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NEED TO BALANCE FREEDOM OF SPEECH AND PROTECTION OF REPUTATION UNDER THE DEFAMATION LAWS IN NIGERIA

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Abstract

Defamation laws are made to protect the reputation or integrity of the individual. However, sometimes, there is a conflict between the right to freedom of expression and reputation protection as provided by section 39(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). Against this background, the authors examined the regime of defamation laws in Nigeria as well as relationship with freedom of expression. The paper further explored the theoretical foundations and constitutional guarantees safeguarding these rights. The authors therefore argued on the role of courts in striking a balance between conflicting rights and drawing justifiable limitations to such rights. The paper concluded that defamation laws play significant roles in protecting reputation and freedom of expression, specifically aimed at balancing freedom of speech and reputation protection, as well as enhanced proper judicial interpretation of defamation laws acting as a catalyst in providing clarity and consistency in the interpretation and application of rights in Nigeria.

Key words: Defamation, Speech and Expression, Freedom, Justice, Law

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1. Introduction

In Nigeria, the tort of defamation plays a significant role in its jurisprudence as it does in many other countries in the world. It is concerned with ‘injury to reputation resulting from words written or spoken by others which tend to lower the plaintiff in the estimation of right-thinking members of society generally.’¹ There are basically two types of defamation-libel and slander. Libel is defamation ‘in a permanent form, the most common being written or printed words’ while slander is defamation in a transient form, most often through the medium of spoken words or gestures.’²

¹ Kodilinye and Aluko., The Nigerian Law of Torts (Revised edition), Spectrum Law Publishing, Ibadan, 1999, p.136.

² Ibid, at p.139

Defamation is *actionable per se*, which means ‘without proof of damage’ because the law presumes damage from publication.³

In Nigeria, as in many other jurisdictions, defamation laws seek to strike a balance between protecting the right to freedom of speech and safeguarding the individual’s reputation. Scholars and intellectuals generally agree that opposing value systems or conflicting interests are reflected in the concepts of freedom of expression and liability for defamatory remarks⁴. One of the rights recognized and safeguarded by the Constitutions of the majority of nations, including Nigeria is the right to freedom of expression. However, this freedom is not without limitations. This right has been subject to limitations since its inception which dates back to the French Declaration of Human Rights in 1789. According to the Declaration, citizens are accountable for misusing their rights to speak freely.⁵

However, although the 1999 Constitution of the Federal Republic of Nigeria (as amended) guarantees the right to freedom of expression under section 39,⁶ section 45, on its part is a limitation-it provides for restriction on and derogation of fundamental rights.⁷ This is to prevent abuse and protect the rights and reputation of others. Defamation laws in Nigeria are governed primarily by common law principles and are also influenced by statutes.

2. History, nature and scope of defamation laws in Nigeria

There is a dearth of information in regards to historical development of defamation law in Nigeria as majority of legal texts in this field do not provide a comprehensive history of the concept. However, the Praetorian Edicts of 130 A.D.,⁸ which marked the end of the Roman Republic and the start of the Roman Empire, are thought to be the source of the law of defamation. The concept dates back to the

³ Dennis Odigie, *Law of Tort, Texts and Cases*, Ambik Press Ltd, Benin City, 2008, p.316

⁴ Alfred H. Kelly, *Constitutional Liberty and the Law of Libel: A Historian’s View*, Vol.7, ISS2, December 1968.

⁵ Article 11, Declaration of the Rights of Man, 1789

⁶ Section 39 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

⁷ Section 45 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

⁸ According to Roman Law, the Praetor’s Edict was an annual Statement of Principles issued by the newly appointed Praetor, a title bestowed by the Roman government on individuals serving in one of two official capacities, either as an elected Magistrate or as the Leader of an army

seventeenth century in England, and the Alien and Sedition At of 1978⁹ in the United States came next gradually evolving till current times.

History has it that the defamation laws in Nigeria initially rooted in common law principles inherited from the British colonial era. These laws were largely based on libel and slander concepts. Nigeria gained independence in 1960, and post- independence defamation laws were gradually shaped by local statutes, court decisions and Constitutional developments. Notable frameworks include the Defamation Ordinance and the Libel and Slander Act.

In recent years, there have been efforts to align defamation laws with Constitutional provisions safeguarding freedom of expression enshrined under *section 39* of the 1999 Constitution (as amended).¹⁰ This section guarantees the right to freedom of expression but also allows for limitations in the interest of public order, morality, and national security. *Section 34*¹¹ of the Constitution stands as constitutional basis for the law of Defamation in Nigeria.

Additionally, court decisions and legislative amendments have played significant roles in refining defamation laws addressing issues such as the defenses of fair comment, justification, qualified privilege, among others. However, challenges remain and ongoing legal developments may further shape the landscape of defamation laws in Nigeria.

Legal scholars and writers have presented a plethora of definition of the concept. Some say “it is concerned with injury to reputation resulting from written or spoken by others”.¹² A defamatory statement may be defined as one which tends:

- i. to lower the plaintiff in the estimation of right-thinking members of society generally; or
- ii. to expose him to hatred, contempt or ridicule; or
- iii. to cause other persons to shun or avoid him; or
- iv. to discredit him in his office, trade or profession; or
- v. to injure his financial credit.¹³

⁹ A Magalla, “A Critical Assessment of the Development of Information, Communication and Technology” (2013), *Tumani Law Journal*, p.2.

¹⁰ Constitution of the Federal Republic of Nigeria (as amended).

¹¹ Constitution of the Federal Republic of Nigeria (as amended).

¹² Kodilinye and Aluko, *The Nigerian Law of Torts* (Revised edition), Spectrum Law Publishing, Ibadan, 1999, p. 136

¹³ Ibid

Consequently, any expression or statement, written, spoken or made in any other manner, which has any of the above effects on a person is defamatory in the absence of justification or legal defence.¹⁴ In *African Press Ltd v Ikejiani*¹⁵, the plaintiff medical doctor sued for libel in respect of an article which alleged that the plaintiff was a “fake” medical doctor. In fact, the plaintiff had a degree as a doctor of medicine, so, the allegation that he was a “fake” was untrue. The West African Court of Appeal dismissed the defendant’s appeal and the plaintiff defendant got judgement in his favour.

In an action for defamation, a plaintiff has a duty to prove some essential ingredients. These include:

- (a) Publication of the offending words;
- (b) that the words complained of refer to the plaintiff;
- (c) that the words are defamatory of the plaintiff;
- (d) that the publication was made to someone other than the plaintiff, that is to say, a third party;
- (e) That there is falsity or lack of accuracy of the words complained of.¹⁶

3. Right to Freedom of Expression

Section 39 of the 1999 Nigerian Constitution (as amended) provides that:

- 1. every person shall be entitled to freedom of expression, including to hold opinions and to receive and impart ideas and information without interference.
- 2. without prejudice to the generality of the subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions provided that no person, other than the government of the federation or a State, or any other person or body authorized by the President on fulfilment of a condition laid down by an Act of National Assembly, shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever.¹⁷

Similarly, several international agreements pertaining to fundamental freedoms and Human Rights also include the right to freedom of speech. Specifically, *Article 19 of the International Covenant on Civil and Political Rights*¹⁸ provides for the right to freedom of expression as follows:

- 1. Everyone shall have the right to hold opinions without interference

¹⁴ Ese Malemi, *Law of Tort* (2nd ed.) Princeton Publishing Co., Lagos, 2017, p. 533

¹⁵ (1953) 14 WACA 386

¹⁶ Dennis Odigie, *Law of Tort, Texts and Cases*, Ambik Press Ltd, Benin City, 2008, p.316.

¹⁷ *Section 39, 1999 Constitution of the Federal Republic of Nigeria* (as amended)

¹⁸ *Article 19 of the ICCPR*

2. 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 print, in the form or art, or through any other medium of his choice.
3. The exercise of the rights provided in *paragraph 3* of this Article carries with it special duties and responsibilities. It may therefore be subjected to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the right or reputation of others; (b) for the protection of national security or of police orders, or of public health or morals.

Additionally, the right to freedom of expression is provided for and guaranteed by the *Universal Declaration of Human Rights (UDHR)* under its *Article 19*¹⁹ which has been recognized as *jus cogens*. It provides that:

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

Also, *Article 9 of the African Charter on Human and Peoples Rights*²⁰ which Nigeria has domesticated further guarantees the right to freedom of expression in the following terms:

1. Every individual shall have the right to receive information
2. Every individual shall have the right to expression and disseminate his opinion within the law

4. Relationship between Defamation Laws and Freedom of Expression

Suffice to say that without defending the rights connected to people's freedom expression, no society can reach its full potential. It is equally vital to remember that there are limitations to the right to free speech. This privilege is acknowledged to be subject to some restrictions, such as the laws against defamation, sedition, treason, and treasonable felonies. The right of other citizens to have their reputation protected must be considered in the context of freedom of expression. Under Nigerian law, the courts are essential in striking a balance between the competing goals of

¹⁹ Article 19 Universal Declaration of Human Right

²⁰ The African Charter on Human and People's Rights (Ratification and Enforcement) Act, Cap A9 LFN 2004

reputation preservation and freedom of expression. According to the provisions of *Article 19 of the Universal Declaration of Human Rights*; ‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinion without interference and to seek, receive and impart information, and ideas through any media and regardless of frontiers.’²¹

Article 19 of the International Covenant on Civil and Political Rights provides for the right to freedom of opinion as follows:

Everyone shall have the right to hold opinions without interference. 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 print in the form of art or through any other medium of his choice.

*Article 9 of the African Charter on Human and Peoples Rights*²² provides for the protection of freedom of expression as follows; ‘Every individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinion within the law.’²³

*Section 39(1)*²⁴ of the 1999 Constitution of the Federal Republic of Nigeria (as amended) provides that:

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

On the other hand, *section 34(1)*²⁵ of the Constitution of the Federal Republic of Nigeria (as amended), which is the constitutional basis for defamation laws provides ‘every individual is entitled to respect for the dignity of his person....’ The 1999 Constitution (as amended), specifically *section 9(3)* and *45(1)* guarantee the rights to freedom of expression. However, certain other fundamental rights are qualified or subject to limitations for the following reasons, namely defence, public safety, public order, public morality, public health or safeguarding the rights and freedom of others. The complicated and divisive field of defamation law aims to reconcile two sometimes at

²¹ I. J. Udofa, ‘The Law of Defamation in Nigeria’ *International Journal of Advanced Legal Studies and Governance* 2(1) (2011): 76.

²² Ese Malemi: “Mass Media Law and Press Law” (3rd ed.) Princeton Publishing Co. Ikeja, Lagos, 2013.

²³ Article 9, African Charter on Human and People’s Rights

²⁴ *Section 39(1)* of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

²⁵ *Section 34(1)* of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

odds interests – reputation, preservation and freedom of speech. International human rights instruments acknowledge the value of freedom of expression, as well as of reputation and privacy. For example, *Articles 17 and 19 of the International Covenant on Civil and Political Rights (ICCPR)* state; ‘(Article 17) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence nor to unlawful attacks on his honour and reputation.’

Furthermore, (Article 19) 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...’²⁶ Therefore, when someone’s reputation is damaged, they have a right of action under the tort of defamation.

5.The inter-relation Freedom of Speech and Reputation Protection

Aleinikoff asserts that ‘balancing’ can apply to all areas where the resolution of conflicts is the major issue.²⁷ He contends that there is something to be said in favour of two or more outcomes in almost all disputes, particularly those that find their way into the judicial system. Regardless of the outcome, he states, there will be winners and losers; certain policies will be advanced at the expense of others. That is why it is typical to hear that a ‘balancing operation’ needs to be done, and that the choice that yields the maximum net gain is the ‘correct’ one. Aleinikoff makes reference to “theories of constitutional interpretation that is based on the identification, valuation, and comparison of competing interests” which is especially relevant in the context of this Article.

He makes reference, for example, to a “balancing opinion” which is a court opinion that considers a constitution question by identifying the parties’ interests and, or establish a rule of constitutional law, either directly, implicitly assigning values to those parties’ interests.

Shriffin, on the other hand, believes that balance is just “a metaphor for the accommodation of values even though every legal conflict calls for some sort of balancing (party A’s case being weighed against party B’s in typical criminal or civil litigation, for example).²⁸ In order to resolve

²⁶ Articles 17 and 19 of the International Covenant on Civil and Political Rights (ICCPR)

²⁷ T. Alexander Aleinikoff, “Constitutional Law in the Age of Balancing” (1987) 96 *Yale L J.* 943

²⁸ Steven Shriffin, “The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment” (1983) 78 *NW UL Rev.* 1212 at 1249.

them, balancing has a special resonance in constitutional theory and adjudication as a constitutional framework.

Freedom of expression serves as the lifeblood of a democracy. It allows for the free-flow of ideas, promotes innovation and dissent, and empowers citizens to participate in their government. Without it, accountability becomes difficult and power structures remain unchecked. On the other hand, reputation protection is essential for individuals to live dignified lives and participate freely in society. Unfounded accusations can cause significant harm, leading to emotional distress, loss of employment and social alienation. The ideal situation would be one where both rights flourish without undue constraints. However, this is not always achievable. Certain forms of expression, such as malicious lies or incitement to violence can inflict severe damage on reputations. Likewise, overly broad defamation laws can have a chilling effect on free speech, stifling legitimate discourse and criticism. Courts, therefore, are tasked with finding the delicate balance between competing interests.²⁹

Different legal systems have developed various frameworks to achieve this balance. A common approach is the Harm Principle which allows for restrictions on freedom of expression only when the speech causes a specific harm such as incurring violence or defaming someone's reputation.

Another framework is the Proportionality Test which considers the nature of the expression, the severity of the harm and the existence of less restrictive means to achieve the desired outcome.

Courts utilize these frameworks by examining the specific context of each case. Factors such as the truthfulness and seriousness of the statement, the public interest in the information, and the manner of publication are all taken into account. Courts must determine whether the harm caused to someone's reputation is outweighed by the public interest in the expression being protected.

6. Comparative analysis on selected jurisdictions: Nigeria, UK & US in balancing Freedom of Speech and Reputation Protection

The essence of this segment is to analyse the differing roles of in balancing freedom of speech and reputation protection in both the Nigerian and, UK and US jurisdictions. As a matter of fact, courts

²⁹ *Olawoyin v Attorney of Northern Nigeria* (1962) 1 All NLR 324

aim to strike a balance between the rights of the individual and the limitations placed on those rights by the government in human rights issues. Various constitutional jurisdiction employ distinct techniques for striking a balance. The development of these techniques in the context of human rights adjudication by the British and America, as well as the challenges Nigerian courts have in faced in handling these cases have existed.

a. United Kingdom (British)

There is no written constitution in use in the United Kingdom. Consequently, they were more likely to discuss administrative law than constitutional law.³⁰ But to the extent that both branches of public law are involved in assessing the conduct of “public authorities”, while having consequences for human rights, the distinction might not be accurate when considering human rights alone. The British similarly lacked a document listing the rights that their citizens were entitled to until the *Human Rights Act of 1998*³¹ came into effect. The enactment of the Human Rights Act domesticated the Convention for the Protection of Human Rights and Fundamental Freedom.³²

The absence of written constitution and a Bill of Human Rights in the British before 1998 does not imply that the rights of individuals were not legally safeguarded. At common law, the courts created adjudicatory criteria to evaluate how public authorities were used in relation to rights that had also been established through common law procedures. However, in contrast to those countries where the legislative power was restrained by constitutionally protected rights, the British parliament is supreme and possesses the legislative capacity to impede the development of common law rights.³³ The courts appeared to alternate between the standards of “illegality, irrationality, and procedural impropriety” established in the *Council of Civil Service Union Case*³⁴ and “unreasonableness” stated in the *Wednesbury Corporation Case*³⁵, when evaluating actions to have violated human rights under British law. The Wednesbury Principle of “reasonableness” was perceived as ambiguous and

³⁰ Chris Hilson, “The Europeanization of English Administrative Law: Judicial Review and Convergence” (2003) 9 *Eur. Pub. L.* 125.

³¹ Human Rights Act, 1998, (UK) L.42 (Human Right Act)

³² 4 November, 1950, 213 UNES 221 at 223, Eur. TSS (European Convention)

³³ David Jenkins, “Common Law Declaration of Unconstitutionality” (2009) 7 *Int’LJ Const L* 18 at 184

³⁴ *Council of Civil Service Unions v. Minister for the Civil Service* (1985) AC 374

³⁵ *Associated Provincial Picture House Limited v. Wednesbury Corporation* (1948) 1 KB 223 (Wednesbury).

faced several criticisms when being compared to other comparable standards, it was not only historically portrayed as a monolithic norm of review but also lacked sufficient structure.

Upon the Human Rights Act of 1998 was passed, the proportionality test was instituted. This occurred together with the courts' renewed zeal for interpreting domestic law generally in light of the European Convention.³⁶ It was necessary for the English court to examine an old principle through a new human rights filter. It happened in ***R v Ministry of Defense***³⁷ with very little success, here the English court of Appeal endeavored to modify the conventional Wednesbury basis to establish a norm that is more consistent with the proportionality test employed in the European court of Human Rights legal precedents.

One distinctive feature of the British court system is that judges compare courts and conduct judicial reviews of executive action and administrative decision-making.³⁸ According to Waldron, if a law violates someone's rights, courts have the authority to examine it carefully to determine whether it complies with those rights and refuse to implement it.³⁹ He uses Britain as an example of a weak version of judicial review since the Human Rights Act was passed. Courts may review legislation under the Act's provisions with the intention of using a "declaration of incompatibility" if the court determines that the legislation under review is incompatible with a right guaranteed by the European Convention. Under the Human Rights Act, a declaration of incompatibility does not affect the legality, on-going operation, or enforcement of the provision in respect of which it was provided, nor does it bind the parties to proceedings in which it is made.⁴⁰

However, the proclamation can prompt a Minister to start a legislative process in an effort to resolve the incompatibility. The European Convention may have had an impact on the increased scrutiny of legislative, executive and administrative process within the proportionality framework.

b. United States of America

³⁶ Margit Cohn "Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom" (2010) 58 *Am J. Camp. L* 583 at 607

³⁷ *R v Ministry of Defence, ex parte Smith* [1996] QB 517

³⁸ Jeremy Walddron, "The Core of the Case against Judicial Review" (2006) 116 *Yale Li* 1346 at 1353

³⁹ *Ibid*, at p. 1354

⁴⁰ Human Rights Act, *Supra*, note 10 "54 (2) (6)

The USA has a written constitution, unlike the United Kingdom. The USA constitution made relatively little mention of safeguards of human rights when it was first enacted.⁴¹ This prompted some scholars to contend that it was consistent with the drafters' understanding that the primary goal of the constitution is to safeguard individual rights and liberty.⁴²

However, over time, specific human rights guarantees were incorporated into the US constitution through amendments, such as the First Amendment, which seemingly provide absolute rights without provision for the legislature to control or place limitations on the enjoyment of the rights guaranteed. The interpretations of these rights, whether absolute or qualified, have been a subject of debate among scholars and jurists. Some argued for absolute rights, believing that the framers intended them to be unequivocal prohibitions against legislative interference⁴³, while others advocate for a more balanced approach, where rights are subject to limitations in cases of conflicting interests.⁴⁴

The US Bill of Rights, including the First Amendment, has been a focal point in this debate. The language of the First Amendment, with its seemingly categorical prohibition on legislative action, has posed challenges for courts in determining the extent of government interference permissible. The legislature would not be to restrict rights inscribed in the law, and the courts would not be required to play the role of balances if the absolutist position won out. In instances where the two interests are at odds, the courses would still be needed to balance rights against greater society interests if non-absolutists held a strong hand. However, the absence of clear guidance within the constitution has further complicated judicial review, especially in balancing individual rights against societal interests.

Additionally, questions arose regarding the application of these rights to state governments, with early beliefs suggesting that the Bill of Rights did not limit State powers.⁴⁵ However, the enactment of the Fourteenth Amendment in 1868, there was an opportunity to extend the application of the Bill of Rights to the States.

⁴¹ Gerald Geenter: "Constitutional Law" (New York: The Foundation Press, Inc., 1985).

⁴² Allan Ides and Christopher May. "Examples and Explanations: Constitutional Law Individual Rights", (New York: Aspen Publisher, 2010) at 1.

⁴³ Alexander Meilejohn, "The First Amendment is Absolute" (1961) Sup. Lt Rev. 245 at 248.

⁴⁴ *Konigsberg v State Bar* (1961) 366 US 36

⁴⁵ *Baron v Baltimore* [1833] 32 US 243

According to EPP, the Fourteenth Amendment's language remained unclear, leading to disputes over its interpretation well into the 20th century.⁴⁶ The lack of procedural resources within the constitution and the Bill of Rights necessitated the courts to develop standards for substantive analysis, with the Equal Protection Clause initially having a limited impact in protecting rights.⁴⁷ It was not until later in the *Carolene case*⁴⁸ where Justice Stone called for a more intense scrutiny in protecting marginalized groups, that there was a shift in judicial approach. The doctrine of "suspect classification" emerged, presuming court constitutional if they discriminated against certain groups. This led to a more strict scrutiny of laws affecting fundamental rights.

The Supreme Court, under Justice Earl Warren, embark on an ambitious agenda to identify new areas appropriate for strict scrutiny, focusing on suspect classifications and fundamental rights. However, the determination of what constitutes fundamental interests remained unclear, leading to ongoing debates and varied standards of review in equal protection cases. Justice Marshall in *San Antonio Independent School District v Rodriguez*⁴⁹ argued for a spectrum of standards based on the constitutional and societal importance of the interest affected. This led to the development of intermediate level scrutiny, balancing governmental interests with individual rights, particularly as cases of sex discrimination. This standard is clearly more intensive than the rational basis reviewer loss demanding than the rigidity of strict scrutiny.

The court established this third category for three main reasons. Firstly, the human rights doctrine was attacked by numerous scholars. Second, there has been a surge in requests for legal protection as a result of growing public awareness of discrimination against groups other than racial groups. Last, but not least, the introduction of legal aid for underprivileged groups had an impact on the growth of innovative judicial intervention on behalf of the poor.⁵⁰ Instead of only declaring a legislation to be valid or invalid based on traditional analysis, the court may examine the goals and methods of the contested statute more thoroughly using this intermediate analytical standard. The

⁴⁶ Charles EPP, "The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Prospective", (Chicago: The University of Chicago Press, 1998) at 30.

⁴⁷ Gayle Lym Pettinga, "Rational Basis with Bite: Intermediate Secretary by any other Name" (1986-1987) 62 *Ind LJ* 779 at 780.

⁴⁸ *United States v Carolene Products Co.* (1938) 304 at 144

⁴⁹ *San Antonio Independent School District v. Rodriguez* (1973) 411 US1

⁵⁰ Gayle Lym Pettinga, *supra* 63 at 784.

court ruled that it does not agree with every state purpose and that, in the event that a different course of action is available, that does not harm the protected group, it may force the legislature collate, that course of action by declaring the statute unconstitutional.⁵¹

When modern American and British Standards of assessment are compared, it becomes clear that while British practice leans towards proportionality, the American approach emphasizes balancing. The question is whether there is a big difference between “proportionality” and “balancing”. Both methods aim to find a fair balance between protecting people’s right and serving the governments’ interests. So, one can assert or argue that they are quite similar.

In both cases, if the government wants to limit someone’s rights, they have to show a really good reason for doing so, and they have to use the least restrictive way to achieve their goal. Chaudhry believes there is a difference between American and British rights adjudication.⁵² In Britain, they adopt the use “proportionality”, where they check if a right is violated and then see if that violation is justified by looking at the overall balance of things. He goes on to say that in the British system, opposing interests are only taken into consideration when applying the principle of proportionality, and rights are typically given a broad interpretation. In contrast, the Americans adopt the use “definitional balancing”, where they decide on the strength of a right in just one step.

However, in both systems, once a government action affects a recognized human right, the government has to give a really good reason for it. They have to prove that their action is justified and they do this by carefully balancing the right against the government’s interest through a structured process.

c. Nigeria

In both the United Kingdom and United States of America, the courts have used judicial tools to balance rights and governmental interests. However, Nigeria has a different approach. Instead of allowing the courts to strike the balance from scratch, the constitution provides a general limitation

⁵¹ *Graig v. Baren* (1976) 429 U.S. 190

⁵² Choidhry S., “After the Rights Revolution: Bills of Rights in the Post Conflict State” (2010) 6 *Ann Rev. Soc. Sci.*, 301.

on human rights provisions, but not all rights are subject to this limitation. *Section 45*⁵³ of the 1999 Constitution (as amended) provides that:

Nothing in section 37 [Privacy], 38[conscience, thought and religion], 39[expression], 40[Assembly] and 41 [movement] 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.

Independent limitation provisions are also present in some quarters, for example, while *section 33(2)* limits the circumstances in which life may be taken – such as protecting someone else from harm or quelling a riot, *section 33(1)* secures the right to life. *Section 35* also permits restrictions on the right to liberty, subject to specific conditions and guidelines. The right to a fair hearing is guaranteed by *section 36*, which is excluded from both the general limiting clause and any other particular provision.

Similar to the two previously reviewed jurisdictions, Nigerian courts have the responsibility of reading the guarantees cited in cases alleging violations of human right before making a decision whether the alleged abuser might be justified in light of any constitutionally permitted restrictions. This is no way a light task, especially because constitutional terminology is as vague as it usually is. This is supposedly because the meaning of the words “reasonably justifiable in a democratic society” in the constitution cannot be determined with any degree of precision.⁵⁴

The only other resources available to Nigerian courts for guidance on interpretation are the language included in the constitution itself. Nigerian courts have a difficult job since they have to examine whether the constitution’s provision expand restrictions against the people’s rights or promote such rights. The rationality and justifiability of legislative and executive activities should be taken into account by the courts when interpreting human rights rules. They should also take into account the local standard of acceptability, historical context, and political and social climate.

The Nigerian Constitution’s limitation system makes no mention of the creation of human rights adjudication standards that are comparable to proportionality balancing. The Nigerian system of restricting rights does not allow for structuralism or the establishment of precise, uniform

⁵³ *Section 45* of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

⁵⁴ B. O. Nwabueze, *A Constitutional History of Nigeria*, Longman Inc., London (1982) at 118.

procedures for successfully weighing rights against governmental goals.⁵⁵ While the majority of the rights enshrine in the Nigerian constitution, Okonkwo argues that should be subject to the application of the balancing scheme rather than being objectively adherent to strict statutory constructions, the vague language of the constitution does not offer a neutral framework for striking a balance.⁵⁶ He continues by saying that the statement “nothing in this section shall invalidate any law” appears to be skewed in favour of the law that is being challenged, which puts the burden of proof on the challenged party to demonstrate that the law is not rationally justified.⁵⁷ In Nigerian courts, human rights are construed as merely spelt out rules rather than principle which makes balancing these rights in real sense avoided. According to Alexy, “doing exactly what a rule requires is a must if it is legal and appropriate. The rule is followed if this is completed if not, the rule is not followed, while principles are standards that demand that, given the available factual and legal context, something be achieved to the fullest extent feasible.”⁵⁸ They can be satisfied to different degrees, and that the right level of satisfaction relies on both what is legally and practically attainable.⁵⁹

In the significant early case of *Cheranci*, the assumption that every law passed by parliament is constitutional as covered in this.⁶⁰ The burden of proving that the law is not rationally justified falls on the complaining party under this presumption. This assumption is based on the ideas that policy decision belongs in the hands of elected representatives rather than an unelected judiciary, and that legislating is a policy role. This point of view holds that the legislature and the executive branches are ultimately in charge of running the nation, and the judiciary should not become involved in matters beyond what is absolutely necessary. The court in *Director of Public Prosecutions v Chike Obi*⁶¹ concluded that a law approved by the legislature is enough to trigger judicial restraint. This restraint has been referred to as a “plain fact” approach, literalism, or austere by various

⁵⁵ R. Chude Okonkwo, “The Legal Basis of Freedom of Expression in Nigeria” (1978) *A Cal W Int’Li* 216 at 265

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Robert Alexy, ‘The Construction of the Constitutional Rights,’ (2020) *4 Law and Ethics Hum. Rights*, 20

⁵⁹ Ibid.

⁶⁰ *Charanci v. Cheranci* (1960) *NRNLR* 24

⁶¹ (1961) 1 All NLR (Pt. 2) 186

commentators⁶². The Nigerian Supreme Court's approach to human rights adjudication has been described as discounting the normative force of human rights guarantees and minimizing consideration of the context or structure of the Bill of Rights.⁶³

The problematic limitation clause in the Nigerian Constitution was a British invention, and the training and process of recruiting judges in Nigeria have been influence by British practice. Due to this, English law and judicial practices have become instinctive to Nigerian judges, who some claim isolate them from the needs and values of the Nigerian people and prevent them from carrying out the more innovative role that written Constitutions require of their judges.⁶⁴

The absence of well-defined legal criteria in Nigerian courts to validate violations of rights guaranteed by the constitution has resulted in imprecise and disjointed legal procedures. It would have been incorrect to argue that the constitution's limitation provision placed the burden of proof on the person contesting the land or executive action to show that a law or action is not reasonably justifiable in a democratic society if Nigerian courts had followed the proportionality reasoning behind the *Cheranci* decision. Nigerian courts, on the other hand, have not followed or advanced this line of thinking, leaving the legal system with verdicts that lack reasoned justifications.

For example, in the case of *Williams v Majekodunmi* (No.3), the plaintiff, a prominent lawyer, contested a government restriction order that was imposed upon him, that it was not reasonably justifiable.⁶⁵ The government countered his claim that the order was not reasonably justified. In its judgment, the Supreme Court concluded that the restriction order was not rationally justifiable. On the other hand, in the case *Adegbenro v Attorney-General of the Federation*, prior to the alleged appointment of the plaintiff, the Western Region Premier was allegedly removed from office, resulting in two factions within the ruling party in that region; the plaintiff's attempt to convene a meeting of the House of Assembly ignited the disturbance that ultimately led to the plaintiff

⁶² Hakeem Yusuf. "Telling the Judiciary to account for the past: Transitional Justice and Judicial Accountability in Nigeria" (2008) 0 *Law and poly* 194 at 212, B. Obinna Okere: "Judicial Activism and Positivity in Interpreting the Nigerian Constitution" (1987)6 1CL Q 288 at 803.

⁶³ Solomon Ukhuegbe: Human Rights Decision-making in Emergent Courts: The Supreme Court of Nigeria 1961-2000, PhD Thesis, Osgoode Hall Law School, York University, 2009) [unpublished].

⁶⁴ B. O.Nabueze "Judicialism and Commonwealth Africa: The Role of Courts in Government", C. Hurst, London (1977).

⁶⁵ (No.3) [1962] 1 All NLR 412

receiving a restriction order, that the plaintiff wishes to resume his role as Premier of that region.⁶⁶ The Supreme Court held that the restriction order placed on the plaintiff was reasonably justifiable.

The case of *Adegbenro v Attorney-General of the Federation* arose from similar facts as that of *Williams v Majekodunmi* (supra), yet the Supreme Court reached contradictory judgements within little coherence or structured process.

The court seemed more inclined in both instances to defend the restriction than to find a middle ground between it and the parties' respective rights. Despite finding in the challenger's favour in the previous case, the court failed to provide any useful guidelines that would have helped in further cases. For all intents and purposes, the court simply said that the restriction was not reasonably justifiable. If the court had tried to justify its decision, any such justification would have at least been an attempt in some balancing activity.

In *Chukwuma v Commissioner of Police*, which is a more recent court decision, where the police broke into a private hotel where a group of Nigerian nationals who belonged to a socio-cultural organization were meeting. Under the guise of obtaining no police permit for the meeting, they broke up the gathering and sealed off the location.⁶⁷ The Court of Appeal ruled that since the meeting's organizers had not obtained the necessary permit, the police had the authority to call it off. The Chukwuma ruling did not even acknowledge the constitutional right to assemble and its connection to the Police Order Act, especially when it came to weighing that right against the public interest of preserving calm.

Also, in *Inspector-General of Police v All Nigeria Peoples Party and others*, twelve registered political parties in Nigeria filed asking the Court of Appeal to rule on whether a police permission or any other comparable written official authority is necessary to hold a demonstration or procession in any region of Nigeria.⁶⁸

In addition, they looked into whether the Public Order Act's prohibitions on processions and rallies without a Police authorization were lawful or unconstitutional given that *section 39 and 40 of the 1999 Constitution* guarantee the Freedom of Expression and freedom of Assembly. It was

⁶⁶ (1962) 1 All NLR 431

⁶⁷ (2005) NWLR (Pt. 927) 278

⁶⁸ (2007) 18 NWLR (Pt. 1066) 457

determined by the court that citizens' fundamental rights could not be suppressed under the pretence of a police permit requirement.

It declared certain provisions of the Public Order Act null and unconstitutional on these grounds, finding them to be inconsistent with the constitution. The court on this case referred to the *Chukwuma's case* however, it did not clearly state whether or not it was overruling this previous judgment.

The above cases illustrate the lack of balancing in human rights analysis and problematic judgment. The absence of any structured justification in these decisions further strengthens the argument that Nigeria's case law lacks clear judicial standards for justifying instructions on constitutionally protected rights. This lack of standards has consequences for uniformity in court practices as well as for the objectivity of decisions rendered. Therefore, it is crucial to develop judicial standards for balancing and proportionality in human right adjudication to create a more robust and executive protection of human rights in Nigeria. Nigerian courts differ from those in other jurisdictions in that they lack a balancing standard, which is a prerequisite for consistency in judicial procedures and objectivity. American balancing and British constitutional cultures have developed standard of analysis for human rights cases. It is difficult to find comparable standards in Nigerian courts which can result to contradictory and uncertain decisions.

7. Conclusion and Recommendations

The paper demonstrated defamation laws and balancing freedom of speech and reputation protection in Nigeria. It presented fundamental principles of the concept theoretical foundations of freedom of speech, legal and constitutional safeguards and limitations of the concept. It did a comparative judicial approach of the concept in United States of America, United Kingdom and Nigeria and highlighted the importance of balancing these rights in a democracy. The paper also examined how defamation laws suppress free speech, public debate and expressions, and the role of the courts in reconciling competing interest.

This paper concludes that defamation laws play an important role in protecting reputation and freedom of speech but need to be carefully balanced to ensure that they do not interfere with fundamental rights.

The paper recommends a legal framework that balances freedom of speech and reputation protection, enhances proper judicial interpretation of defamation laws and provides clarity and

consistency in the interpretation and application of rights in Nigeria as obtainable in civilized country the world over.