclosure of official secrets,^{xxxvii} censorship, perjury,^{xxxviii} contempt of court and contempt of legislature.

CYBERSTALKING LAW IN NIGERIA

The Internet has improved global interactions and made the world a global village with the free exchange of information, ideas, skills, culture and technology. However, it also raises a number of personal security risks. Some internet users (for various reasons) prey on other users and cause havoc which affect not only personal interests but also commercial concerns.^{xxxix} Cyberstalking (also known as cyberbullying) is “the act of threatening, harassing, or annoying someone through multiple email messages, as through the Internet, especially with the intent of placing the recipient in fear that an illegal act or an injury will be inflicted on the recipient or a member of the recipient's family or household. Cyberbullying occurs when someone is bullied, harassed, humiliated, threatened, embarrassed, intimidated, or targeted in some way through the use of information technology such as e-mail, instant messaging, chat rooms, pagers, cell phones or any other online services. Cyberbullying has been called “a social online terror”^{xl} “a deadly epidemic”^{xli}, “a nightmare that happens all too often,” and the cause of youth suicides.^{xlii} Cyberstalking is becoming a common phenomenon in Nigeria as more people engage in it especially on social media platforms. As a means of dealing with a wide variety of technology-based threats, the National Assembly enacted an Act called the Cybercrimes (Prohibition, Prevention, Etc.) Act 2015. The purpose of the Cybercrimes Act is to provide an effective and unified legal, regulatory and institutional framework for the prohibition, prevention, detection, prosecution and punishment of cybercrimes in Nigeria. In Nigeria, the provision of section 24 of the Cybercrime Act 2015 makes express provisions that criminalise

all forms of cyberstalking. The elements of this offence are, that the message is grossly offensive or of an indecent, obscene or menacing character; and it is sent for the purpose of causing annoyance, inconvenience or needless anxiety to another or causes such a message to be sent.^{xliii}

The Act provides the punishment for the offence as fine of not less than Two Million Naira or imprisonment for a term of not less than one year, or to both fine and imprisonment. According to the provisions of section 58 of the Act, cyberstalking includes a course of conduct directed at a specific person that would cause a reasonable person to feel fear. The acts that come within the confines of this offence may also include sending multiple e-mails, often on a systematic basis, to annoy, embarrass, intimidate, or threaten a person or to make the person fearful that she or a member of her family or household will be harmed.^{xliv} For the purpose of clarity, the provision of section 24 of the Cybercrime Act is reproduced hereunder:

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.

(2) Any person who knowingly or intentionally transmits or causes the transmission of any communication through a computer system or network -

- (a) to bully, threaten or harass another person, where such communication places Another person in fear of death, violence or bodily harm or to another person;
- (b) containing any threat to kidnap any person or any threat to harm the person of another, any demand or request for a ransom for the release of any kidnapped person, to

extort from any person, firm, association or corporation, any money or other thing of value; or

(c) containing any threat to harm the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, to extort from any person, firm, association, or corporation, any money or other thing of value:

Commits an offence under this Act and shall be liable on conviction-

- (i) in the case of paragraphs (a) and (b) of this subsection to imprisonment for a term of 10 years and/or a minimum fine of N25,000,000.00; and
- (ii) in the case of paragraph (c) and (d) of this subsection, to imprisonment for a term of 5 years and/or a minimum fine of N15,000,000.00.

The above provision of the Cybercrime Act relates to cyberstalking and this provision has been largely criticised by many Nigerians including legal practitioners. The criticisms centers around the argument that the provision is a violation of the right to freedom of expression entrenched in the Nigerian Constitution. The provision has even been challenged in the court of law for violation the Constitution. In the case of *Okedara v. A.G. Federation*,^{xlv} the Court of Appeal in Lagos dismissed a challenge to the constitutionality of Section 24(1) of the Cybercrime Act, 2015 on the ground that it lacked merit. Affirming the judgment of Buba J. of the Federal High Court, the Court disagreed with the Appellant that the provision was vague, overbroad and ambiguous and threatened his rights to freedom of expression under Section 39 of the Constitution and was not within the permissible restrictions pursuant to Section 45 of the Constitution. Instead the Court of Appeal found Section 24(1) of the Cybercrime Act to be clear and explicit and not in conflict with the provisions of Sections 36(12), 39 and 45 of the 1999 Constitution. The Court equally rejected the Appellant's argument that section 24 of the Act does not satisfy the requirements of section 36(12) of the Constitution holding that in its view the words in section 24(1) of the Act are "explicit and leave no room for speculation or logical deductions." The Court held that the offence in the relevant section of the Act is clearly defined and the punishment is also clearly stated. It therefore concluded that the provisions of section 24(1) of the Cybercrime Act, 2015 are not in conflict with the provisions of sections 36(12) and 39 of the Constitution. The Court unanimously held that the Appellant's appeal was

devoid of merit and deserved to be dismissed. It accordingly dismissed the appeal and affirmed the judgment of the lower court delivered by Buba J. of Federal High Court. In a similar stand, the applicant took out an originating summons with Suit No. FHC/L/CS/692/16 at the Federal High Court on behalf of Paradigm Initiative (PIN), EiE Nigeria (EiE) in a case involving the Media Rights Agenda (MRA) against the Attorney General of the Federation, the National Assembly and the Inspector General of Police seeking certain declarative reliefs nullifying Sections 24 and 38 of the Cybercrime Act. The Court rejected the application of the applicant and upheld the constitutionality of the section 24 of the Cybercrime Act. Dissatisfied with the decision of the court, the applicant immediately appealed. The appeal was dismissed on June 1, 2018. The case was further appealed to the Supreme Court and the court is yet to give a verdict over the matter.

Meanwhile, a similar suit challenging the constitutionality of the provision of the Cybercrime Act was filed at the ECOWAS Community Court of Justice. In the case of *Incorporated Trustees of Laws and Rights Awareness Initiative v. the Federal Republic of Nigeria*.^{xlvi} After the hearing of this suit, the court delivered a judgment compelling the Nigerian court to repeal or amend the Cybercrime (Prohibition, Prevention etc) Act 2015. The Court specifically held that it is not enough that the restrictions are established by law, it must be formulated with sufficient precision, that is, it must be sufficiently clear to allow the individual to adapt his conduct to its predictions and still allow the enforcers of the rule to determine which forms of expression are legitimately restricted and which are duly restricted; the provisions of section 24 of the law in question typify criminal conduct and define the applicable sanctions. For this reason, in all its ramifications, it must be legally well written and its elements clearly defined to avoid any ambiguity in their meanings and; it can be concluded that when a law does not define the parameters or elements of the crime that it typifies, it cannot pass the test of legality since, by its nature, it will be arbitrary. Consequently, it orders the Nigerian Government to repeal and amend Section 24 of the Cybercrime Act 2015 in accordance with its obligation under Article 1 of the African Charter and International Covenant on Civil and Political Rights.

This paper conceives that the provision of the Cybercrime Act is a limitation to the right to freedom of expression in Nigeria. Freedom of speech and expression is a constitutionally guaranteed right of a person to hold opinions and to receive and impart ideas and information without interference. It is clear that this right is limited by the provisions of Section 24 of the

Cybercrimes Act, which states that such ‘opinions, ideas, and information’ must not be obscene, malicious, or false. Such information must not also contain the threat to harm the property or reputation of the addressee. It is also apparent that the right to freedom of speech only extends to the limit that it does not cause harm to another person. The implication of the combination of both laws is that a person is allowed freedom to use electronic means (including the internet) to give his or her opinion on matters which are the truth and will not cause damage to the victim.

IS THE CYBERSTALKING LAW REASONABLY JUSTIFIABLE IN A DEMOCRATIC SOCIETY?

In this part of the paper, the paper seeks to evaluate the cyberstalking law in Nigeria for the purpose of determining its reasonability. This paper had earlier posited that for any limitation placed on the right to freedom of expression in Nigeria to be deemed valid, it must be such that is reasonably justified in a democratic society as provided under the Nigerian Constitution.^{xlvi} In countries with strong democratic institutions, deeply embedded liberal democratic values, a vibrant civil society, and a good record of human rights, open-ended and even vague limitations clauses, which leave a lot of discretion to legislatures and courts, may be acceptable. This is because unnecessary encroachments are likely to be politically resisted by the legislature, by the courts, and by public opinion, at least as long as these values endure. This puts a premium, however, on civic education and on the maintenance of democratic values and norms in society at large.^{xlvi} Section 45 of the Nigerian Constitution provides that nothing in sections 37, 38, 39, 40 and 41 of the Constitution shall invalidate any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedom of other persons. In the case of the *Director of Public Prosecutions v. Chike Obi*,^{xlix} the defendant was charged with the offence of Sedition. He complained that the provision of the Criminal Code providing for the offence violates his right to the freedom of expression. The court ruled that the provision of the Constitution relating to Fundamental Human Rights has not in any way invalidated the Law of Sedition as contained in sections 50 and 51 of the Criminal Code insofar as these sections relate to the matters under consideration in this reference. In other words, the court

held that the said provision of the Criminal Code is reasonably justifiable in a democratic society. The Federal Supreme Court opined thus:

“a person has a right to discuss any grievance or criticise, canvass and ensure the acts of Government and their public policy. He may even do this with a view to effecting a change in the party in power or to call attention to the weakness of a Government so long as he keeps within the limit of fair criticism. It is clearly legitimate and constitutional by means of fair argument to criticise the Government of the day. What is not permitted is to criticise the Government in a malignant manner as described above, for such attacks, by nature tend to affect the public peace.”^l

With the advent of internet and in the wake of online communications, stalking and harassment of persons have increased unimaginably. Undoubtedly, Nigeria has a problem with advance-fee scams and one that has quickly morphed into cyber-criminality; one, most of all that continues to tarnish Nigeria’s image in the international community. The first cybercafes appeared in Nigeria in the late 1990s; spacious and swanky in some areas, cramped and stuffy in other places but, nonetheless, spaces that depicted the world’s commitment to globalise. Cybercafes opened up large and small in major cities all over the country, often working around the clock and providing a window to the Internet at agreeable financial rates. These establishments opened their doors and Nigerians visited them in droves for a multiplicity of reasons, academic, exploratory, familial and fraudulent. There is a long-standing association of Nigeria with cyber-fraud. The origin of these scams in the country can be traced to the 1980s: beset by flailing oil prices, crude oil being Nigeria’s primary source of income, the Shehu Shagari administration oversaw a period of economic decline that caused a spike in unemployment rates and a billowing poverty problem that kick-started the postal fraud era. Perpetrators promised their marks, mostly British-American for ease of conversation, percentages of illicit riches (from corrupt governmental institutions) they were trying to transfer out of Nigeria in return for help in providing sensitive financial details. Typically, perpetrators required a foreign bank account to receive the wealth abroad and, crucially, an advance fee to sort out ‘domestic issues’.^{li} Among a considerable number of Nigerians, cybercrime exists at the intersection of crime and means of livelihood; wrong but necessary. This complication also exposes the fractured state of the national psyche in Nigeria today. In

the earliest days of postal and online fraud, perpetrators were scorned and derided for the illegitimate source of their wealth as they flaunted their dishonest returns.

Given the popularity and peculiarity of Cybercrime in Nigeria, the Nigerian Government enacted a legislation to curb the vice. The Cybercrime Act criminalises various forms of cybercrime. The Cybercrime Act prohibits cyberstalking in order to effectively regulate the spread of false stories and sometimes also indecent or unethical images online. Section 24 (1a) of the act states that any person who knowingly or intentionally sends a message or other matter by means of a computer system or network that “is grossly offensive, pornographic or of an indecent, obscene or menacing character or causes any such message or matter to be sent” has committed an offence under the Act and shall be eligible for prosecution. Also, Subsection 1b provides that any person who knowingly or intentionally spreads messages or other matter by means of a computer network system that “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” faces the same possibility of punishment.

One cannot agree less with the decision of the Federal Government to punish online stalking which has been reported to have done several harms. This paper thereby align itself with the decision of both the Federal High Court and the Court of Appeal in *Okedara's case* that the provision of the Cybercrime Act criminalising cyberstalking is reasonably justifiable in a democratic society, hence it is a constitutional provision.

CONCLUSION AND RECOMMENDATION

Freedom of expression is a fundamental human right that must be upheld in democratic societies. Freedom of expressions is absolutely very important to everybody, and it is meaningful to protected, but to make minority also enjoy the benefit of free speech, it is very important for government to make a protection to protect them. However, the right is not absolute and it can be limited in several circumstances as long as the restriction is constitutional. Cyberstalking has become a very real problem in today's world, one that can have devastating consequences for victims, especially in cases of obsession or derangement. Virtually everybody can become the victim of cyberstalking. Perpetrator's conduct can include

annoying or threatening emails (including threats of rape and physical violence or lustful, obscene or vulgar words), malicious comments on websites or false website ads, illegal access to victim's e-mail account, impersonation in chat rooms, creation of webpages pages under victim's name, publication of Twitter posts, posting of nude photos or lewd videos on Facebook, use of malware etc. This research paper has examined the right to freedom of expression under international, regional and the Nigerian law. In addition to this, the research examined the limitations to the right and considers whether the provision of section 24 of the Nigerian Cybercrime Act is a violation of the right or a limitation to the right.

This paper hereby recommends the adoption of a law to serve as international legal response to cyberstalking. If this is done, the law can be used as a model for other countries to design their cyberstalking on. The paper further recommends that there is a need to have collaboration between the ICT experts and the prosecutors towards an effective prosecution of the perpetrators of cyberstalking.

ENDNOTES

ⁱ 244 F. 535 (S.D.N.Y. 1917).

ⁱⁱ *Ibid* at 540; see also Yinka Olomjobi, *Human Rights and Civil Liberties in Nigeria: Discussion, Analyses, and Explanations* (Revised Edition, Princeton and Associates Publishing Co. Ltd, Lagos, 2018) 229.

ⁱⁱⁱ Abiodun Ashiru, A Comparative Analysis of the Legal Framework for the Criminalisation of some forms of Cybercrime in Nigeria, England and the United States (An LLM Dissertation Submitted to the Faculty of Law, University of Lagos, 2020) available at https://www.researchgate.net/publication/348182366_A_Comparative_Analysis_of_the_Legal_Framework_for_the_Criminalisation_of_some_Forms_of_Cybercrime_in_Nigeria_England_and_the_United_States, accessed January 10, 2021.

^{iv} Section 24 of the Cybercrime Act criminalises Cyberstalking.

^v In *Okedara v Attorney General of the Federation*, the plaintiff appellant sued the Federal government claiming that the section 24 of the Cybercrime Act was vague and overbroad and that it threatened his right to freedom of expression (protected by section 39 of the Constitution) and a fair hearing (protected by section 36(12) of the Constitution).

^{vi} The Universal Declaration of Human Rights remains as relevant today as it was on the day in 1948 that it was proclaimed and adopted by the United Nations General Assembly. The extraordinary vision and resolve of the drafters produced a document that, for the first time, articulated the rights and freedoms to which every human being is equally and inalienably entitled. The Universal Declaration of Human Rights, which was adopted by the UN General Assembly on 10 December 1948, was the result of the experience of the Second World War. With the end of that war, and the creation of the United Nations, the international community vowed never again to allow atrocities like those of that conflict happen again. World leaders decided to complement the UN Charter with a road map to guarantee the rights of every individual everywhere. The document they considered, and which would later become the Universal Declaration of Human Rights, was taken up at the first session of the General Assembly in 1946. The first draft of the Declaration was proposed in September 1948 with over 50 Member States participating in the final drafting. By its resolution 217 A (III) of 10 December 1948, the General Assembly, meeting in Paris, adopted the Universal Declaration of Human Rights with eight nations abstaining from the vote

but none dissenting. The entire text of the UDHR was composed in less than two years. At a time when the world was divided into Eastern and Western blocks, finding a common ground on what should make the essence of the document proved to be a colossal task.

^{vii} (UN Human Rights Committee, 2011, para. 2).

^{viii} The ICCPR attempts to ensure the protection of civil and political rights. It was adopted by the United Nations' General Assembly on December 19, 1966, and it came into force on March 23, 1976. The ICCPR recognizes the inherent dignity of each individual and undertakes to promote conditions within states to allow the enjoyment of civil and political rights. Countries that have ratified the Covenant are obligated "to protect and preserve basic human right [and] "compelled to take administrative, judicial, and legislative measures in order to protect the rights enshrined in the treaty and to provide an effective remedy." There are currently 74 signatories and 168 parties to the ICCPR. The unifying themes and values of the ICCPR are found in Articles 2 and 3 and are based on the notion of non-discrimination. Article 2 ensures that rights recognized in the ICCPR will be respected and be available to everyone within the territory of those states who have ratified the Covenant (State Party). Article 3 ensures the equal right of both men and women to the enjoyment of all civil and political rights set out in the ICCPR.

^{ix} ICCPR, Article 19.

^x (Application no. 9815/82) ECHR 1986, at para 41.

^{xi} For instance, conflicts with other protected rights is discussed in the context of Article 10 of the European Convention; see also Monica Makovei, *Freedom of Expression: A Guide to the Implementation of Article 10 of the European Convention on Human Rights* (Strasbourg Cedex: Council of Europe, 2004) 6.

^{xii} The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is a United Nations convention. A third-generation human rights instrument, the Convention commits its members to the elimination of racial discrimination and the promotion of understanding among all races. The Convention also requires its parties to outlaw hate speech and criminalize membership in racist organizations. The Convention also includes an individual complaints mechanism, effectively making it enforceable against its parties. This has led to the development of a limited jurisprudence on the interpretation and implementation of the Convention. The convention was adopted and opened for signature by the United Nations General Assembly on 21 December 1965, and entered into force on 4 January 1969. As of July 2020, it has 88 signatories and 182 parties. The Convention is monitored by the Committee on the Elimination of Racial Discrimination (CERD).

^{xiii} The Convention constitutes a comprehensive international treaty regarding the protection of migrant workers' rights. It emphasizes the connection between migration and human rights, which is increasingly becoming a crucial policy topic worldwide. The Convention aims at protecting migrant workers and members of their families; its existence sets a moral standard, and serves as a guide and stimulus for the promotion of migrant rights in each country. In the Preamble, the Convention recalls conventions by International Labour Organization on migrant workers: Migration for Employment Convention (Revised), 1949, Migrant Workers (Supplementary Provisions) Convention, 1975, and on forced labour; Forced Labour Convention and Abolition of Forced Labour Convention as well as international human rights treaties including Convention against Discrimination in Education. The primary objective of the Convention is to foster respect for migrants' human rights. Migrants are not only workers, they are also human beings. The Convention does not create new rights for migrants but aims at guaranteeing equality of treatment, and the same working conditions, including in case of temporary work, for migrants and nationals. The Convention innovates because it relies on the fundamental notion that all migrants should have access to a minimum degree of protection. The Convention recognizes that regular migrants have the legitimacy to claim more rights than irregular immigrants, but it stresses those irregular migrants must see their fundamental human rights respected, like all human beings.

^{xiv} Katie Bresner, *Understanding the Right to Freedom of Expression : An International Law Primer for Journalists* (University of Toronto Faculty of Law, International Human Rights Program, Rachel Pulfer, 2014) 14.

^{xv} Application No. 004/2013, Judgment of 5 December 2014.

^{xvi} The Constitution of the Federal Republic of Nigeria 1999 (4th Alteration 2010).

^{xvii} *Shugaba v Minister of Internal Affairs* (1981) 2 NCLR 45; *A.G. Bendel State v.A.G. Federation &22 Ors* (1981) All NLR 85 SC; *A.G. Ogun State & Ors. v. A.G. Federation* (1982) 3 NCLR 166 SC.

^{xviii} Constitution of Nigeria 1999, s. 39.

^{xix} See the UDHR, Article 19.

^{xx} Ben Nwabueze, the Presidential Constitution of Nigeria (Sweet & Maxwell) 462.

^{xxi} (2007) 18 NWLR (Pt.1066) 457 C.A.

^{xxii} *Ibid*, Per Adekeye, J.C.A. (P. 28, Paras. F-G).

^{xxiii} Paul Adole, "Freedom of Expression in a Democratic Society: The Latitudes and Limits under Nigerian Law" (2009) 1 (3) *A.B.U.J.P.I.L* 108-124.

- xxiv (1990) 3 N.W.L.R [Pt. 139] 392 at 408-409.
- xxv (2007) ALL FWLR [Pt. 386] 658.
- xxvi *IGP V ANPP* (2007) 18 N.W.L.R [Pt. 1066] 457.
- xxvii Human Rights Committee, General Comment No. 34, note 4, para 21.
- xxviii *Ibid*, para 22.
- xxix (UN Human Rights Committee, 2011, para. 37).
- xxx Yinka Olomajobi, *supra* note 2 at 229.
- xxxi Constitution of Nigeria 1999, s. 39 (3).
- xxxii (2007) 14 NWLR (Pt. 1055) 551.
- xxxiii (1984) 5 NCLR 78.
- xxxiv The Criminal Code Act 1990, s. 51 (1).
- xxxv The Penal Code Act 1990, ss. 396 and 398.
- xxxvi The Criminal Code Act 1990, s. 59.
- xxxvii The Official Secrets Act 2004, s. 1 (1).
- xxxviii Criminal Code, s. 117.
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- xlii *Ibid*.
- xliii Maitanmi Olusola, Ogunlere Samson, Ayinde Semiu, and Adekunle Yinka, "Cybercrimes and Cyber Laws in Nigeria", (2013) 2 (4) *the International Journal of Engineering and Sciences*, 19-25.
- xliv Chibuko Raphael Ibekwe, *the Legal Aspects of Cybercrime in Nigeria: An Analysis with the UK Provisions* (A Thesis Submitted to the School of Law, University of Stirling for the Degree of Doctor of Philosophy, 2015), 242.
- lv See <https://globalfreedomofexpression.columbia.edu/cases/okedara-v-attorney-general/>, accessed January 12, 2021.
- lvi Suit NO. ECW/CCJ/APP/53/2018, JUDGEMENT No ECW/CCJ/JUD/16/20.
- lvii Constitution of Nigeria 1999, s. 45 (1).
- lviii Dawood Ahmed and Elliot Bulmer, *Limitation Clauses*, International IDEA Constitution-Building Primer 11, (Second Edition, International Institute for Democracy and Electoral Assistance (International IDEA), Sweden, 2017) 16.
- lix (FSC 56/1961) [1961] 10 (06 APRIL 1961) .
- ¹ *Ibid*, p. 194.
- li The Republic, No More Insufficient Funds, available at <https://republic.com.ng/august-september-2019/yahoo-yahoo-naija/>, accessed January 14, 2020.