INTERPRETING 'REASONABLY JUSTIFIABLE IN A DEMOCRATIC SOCIETY': A PROTECTIVE STANDARD FOR FREE SPEECH IN NIGERIA*

ABSTRACT

Free speech is a delicate matter and of special value to the sustenance of a democratic society, but it could be a source of concern when discussing public harm. Knowing the value of free speech vis-a-vis concerns of public harm, the framers of our Constitution struck a balance between public harm and free speech by requiring a law that will abridge free speech be justified. This work seeks for a strict standard of review of laws that may abridge free speech in Nigeria arguing that since free speech is of special value to humans and democratic governance, it requires more than mere moderate or tolerable reasons for its suppression. Following the synthetic method of constitutional construction and international standards, a workable standard that courts may apply when deciding the justifiability of laws that seek to suppress speech in a republican democracy is prescribed.

Keywords: Sedition, Free Speech Protection, 'Reasonably Justified'

INTRODUCTION

The focus of this work is on how laws that stifle free speech should be interpreted with a view to protecting the right to free speech. However, there are those who opined that the expression 'reasonably justifiable in a democratic society' as provided in the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (the Constitution) implies judicial deference or at the least implies that wide discretion be accorded the legislature when they enact statutes that suppress free speech. A contrary view is proposed here because deference where the framers expect judicial engagement is an abdication of constitutional responsibility. Thus, judicial engagement through a strict scrutiny styled the heightened standard of review remains the proper role of courts in protecting human rights.

Heightened standard means a standard that gives security to free speech more than a mere minimal standard[1] because of the value of free speech to the viability of a democratic society. Free speech is used here to cover freedom of thought, expression, and the press. Another term

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[1] Stephen A Siegel, 'The Origin of the Compelling State Interest Test and Strict Scrutiny' (2006) 48(4) The American Journal of Legal History 355 < *JSTOR*, www.jstor.org/stable/25469981> accessed 23 April 2020

used here is 'sedition laws', and it is used loosely to describe laws that generally seek to suppress speech.

The crime of sedition in 16th-century England is traceable to crimes under the heading of *treasonable words*.[2] Sedition as it was understood concern treasonable words if it touched the crown, or under the doctrine of *scandalum magnatum* if it involved peers or high crown officials.[3] What sedition laws sought to do was to protect the ruling class that considered itself as the sovereign and wanted no criticism of its policies as political awareness grew.[4]

The history of the cases prosecuted under sedition laws have one thing in common: suppress criticism of government and its agents. In Nigeria the case of *DPP* v. *Chike Obi*,[5] and *James Ogidi v. COP*[6] are illustrative.[7] In *Chike Obi's case* for example, he was prosecuted for distributing a pamphlet called "The People: Facts that You Must Know" containing these words: '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….'

In colonial Nigeria, sedition laws were enacted with intent to prevent locals from complaining about perceived injustice that followed the colonial government policies, and to restrict the press from publishing materials which criticised the British administration.[8] Recent events in

[2] Roger B Manning, 'The Origin of the Doctrine of Sedition' (1980) 12(2) Albion: A Quarterly Journal Concerned with British Studies 99 <JSTOR www.jstor.org/stable/4048812> accessed 31 March 2020.
[3] *Scandalum magnutum* was created in the Statute of Westminster in 1275 and the offence comprised of publishing false rumours or slander which might create a division between the king and his magnates. It was the earliest form of criminal libel. For a discussion of the history of sedition laws see Fabrizio Dal Vera 'Quietis Publicae Perturbatio: Revolts in the Political and Legal Treatises of the Sixteenth and Seventeenth Centuries' in Malte Griesse (ed.) *From Mutual Observation to Propaganda War: Premodern Revolts in Their Transnational Representations*, (Transcript Verlag, Bielefeld 2004) 273 <www.jstor.org/stable/j.ctv1xxrvx.12> accessed 1 May 2020
[4] Manning (n 2) 120.
[5] *DPP* v. *Chike Obi* ALL NLR (1961) 194 SC
[6] (1960) 5 F.S.C. 251SC
[7] See *also R v Agwuna & Ors* (1949) 12 W.A.C.A 456; *The Queen v. African Press Ltd. & Jakande* (1957) W.R.N.L.R 1; cf Wendell Bird, *Criminal Dissent: Prosecutions under the Alien and Sedition Acts of 1798*. (Harvard University Press 2020) 55 – 84, 225 – 248 <www.jstor.org/stable/j.ctvsxtj0> accessed 1 April 2020 on the history of the use of sedition in the United States.
[8] O.W. Igwe and Alunegbe Oziegbe, 'The Law of Sedition in Contemporary Nigerian Criminal Law: A Review of the Case of Arthur Nwankwo v. The State' <https://works.bepress.com/alunegbe-oziegbe/> accessed 23 April 2020. See also Peter N Nwokolo, 'The Nigerian Press and the Law of Sedition: A Progressive Interpretation' (2010) 23(1) Review of Education Institute of Education Journal 210 <www.unn.edu.ng/publications/files/images/PeterNNwokolo.pdf> accessed 27 April 2020 where the writer shared same view.

Nigeria show how our government and her agents seek to supress any form of speech that presents the government in bad light under the guise of fake news[9] religion and ethnic divisions.

Similar to the opinion expressed above, the purpose of sedition law, then and now, is often understood as partisan, to silence political opposition.[10] The history of sedition laws from its Court of Star Chamber origins down to modern times shows its inherent purpose and use has been to throttle political dissent.[11]

Notwithstanding the fact that sedition under the Criminal Code Law of states in Nigeria was held unconstitutional by the Supreme Court of Nigeria,[12] public officers have found new penchant for enacting laws that unreasonably burden speech using social media (fake news), ethnic and religious division/hostility as excuse or justification.[13] They may have done so either because of the deference by courts to policymakers or because there seems to be no clear descriptive standard to guide courts and policymakers when deciding on a measure that may affect free speech as protected under the Constitution. Whatever the case may be, this work seeks to provide a guide on what the framers meant with the expression 'reasonably justifiable in a democratic society'. An interpretational standard that heightens protection of free speech is prescribed. The standard is not only descriptive, it offers a workable solution in ascertaining the constitutional meaning of 'reasonably justifiable in a democratic society'.

There are basically three methods of constitutional construction: analytic, historic, and the synthetic methods.[14] This work to a large extent adopts the synthetic method. Synthetic method of constitutional construction involves the correlation of all constitutional provisions which

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[9] See Oluseyi Awojulugbe 'Don't Embarrass Govt with Your #EndSARS Reports, NBC Tells Media Houses' (*The Cable* October 20, 2020) <https://www.thecable.ng/nbc-houses-careful-report-endsars-crisis-dont-embarrass-govt> accessed 30 October, 2020; QueenEsther Iroanusi 'Explainer: Important Things to Know about Nigeria's 'Hate Speech' Bill' (Premium Times November 13, 2019) <https://www.premiumtimesng.com/news/headlines/362633-explainer-important-things-to-know-about-nigerias-hate-speech-bill.html> accessed 30 October, 2020

[10] Marc Lendler, ''Equally Proper at All Times and at All Times Necessary': Civility, Bad Tendency, and the Sedition Act*'* (2004) 24(3) *Journal of the Early Republic*, 419, 420 <www.jstor.org/stable/4141440> accessed 2 April 2020

[11]L.W. Maher ''Modernising' the Crime of Sedition?' (2006) 90 *Labour History* 201, <www.jstor.org/stable/27516121> accessed 16 April 2020.

[12] See *Arthur Nwankwo v The State* (1985) 6 NCLR 228, 237

[13] Examples of such legislations include the bill on hate speech and fake news before the National Assembly. The Minister of Information and Culture, Lai Mohammed was reported to have proposed a plan to sanction media houses under the NBC (Nigeria Broadcasting Corporation) regulations. In fact, the Minister attempted to sanction media houses for broadcasting a protest by Nigerians against police brutality (#EndSars). See Vanguard' Breaking: Channels TV, Arise, AIT sanctioned over coverage of #ENDSARS protests' October 26, 2020 <https://www.vanguardngr.com/2020/10/breaking-channels-tv-arise-ait-sanctioned-over-coverage-of-endsars-protests/> accessed 10 November 2020

[14] Theodore Schroeder, *Free Speech for Radicals* (Enlarged edn, Hillacre Bookhouse, Riverside 1916) 82

define and restrict governmental authority. The synthetic method is based on the assumption that each of the limitations and guarantees form part of a general idea of liberty, and that only by understanding each part in its relation to all other parts may we arrive at an all-inclusive generalization thereafter to be applied deductively and decisively to each concrete problem of freedom and to each separate constitutional guarantee of a partial or particular liberty.[15]

To ascertain the meaning of the constitutional expression in question, we may start by asking- how and at what point should the government be allowed to interfere with the liberty of speech?[16] This is what the expression 'reasonably justifiable in a democratic society' sought to answer.

Worthy of note is that this work is written with an understanding that constitutional provisions protecting free speech though not absolute, at the least were intended to wipe out sedition laws and make the prosecutions for criticism of government, without incitement to law breaking impossible in modern democracy.[17]

SPECIFIC JUSTIFICATIONS

In both judicial and scholarly discourse there are several competing theories that seek to justify free speech and those that say otherwise. In attempting to set out justifications for free speech oversimplification may be the main disease of this work.[18]

Generally, there is a minimal principle of liberty that maintains that government should not inhibit speech that pose no legitimate threat of harm.[19] Beyond the minimal principle of liberty, a principle of free speech should advocate for some range of protection for speech that goes beyond limitations on government interference with other forms of activities. Thus, the heightened standard prescribes that government should not interfere with free speech directly and when allowed there must be a compelling interest the government seeks to protect.

One may ask- what is unique about speech that it requires more protection than the general liberty protection? According to the United States Supreme Court, free speech is delicate and

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[15] ibid 87

[16] See Isaiah Berlin, 'Two Concepts of Liberty' in I. Berlin (ed), *Four Essays on Liberty* (Oxford University Press, England 1969) 121–122 where he discussed government's interference with personal liberty.

[17] See Zechariah Chafee, *Free Speech in the United States*, (Harvard University Press, Massachusetts 1941) 21 <https://archive.org/details/in.ernet.dli.2015.499889/page/n5/mode/2up> accessed 29 April 2020

[18] See Kent Greenawalt, 'Free Speech Justifications' (1989) 89(1) Columbia Law Review 119 <www.jstor.org/stable/1122730> accessed 9 April 2020 observing that oversimplification remains the main disease of legal and philosophical scholarship.

[19] ibid

vulnerable, as well as supremely precious in our society, thus, 'need breathing space to survive.'[20] The Court further noted that free speech has transcendent value to all society, and not merely to those exercising their rights.[21]

If some human activities have special value, a good government will need stronger reasons to prohibit them than to prohibit other activities.[22] Further, based on the notion that particular reasons for prohibition are at odds with how human beings should be regarded or with the proper role of government, government should not be permitted to suppress ideas that pose challenge to it, because one feature of a legitimate government is that criticism of those presently in power may be entertained.[23]

The question could also be answered using the words of Gorge Orwell: 'Is every opinion, however unpopular— however foolish, even—entitled to a hearing? Put it in that form and nearly any English intellectual will feel that he ought to say 'Yes'…. If liberty means anything at all, it means the right to tell people what they do not want to hear.'[24]

There are those who believe free speech right is absolute and other advocates like Robert Bork who argue that free speech is limited to political speech and that there should be no constitutional protection for any speech advocating violation of the law.[25]Whereas the likes of Justice Brandeis would opine that even advocacy for violation of law, though morally reprehensible, is no justification for denying free speech where the advocacy fall short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.[26]

The approach advocated here is not about the absoluteness of free speech because the text of the Constitution does not give room for such claim; but that a standard that strengthens security of speech be used in judicial reviews.

Some have argued against free speech on the basis of order and civility. They posit that liberty is order. And that 'instead of this order, our high-flying scribblers who care as little as they know about the principles of liberty, make it consist not in this order, but in innovation, change,

[20] *NAACP v. Button*, 371 U. S. 415, 433 (1963)
[21] *Dombrowski v. Pfister,* 380 U. S. 479, 486 (1965)
[22] Greenawalt (n 18) 122
[23] ibid
[24] Gorge Orwell 'Freedom of the Press' New York Times (New York, 8 October 1972) 12 <https://www.nytimes.com/1972/10/08/archives/the-freedom-of-the-press-orwell.html> accessed 18 October 2020
[25] Robert H. Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 Indiana Law Journal 1, 31 <https://www.repository.law.indiana.edu/ilj/vol47/iss1/1/> accessed 16 April 2020
[26] *Whitney v. California,* 274 U.S. 357, 376 (1927)

anarchy.'[27] The advocates of order failed to accommodate the fact that without liberty, order is but an illusion. Per Justice Brandeis:

> Those who won our independence … valued liberty both as an end and as a means …. They recognised the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.[28]

Some commentators seem to refer to order as the *civility code* attempting to draw a line between calm, orderly, and therefore legitimate political dissent, and 'low value' destructive appeals to passion.[29] That is, inflammatory rhetoric that appeal to senses instead of reason endangered the republican system. Their position is that free speech will cause faction which will in turn destroy the viability of a republican government. However, Madison in *The Federalist No. X* as a rebuttal submitted that:

> There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.
> It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.[30]

Madison further wrote that to give the same passion or opinion to everyone is impracticable and unwise. That the diversity in the faculties of men, from which property rights originate is an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government.[31] Assuming we were to admit that a uniformed idea was proper, who

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[27] The Federalist Editorial in the Gazette of the United States (Philadelphia), Jan. 23, 1793 cited by Lendler (n 10)
[28] *Whitney v. California* 274 U.S. 357 (1927). See also Ben W. Palmer 'Liberty and Order: Conflict and Reconciliation' (1946) 32(11) American Bar Association Journal 731 <www.jstor.org/stable/25715775> 10 April 2020); Henry Steele Commager, 'The Reconciliation of Liberty and Order' (1945) 17(3) The Australian Quarterly 35 <www.jstor.org/stable/20631288> 03 April 2020
[29] Lendler (n 10)
[30] M. Walter Dunne, *The Federalist: A Commentary on The Constitution of The United States. Being a Collection of Essays Written by Alexander Hamilton, James Madison and John Jay* Vol. 1 (M. Walter Dunne Publisher, Washington & London 1901) 62-70. Protection of free speech under the US Constitution has not destroyed the US republican government or any other democratic government in the world.
[31] ibid

decides on the uniform idea- the political party in power or the people? The simple answer should be the people. But the people cannot make that decision without free speech because they need exchange of ideas to decide on a standard, and free speech is the vehicle for such exchange of ideas.

One of the ways to build public confidence is not in censure but in robustly engaging the public. Free speech is the recipe for a viable republic not the other way round. Justice Gorsuch of the United States Supreme Court observed:

> At our founding the people fought … to rule themselves. They knew the right of self-government promised many gifts. The right to chart our destiny as a people. *To speak our minds…. We won't always agree about the right policies for the day. That's to be expected, even treasured. After all, the capacity to express, debate, and test all ideas is part of what makes a republic strong.*[32]

The argument for order seems not to insulate itself from use of totalitarian or fascist system in order to save democracy. The tendency is to argue that one can defend democracy only by totalitarian methods. If one loves democracy, the argument runs, one must crush its enemies by no matter what means. 'In other words, defending democracy involves destroying all independence of thought.'[33]

They also fail to prescribe a limiting principle that may prohibit use of undemocratic methods to suppress speech. To justify restriction on free speech, the government is duty bound to identity the specific harm sought to be avoided. Appeals to the need to guard against incitement to violence and disorder is not enough because such appeals are vague as they are aimed at speech related conduct which may or may not carry with it some unspecified risk of prompting violence. If its intent is only to penalise incitement to violence and disorder, its proponents should be able to identify deficiencies in our existing criminal law prohibition on violence, actual or threatened incitement to violence, and other related provisions.[34] It may be true that every idea is an incitement. It offers itself for belief, and, if believed, it is acted on.[35] If, on the

[32]Neil Gorsuch, *A Republic, if You Can Keep It* (Crown Forum, New York 2019) 8. Italics are mine for emphasis.
[33] Orwell (n 24)
[34] Maher (n 11) 207. This is the major short coming of the National Commission for the Prohibition of Hate Speeches (Est, etc) Bill (2015-2019) and the Protection from Internet Falsehood and Manipulation and Other Related Matters Bill (2015 – 2019) before the National Assembly because its proponents cannot point out why existing statutes like the Criminal Code Act and Cybercrimes (Prohibit and Prevention, etc) Act of 2015 does not cover the issues raised in the proposed bills.
[35] *Brandenburg v. Ohio* 395, US 444 (1969)

long run, the beliefs expressed are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance.[36]

One more blind spot with crimes created by sedition laws generally, is that the wordings of such laws lack specificity thereby rendering them impossible to know in advance of engaging in any speech-related conduct whether one is exposed to criminal liability.[37]

Scholars who sought to justify free speech, apart from the general principle of liberty earlier mentioned, have expressed their views differently. A few of their views justifying free speech protection are discussed hereunder. However, it should be noted that there is no single universally accepted justification of free speech.[38]

a. Consent and Private Domain: This justification has its root in social contract theory. It states that individuals entering a social contract consent to government power to secure their lives, liberty, and property; but did not authorize the government to interfere with activities in their private domains. Furthermore, the idea of a government consented to by the people underlies that a legitimate government should not suppress political ideas and facts, even when a present majority approves that suppression. The implication of the social contract is that government should take the form to which the people consent. To have a valid consent, relevant information must be made available to the people. Accordingly, free speech is one of the activities in private domain which the people did not give away because to do so would mean the people lost the power to consent to the form their government takes.[39]
b. Self-Government: The claim is that free speech contributes to the functioning of liberal democracy. A basic assumption of liberal democracy is that public issues shall be decided by universal suffrage.[40] 'Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.'[41] That is, free speech is the vehicle by which voters acquire relevant intelligence for self-government.

[36] *Gitlow v. New York* 268 US 652, 673 (1925)
[37] Maher (n 11) 203
[38] Generally, see Thomas I. Emerson, *The System of Freedom of Expression* (Random House, New York 1970); Martin H. Redish, 'The Value of Free Speech' (1982) 130(3) University of Pennsylvania Law Review 591< https://scholarship.law.upenn.edu/penn_law_review/vol130/iss3/2/> accessed 10 June 2020
[39] Greenawalt (n 18) 149-159
[40] Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper Brothers Publisher, New York 1948) 27 <https://archive.org/details/in.ernet.dli.2015.84399/page/n11/mode/2up> accessed 30 April 2020
[41] Alexander Meiklejohn 'The First Amendment is an Absolute' (1961) 1961(1) The Supreme Court Review 245, 255, <www.jstor.org/stable/3108719> 14 April 2020. See also Vincent Blasi 'The Checking Value in First

c. Discovery of Truth: This theory assumes that if those in power suppress communication, they may suppress ideas that are true or partly true and that free speech is essential to truth discovery. John Stuart Mill argues that even if the idea is wholly false, by its refutation people are informed and that vitalizes truth than if government suppresses what it deems false.[42]Oliver Wendell Holmes in what is called 'marketplace of ideas' wrote that the ultimate good desired is better reached by free trade in ideas- that the best test of truth is the power of thought to get itself accepted in a competition in a market, and that truth is the only ground upon which their wishes safely can be carried out.[43]
Critics of the truth discovery theory amongst others, argue that free speech does not contribute to truth discovery in any unique way and that there is a significant inequality in the marketplace of ideas. The inclinations of people to believe messages that are dominant socially or that serve unconscious, irrational needs undermine the claim that free speech leads to truth discovery.[44] If there is such inequality, it justifies a position that promotes more platforms for speech and fair hearing to be accorded divergent views rather than suppression of speech.

d. Autonomy and Personhood: It is claimed that people will be more autonomous under a regime of free speech than under substantial suppression of free speech. When all ideas can be expressed, people will be less subject to the dictates of others in their decisions and will be encouraged to exercise this independence in a considerate manner that reflects their fullest selves.[45] Government should treat people as if they were rational and autonomous by allowing all information and advocacy that might help them make a choice. It further claimed that restrictions on expressions may offend dignity to a greater degree than most restrictions because expression of beliefs and feelings lie closer to the core of persons than most actions we perform.

Amendment Theory' (1977) 2(3) American Bar Foundation Research Journal 521 <www.jstor.org/stable/827945> accessed 14 April 2020 on how free speech helps individuals check government excesses and arbitrariness.

[42] John Stuart Mill, *On Liberty*, in M. Cowling (ed), Selected Writings of John Stuart Mill (1968) 136, 152-162 cited by Greenawalt (n 18). See Justice Brandeis in *Whitney v. California,* (n 28) 375 where he wrote that the "fitting remedy for evil councils is good ones" and that if there is time to expose through discussion falsehoods, to avert the evil by the process of education, the remedy that should be applied is more speech, not enforced silence.

[43] *Abrams v. United States* 250 U.S. 616, 630 (1919)

[44]Greenawalt (n 18) 131- 141

[45] For criticism of the autonomy theory see Bork (n 25) 25; Mari J. Matsuda 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87(8) Michigan Law Review 2320 <www.jstor.org/stable/1289306> accessed 14 April 2020. See also Michel Rosenfeld, 'Extremist Speech and the Paradox of Tolerance' (1987) 100(6) Harvard Law Review 1457 <www.jstor.org/stable/1341168> accessed 14 April 2020.

These justifications set out above are important to show the special value of free speech and the basis for advocating for a heightened standard of judicial review of statutes that seek to suppress speech.

HEIGHTENED STANDARD OF REVIEW OF LAWS THAT SUPPRESS SPEECH

The framers of the Constitution who empowered the legislature to regulate free speech require statutes that may abridge speech to be reasonably justified in accordance with the Constitution and the tenets of democratic societies. Courts by implication, were required to judicially engage statutes seeking to suppress speech in order to decide whether such statute or measure taken by government is justified. Meaning the legislature does not have unbridled power that infers deference.

For our purpose sections 38, 39, and 45 of the Constitution on freedom of thought, expression, and press read in part:

> 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. ….
> 3. *Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society….*
>
> 45. 1. *Nothing in sections … 38, 39… 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.

The focus here is on the expression: 'reasonably justifiable in a democratic society' because we seek to answer whether certain laws that seek to criminalise or suppress speech are justifiable in our republic and where so what is the standard for justifying such laws.

There are submissions like that of S.A. De Smith which state that: 'reasonably justified in a democratic society' ought to be so construed as to leave the legislature with a very wide area of discretion, wider than it could properly exercise if the power to impose restrictions were to be measured simply be reference to a standard of reasonableness.[46] The Siracusa Principles

[46] See S.A. De Smith, 'The New Commonwealth and its Constitutions' (1965) 14(4) The American Journal of Comparative Law 702 <https://doi.org/10.2307/838920> accessed 28 April, 2020; J. D. Ojo, 'Freedom of the

contradicts this notion. Its section on "Interpretative Principles Relating to Specific Limitation Clauses" states that 'The expression "in a democratic society" shall be interpreted as imposing a further restriction on the limitation clauses it qualifies.'[47]

If De Smith's proposal will lead to a presumption of constitutionality in favour of the legislature, Bolick, J. would respond holding that it is essential to our system of justice, and to its endurance, that every person enter the courtroom on a level playing field. Thus, when a litigant argues that a law that diminishes liberty is unconstitutional, a presumption of constitutionality tips the scale in favour of government. Such presumption is antithetical to the most fundamental of ideals: that our Constitution is intended primarily not to shelter government power, but to protect individual liberty. The Constitution does not suggest an elevation of legislative or executive power over individual rights. To the contrary, the Constitution establishes the protection of individual rights as a core purpose. This purpose, conjoined with the express guarantee of individual rights in chapter IV of the Constitution, undermine any notion that courts should presume that laws infringing individual rights are constitutional.[48]

Ademola CJF preferred what he termed reasonable precaution standard as stated in *Chike Obi's Case* which may involve the prohibition of acts which, if unchecked and unrestrained, might lead to disorder, even though those acts would not themselves do so directly. Ogundare JSC states that reasonably justified under the Constitution should mean moderate, tolerable, and not excessive.[49] However, ordinary meaning of words used in the Constitution should not be used in its interpretation to defeat the principles and goals set by the Constitution.[50] Apart from the fact that these proposed standards are too broad and will not protect free speech, they are neither predictable nor workable.

Their position advocates for a deferential standard that should not be used in any review by any court in our type of democratic republic where individual liberty is at stake because it is

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Press in Nigeria Since 1960: A Comparative Analysis' (1976) 18(4) Journal of the Indian Law Institute 529 <www.jstor.org/stable/43950449> accessed 28 April 2020

[47] The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, April 1985 < https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf> accessed 12 June, 2022

[48] See *State of Arizona v. Arevalo* No. CR-19-0156-PR Filed September 1, 2020 pp 12 -14 <https://www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2020/CR190156PR.pdf> accessed 7 September 2020.

[49] *Gozie Okeke v. State* (2003) NWLR (Pt.842) 25.

[50] See Larry M. Eig, 'Statutory Interpretation: General Principles and Recent Trends' 2014 Congressional Research Service 7-5700 <https://fas.org/sgp/crs/misc/97-589.pdf> accessed 15 October 2020. See also *Ogun State v. Federation* (1982) 1-2 SC 13

contradictory to the role of the judiciary in protecting liberty under the Constitution.[51] In *A-G Abia State v A-G Federation*, Tobi JSC emphasized that where the legislature in the exercise of its constitutional power to make laws, stray from the constitutional power, and a question as to constitutionality arises, the role of the judiciary, when asked by a party, is to move in to stop any excess in exercise of legislative power.[52] But that is impossible where the court's standard is deference. Chief Justice Warren of the US Supreme Court in *Trop v Dulles*[53] was of the view that:

> We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguard that protects individual rights. When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence… When it appears that an Act of Congress conflicts with one of the provisions of the Constitution, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less.[54]

In *Patel v. Texas Department of Licensing and Regulation*[55] the Court questioned excessive judicial deference and noted that a pro-liberty presumption is hardwired into its republican Constitution; meaning that the people are presumptively free, and government must justify its deprivations. The Siracusa Principles mentioned above confirm this position stating that 'The burden is upon a state imposing limitations so qualified to demonstrate that the limitations do not impair the democratic functioning of the society.'[56]

The heightened standard advocated here involve some form of judicial engagement of the rationale for interference instead of a mere deference principle.[57] A deferential standard violates the letters and spirit of the Constitution, particularly, the exact purpose for which Chapter IV of the Constitution was written: to protect fundamental rights. To ask courts to defer when the constitutionality of legislative action is considered means the exact opposite of what the

[51] See n. 57
[52] (2006) 16 NWLR (Pt 1005) 265 at 381-382 paras H-A
[53] 356 US 86 (1958)
[54] ibid 104
[55] 469 S.W.3d 69 (2015)
[56] See n 47
[57] See *Ag & Commissioner of Justice, Kebbi State v. Jokolo & Ors* (2013) LPELR-22349(CA) Per TUR, J.C.A. (Pp. 45-46, paras. F-G) where the court held that liberty encroachments are rigorously tested by Courts to ascertain the soundness of purported governmental justifications and that a fundamental right triggers strict scrutiny.

Constitution commands. The question for judges is not whether a law is sensible but whether it is constitutional. The court should not be bend-over-backward advocates for the government.[58]

Republics or democratic societies based on ideals like ours use strict standards to protect free speech because of its special value to the sustenance of democratic societies.[59] An example is Article 19 (2) of the Indian Constitution which (in effect similar to the clause in section 45 of the Constitution) was held by the Indian Supreme Court to set a very narrow and stringent limit on permissible legislative abridgment of free speech.[60]Laurence Tribe argues that regulation of the content of speech presumptively violates free speech[61]which is why under the United States constitutional law the burden is on the government which seeks to enact such statutes to justify it under what is termed *strict scrutiny test*, and the *clear and present danger test* or the *O'Brien test*. The US courts combine these tests with a concept called the *vagueness and overbreadth doctrine* to decide whether a statute or measure is justified.

The approach by the Indian and US courts afford free speech better protection than the deference standard mentioned earlier. Taking a cue from the US and the African Commission on Human and Peoples' Rights' *Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019*, this article recommends the heightened standard set out below when determining whether or not a law is reasonably justified in a democratic society. It is a workable standard that requires courts to ask:[62]

a. Is the law within the powers conferred on government?

b. Is the interest sought to be achieved by government compelling?

c. Is the government's interest unrelated to the suppression of free speech?

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[58] *State v. Arevalo* (n 48) 18

[59] To appreciate the basis for advocating for a strict standard of review, it is important to understand at least one of the values that underlie free speech and the related reasons why courts scrutinize speech restrictions strictly. The US Supreme Court explained in these words: 'We the People of the United States have created a government of laws enacted by elected representatives. For our government to remain a democratic republic, the people must be free to generate, debate, and discuss both general and specific ideas, hopes, and experiences. The people must then be able to transmit their resulting views and conclusions to their elected representatives, which they may do directly, or indirectly through the shaping of public opinion. The object of that transmission is to influence the public policy enacted by elected representatives. As this Court has explained, [t]he First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' See *Meyer v. Grant*, 486 U. S. 414, 421 (1988) (internal quotation marks omitted). See generally Robert C. Post, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State* (Reprint edn, Yale Univeristy Press, New Haven 2013). 1-25.

[60] See *Romesh Thapper v. The State of Madras*, All Indian Reporter 1950 Supreme Court 124 at 129 per Sastri J.

[61] L Tribe, *American Constitutional Law* (2nd edn, Foundation Press, New York 1988) 790

[62] See *United States v. O' Brien* 391 U.S. 367 (1968)

d. Is the law necessary to achieve that compelling government interest?

e. Is the law the least restrictive alternative to achieving the compelling interest?

f. Is the law clear, precise, accessible, and foreseeable?

The question of whether the law is within the powers conferred on government starts with asking whether the legislature has power to enact statutes that are incompatible with the principles of the system of government for which consent of the people was obtained. Montesquieu opined in Book V of *The Spirit of Laws* that in a democratic society laws enacted by the legislature should be relative to the principles of the system of government consented to by the people.

According to the consent and private domain theory discussed above, it is clear the people reserved certain rights for themselves and only gave consent to a system of government that promised protection of those rights. Where the powers of government are not limited to the system of government for which consent of the people was obtained, the promises of individual rights contained in the contractual document (the Constitution) will remain mere promises.

To fulfil the promises of individual rights and keep our republic, our standard of interpreting laws that seek to restrict those rights promised by a republican democracy must be informed by the promises in the system of government *the people* had looked forward to when they consented to the system of government. And courts must avoid what Montesquieu described as the delusion of Machiavelli to have given to princes for the maintenance of their grandeur some principles which are only necessary in a despotic government and are unhelpful, dangerous, and impractical in our type of republic.[63]

To ascertain what the people had consented to we have to look at the contractual book that regulates the relationship between the government and the people. That book is the Constitution. The Constitution will be interpreted here following the synthetic method of construction and the opinion of the Supreme Court in *Saraki v. FRN* [64] where it held that one of the guiding principles in the interpretation of the provisions of the Constitution is that the principles upon which the Constitution was established, rather than the direct operation or literal meaning of the words used, measure the purpose and scope of its provisions. Above all, the

[63] Vickie B. Sullivan 'Against the Despotism of a Republic: Montesquieu's Correction of Machiavelli in the Name of the Security of the Individual' (2006) 27(2) History of Political Thought 263, 266 <www.jstor.org/stable/26222196> accessed 14 April 2020

[64] *Saraki v. FRN* (2016) 3 NWLR (Pt. 1500) 531 at 631-632; *Skye Bank Plc v. Iwu* (2017) 16 NWLR (Pt 1590)24.

rationale is that interpretation that would fail to achieve the goal set by the Constitution must be avoided.

The Constitution starts with 'we the people' in its Preamble and goes on to declare that the nation shall be called a 'Federal Republic.' To make the matter clearer in its section 14, it declared: 'sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority.' These provisions make it clear that the set goal of the Constitution is to form a republican system of government where the people are the sovereign. Submissions here are strengthened by the understanding that:

> The life and moving spirit of the Constitution of this country is captured in the Preamble. It has been held that when a constitutional provision is interpreted, the cardinal rule is to look to the Preamble to the Constitution as the guiding star and the directive principles of State Policy as the 'book of interpretation' and that while the Preamble embodies the hopes and aspirations of the people, the directive principles set out the proximate grounds in the governance of the country.[65]

The question above can be framed differently- What rights did the people reserve in a republican democracy that government cannot deprive? One basic feature of republican system of government is that the people reserved their right to participate in self-government. This is clearly enshrined in section 14(2) (c) of the Constitution. If it is implausible to argue that in republican democracy the people forego their right to participate in governance; so is it to say that the use of the vehicle for such participation was abandoned or left to the discretion of those whom they oversee. The people can only meaningfully participate in self-government if they have information, access, and public platforms necessary for such participation.

Also relevant to this question is understanding the meaning of the term *republic* to ascertain the limit of the form of government we chose and its promises. This is premised on the understanding that 'Like the apostle Paul, Republican Government has been 'made all things to all men.' The concept is indeed a spacious one, and many particular ideas can comfortably nestle under its big tent. Surprisingly, however, few modern scholars seem even aware of the central meaning of Republican Government- of the main pole that keeps the big top up, as it were.'[66]

[65] *Federal Republic of Nigeria v. Alh. Isa Sadiq Achida & Anor* (2018) LPELR-CA/S/178C/2017

[66] Akhil Reed Amar, 'The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem' (1994) 65 University of Colorado Law Review 749, 759 – 760 <

Amar submits that 'the central pillar of Republican Government, I claim, is popular sovereignty. In a Republican Government, the people rule. They do not necessarily rule directly, day-to-day… What it does require is that the structure of day-to-day government-the Constitution-be derived from 'the People' and be legally alterable by a 'majority' of them.'[67]

Because the peoples are sovereign in a republican government, the type to which the Nigerian people gave consent as captured in the Constitution '… censorial power is in the people over the government, and not in the government over the people.'[68] 'It is no small thing that the founders claimed our new government was formed by "we the people". They didn't say the government was formed by the continental Army or the Congress or the States or some bureaucratic drafting committee. *Institutions like those the preamble made clear, exist to serve the people- not the other way round.* '[69] The right to free public discussion of the stewardship of public officials is a fundamental principle of the republican form of government.[70]

According to the consent and private domain theory discussed above, government cannot regulate certain activities considered to be within the private domain of the people. It follows that the legislature can only regulate as much as the people had given consent.

In other words, the censorial right of the people is outside the reach of those who exist to serve them. It is difficult to safely argue that the people granted their servants power to punish them for criticising the servants except where it is so expressly stated. To say otherwise would be a logic based on sovereignty of the crown or supremacy of a constituted authority over 'the people.' That is at odds with the republican government promised and the express provisions of the Constitution.

It is therefore clear that statutes that seek to protect public officers or political office holders from censure are in conflict with our republican Constitution because when the people consented to the republican form of government they did not give away their right to censure constituted authority.

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https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1969&context=fss_papers> accessed 24 June 2020

[67] Amar (n 66). See also Jack M. Balkin, 'Republicanism and the Constitution of Opportunity' (2016) 94 Texas Law Review 1427, <https://texaslawreview.org/republicanism-and-the-constitution-of-opportunity/> accessed 20 April 2020.

[68] See Justice Brennan of the US Supreme Court quoting Madison in *New York Times Co. v. Sullivan* 376 U.S. 254 (1964)

[69] Gorsuch, (n 32) 36. Italics are mine for emphasis.

[70] See *New York Times v. Sullivan, (*n. 68) above and *Boucher v. R* (1957) S.C.R 265, 294

The case made here is that provisions in our penal laws seeking to criminalize speech (like chapter xxiv of the Penal Code Act except section 417 under this analysis) against government and its officials are ultra vires and unconstitutional in our type of republic because 'we the people' are the sovereign and we retain the power to censure constituted authority; a power without which we cannot participate in self-government. Simply put, government officials (servants) have no power by way of legislation to limit their criticism by the sovereign.

Those who promote sedition laws to protect government and its officials seem to base their theory of representation and style on deferential politics which is incompatible with our constitutional republic.[71] According to Marc, the position of these promoters go like this: '*People were to select their representatives, then let them do all the necessary deliberating. The public's job was to keep out of the way, much as a client is best served by staying out of a lawyer's way'.*[72] The Nigerian Supreme Court rejected this deferential standard in *Arthur Nwankwo v. State* when it upheld the right of the sovereign to critique the government. The Court held:

> The decision of the founding fathers of the present Constitution which guarantees freedom of speech which must include freedom to criticise should be praised and any attempt to derogate from it except as provided by the Constitution must be resisted. Those in public office should not be intolerant of criticism in respect of their office so as to ensure that they are accountable to the people. They should not be made to feel that they live in an ivory tower and therefore belong to a different class. They must develop thick skins and where possible, plug their ears with wool if they feel too sensitive or irascible.[73]

Like Gorsuch wrote quoting Winston Churchill, the world is divided into people who own their government and governments who own their people;[74] our Constitution's design that the people own our government must be emphasized and we must not cross that line under the guise of sedition laws or judicial deference.

Where (a) is answered in the negative, the enquiry ends. Assuming (a) is positively answered, the court should proceed to ask whether the identified government's interest is compelling. This requires proof on the part of the government that the purpose it seeks to achieve with the

[71] James P Martin 'When Repression is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798' (1999) 66(1) The University of Chicago Law Review 117, 121 <https://chicagounbound.uchicago.edu/uclrev/vol66/iss1/3/> accessed 09 April 2020.
[72] Lendler (n 10) 423
[73] *Arthur Nwankwo v The State* (1985) 6 NCLR 228, 237
[74] Gorsuch, (n 32) 64.

statute/action is compelling and that the law is the necessary means to achieve that purpose. For a government interest to be held compelling, it must be one of the enumerated items in section 45 of the Constitution in any free speech review under the Constitution.

The enquiry does not end with a finding that the stated interest is within the enumerated list in section 45 of the Constitution; the court also must ask whether the measure taken by government is necessary to achieve the stated interest. If the measure is not the least restrictive alternative, it is not necessary, thus, not compelling, and not justifiable.[75] This requires the court to enquire whether the measures prescribed are reasonable and what less restrictive alternative the government had but chose the measure in question. A government's interest may be within the enumerated list but where the measure prescribed to achieve that interest is not the least restrictive, it is not justifiable nor constitutional.

Furthermore, if the interest of government is directly related to suppression of speech the law is not reasonably justifiable in a democratic society because the people did not consent to direct suppression of the medium by which they gain intelligence for self-government. A law can only be justified if the governmental interest is unrelated to suppression of free speech, but it accidentally interferes with free speech. This position is strengthened by the court's decision in *IGP v. ANPP*[76] where Adekeye, JCA held:

> I hold in unison with the reasoning in the case of *Shetton v. Tucker* 364 US 479,488 (1960) where the United States Supreme court observed that- 'Even though the Government's purpose may be legitimate and substantial that purpose cannot be pursued by means that broadly stifle fundamental personal liberties.'

Related to the question of whether the interest is directly related to suppression of free speech is an enquiry into whether the action or statute is based on view point restriction: is it a restriction on the content or subject matter of the speech, or the speaker? A law regulating speech that on its face draws distinctions based on the message a speaker conveys is viewpoint restriction.[77]

The free speech provision in the Constitution does not allow government generally to have '… power to restrict expression because of its message, its ideas, its subject matter, or its

[75] Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (4th edn, Wolters Kluwer law & Business, New York 2011) 552 -555
[76] (2007) 18 NWLR (Pt. 1066) 457 CA
[77] See *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd*., 502 U. S. 105, 116 (1991)

content'.[78] Discriminatory restrictions on speech are on their faces impermissibly unconstitutional[79] except where such restrictions can be strictly justified by surviving the enquiries discussed here. The rationale is that government should not be allowed to choose what issues are worth discussing or debating.[80]

If we apply the standard advocated here to the *Protection from Internet Falsehood and Manipulation and Other Related Matters Bill, 2019*[81] which is before the National Assembly that claims 'to prevent the transmission of false statements/declaration of facts in Nigeria and to enable measures to be taken to counter the effects of such transmission' the Bill will be held unconstitutional. Its set goal does not fall within the enumerated items in section 45; therefore, it is not a compelling interest.

Say for instance we also ask- is criminalisation or suppression of false statements the least restrictive alternative to achieve the stated government's interest: counter the effect of false statements? The answer will off course be NO. Measures could be taken to counter the effect of falsehood without resort to free speech suppression by placing what they claim to be the truth in the same marketplace and allow both to compete. Public issues should be debated uninhibited. To protect free speech, the government have an effective alternative to transmit the truth on the same platform to counter falsehood without having chilling implications on free speech.

The U.S. Supreme Court noted in *New York Times v. Sullivan* that even where there is a defence of truth, sedition laws are not saved because the burden of proving the truth on the defendant does not mean that only false speech will be deterred. 'Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.'[82]

The court is also required to ask- Is the law clear, precise, accessible, and foreseeable? This is mostly referred to as the *vagueness doctrine* used in free speech constitutional review. A

[78] *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 95 (1972). See also *Reed v. Town of Gilbert*, 576 U. S. 155, 165 (2015) and *Hudgens v. NLRB*, 424 U. S. 507, 520 (1976)
[79] See *Boos v. Barry*, 485 U. S. 312, 321 (1988); *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622, 658 (1994) and *Sorrell v. IMS Health Inc.*, 564 U. S. 552, 563–564 (2011)
[80] *Reed v. Town of Gilbert*, 576 U. S. 155, 182 (2015)
[81] Same applies to section 39 of the Criminal Law of Lagos State, 2011
[82] See *New York Times Co. v. Sullivan*, (n 67)

statute which upon its face, and as authoritatively construed, is so vague and indefinite should be held unconstitutional.

As pointed out earlier, one of the shortcomings of bad tendency offences or hate speech laws is their inability to be specific. The vagueness doctrine requires a criminal statute to define an offence with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. In *Connally v. General Constr. Co.*[83], it was held that a law is unconstitutionally vague when people of common intelligence must necessarily guess at its meaning. In other words, a law that a reasonable person cannot tell what speech is prohibited and what is permitted is vague, overbroad, and unconstitutional.[84] Statutes regulating speech requires clear and greater precision to give adequate notice as to what speech is prohibited and allowed.[85]

Chemerinsky wrote that 'the vagueness doctrine is about fairness, and that it is unjust to punish a person without providing clear notice as to what conduct was prohibited. Vague laws also risk selective prosecution; … the government can choose who to prosecute based on their views or politics'.[86] And that the doctrine helps to reduce standard-less enforcement based on pursuit of the prosecutor's personal predilections. The constitution does not look kindly at vague laws because they invite the exercise of arbitrary power by leaving the people in the dark about what the law demands and allows prosecutors and courts to make it up.[87]

The doctrine is about the demands of rule of law- certainty and fair notice because rule of law depends on the existence of laws that are clear, finite, and stable. Rule of law cannot protect individual liberty if the laws are vague. Using the words of Madison in *Federalist No. 62*, incoherent statute 'poisons the blessings of liberty itself. It will be of little avail to the people, that the laws are … so incoherent that they cannot be understood: … that no man who knows what the law is to-day, can guess what it will be to-morrow'.

Most of the hate speech laws in Nigeria will fail under the vagueness doctrine. Say for instance section 124 of the Criminal Law of Lagos State which reads:

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[83] 269 U.S. 385, 391 (1926)
[84] See the following cases where penal laws were declared void on ground of vagueness: *Baggett v. Bullitt* 377 U.S. 360, 362 (1964); *NAACP v. Button*, 371 U.S. 415, 433 (1963) United *States v. Williams*, 553 U.S. 285 (2008)
[85] See Principle 11 of the African Commission on Human and Peoples' Rights' *Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019* adopted by the African Commission on Human and Peoples' Rights at its 65th Ordinary Session which was held from 21 October to 10 November 2019 in Banjul, Gambia with the same requirement.
[86] Chemerinsky, *(n* 75) 970
[87] See Gorsuch in n 32 and *Sessions v. Dimaya* 138 S. Ct. 1204 (2018)

> 124. Any person who does an act *which any class of persons consider as a public insult on their religion*, with the intention that they should consider the act an insult, and any person who does an unlawful act *with the knowledge that any class of persons will consider it an insult*, is guilty of a misdemeanour, and is liable to imprisonment for two years or a fine of Fifty Thousand Naira (N50, 000.00).

Insults may be irrational and morally reprehensible, but the legislature has a duty when it creates an offence to attain clarity and certainty in the wording of the penal statute enacted.[88] Nowhere in the Lagos law is the phrase *public insult* defined. The question becomes what kind of actions fall within the prohibited *public insult* that will not offend sections 36, 39 and 45 of the Constitution to be justified and how is it determined? Should its meaning be based on the subjective interpretation by the class of persons offended since the law says the insult could be an act '*any class of persons will consider … an insult';* or should it be decided objectively? Should it be decided by the prosecutor or a judge? Say a Muslim calls Christians 'unbelievers' or 'pagans', should that fall under the insult to be prosecuted?

The more questions are asked, it becomes clear that the provision leaves the people to guess what the law demands. This lack of specificity makes the law fail the vagueness doctrine.[89] In *Gooding v. Wilson* [90]a Georgian law that prohibited use of '… opprobrious words or abusive language, tending to cause a breach of the peace' was found overbroad and vague. Another example is a St. Paul's ordinance that criminalised placing 'on public or private property symbols, objects, characterizations, or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows and has reasonable ground to know arouse anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender' that was held unconstitutional by the United States Supreme Court.[91]

The meaning of insult can be stretched wide enough to cover what may be largely considered criticism or mere banter. Assuming a religious group or their leader is criticised for their actions and the group perceive those critical words as insult, should such criticism be deemed insult under the Lagos law? The right to criticise is constitutionally protected. Thus, the argument may be that the Lagos law is unconstitutional because it regulated speech more than

[88]See *Brown v. Oklahoma* 408 U.S. 914 (1972) where the court held that speech like 'black mother-fucking pig' is protected even if uttered in anger, filled with profanities and likely to anger the audience.
[89] See *Rosenfeld v. New Jersey* 408 U.S. 901 (1972), *Lewis v. City of New Orleans* 408 U.S. 913 (1972); *UWM Post, Inc. v. Board of Regents of Univ. of Wisconsin* 774 F. Supp. 1163 (E.D. Wis. 1991)
[90] 405 U.S. 518 (1972)
[91] *R.A.V. v. City of St. Paul* 505 U.S. 377 (1992)

the Constitution allows as it accords any class of persons unconstitutional discretion to consider any action an insult.

The concern regarding the statute is its vague terms with no certain meaning and the resulting potential for discriminatory enforcement. Assuming it is conceded that 'insults' are not protected speech, or that it could be justified on the basis of protecting public morality, the provision should still be invalidated because the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of the statute.[92]

The vagueness doctrine demands what the rule of law demands. It is a doctrine rooted in section 36 of our Constitution which demands that penal statutes not only be written but also fair notice be given. A provision like the Lagos law put demands of the rule of law at risk. It threatens the promise of fair notice and ascertainable fixed law. Rule of law demands that government in all its actions be bound by rules fixed and announced beforehand: rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.[93] Section 124 above does not give the individual fair notice and it is far from being certain, therefore, it is vague and unconstitutional.

CONCLUSION

The heightened standard is advocated because it will be more protective of free speech and it aligns with the commitment to protect free speech as contained in the Constitution. Secondly, a deferential standard will have a chilling effect on free speech even where truth is a defence to sedition laws.

The standard advocated here is based on the idea that free speech has special value in a democratic society and if some human activities possess special value, governments need stronger reason(s) to prohibit them than they need to prohibit other activities. Chief Justice Hughes in *Stromberg* v. *California* wrote that free speech is an opportunity essential to the security of the republic because government may be responsive to the will of the people; and that a statute which permits the punishment of the fair use of this opportunity is repugnant to

[92] See *Broadrick v. Oklahoma*, 413 U. S. 601, 611–613 at 612 (1973)
[93] F A Hayek *The Road to Serfdom* (The University of Chicago Press, US 1944) 80–92

the liberty guaranteed.[94] Since the maintenance of the opportunity for free speech is a fundamental principle of our constitutional system, to ensure preservation of this essential opportunity, a strict standard of review of statutes seeking to punish use of that opportunity is required. Thus, speech will be more protected where our courts adopt a combination of the *vagueness doctrine* and the *heightened standard* prescribed here.

[94] *Stromberg v. California* 283 U.S. 359 (1931)