

CRIMINALISATION OF FREE SPEECH: A COMPARATIVE STUDY OF THE NIGERIAN
CYBERCRIMES ACT*

Abstract

The Nigerian Cybercrimes (Prohibition, Prevention, etc.) Act 2015 (as amended in 2024) criminalises broad categories of online expression, including messages that are described as being 'grossly offensive' or cause 'annoyance' or 'insult.' This article undertakes a comparative analysis of these provisions against constitutional free speech guarantees under Section 39 of the 1999 Constitution and the African Charter on Human and Peoples' Rights. Drawing on case law from Nigeria, South Africa, Kenya, and the European Court of Human Rights, the article argues that the Act's vague and overbroad provisions chill legitimate speech and violate constitutional standards. It proposes targeted amendments to align the Act with international best practices.

Keywords: Free Speech, Cybercrime, Criminalisation, Nigeria, Cybercrimes Act, Constitutional Law.

1. Introduction

The digital age has transformed the exercise of free speech, but it has also created new avenues for alleged harms. In response, Nigeria enacted the Cybercrimes (Prohibition, Prevention, etc.) Act in 2015, amended in 2024.¹ The Act criminalises online speech-related conduct including cyberstalking, identity theft, the distribution of racist material and amongst others.² However, these provisions have attracted significant criticism in the light of Section 39 of the 1999 Constitution which guarantees freedom of expression, including the right to hold opinions and impart ideas without interference.³ This right is not absolute. Composite reading of Section 39(3) and Section 45 permits reasonable limitations in the interests of defence, public safety, public order, public morality, or public health.⁴ The central question is whether the limitations imposed by the Cybercrimes Act are 'reasonable' and 'justifiable in a democratic society.'⁵ This article addresses three questions: What speech-related provisions does the Cybercrimes Act contain? How do these provisions compare with constitutional free speech guarantees? What reforms are necessary?

2. The Nigerian Constitutional Framework for Free Speech

Section 39(1) of the 1999 Constitution provides: 'Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.'⁵ However, the above provision is not absolute and without exceptions. In *Okafor & Ors v. Ntoka & Ors*⁶, the court held on the right to freedom of expression and its exceptions as follows:

Section 39 provides as follows: - 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. Without prejudice to the generality of Subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions: Provided that no person, other than the Government of the Federation or of a State or any other person or body authorized by the President on the fulfillment of conditions laid down by an Act of the National Assembly, shall own, establish or operate a television or wireless broadcasting station for, any purpose whatsoever. 3. Nothing in this section shall

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¹ Cybercrimes (Prohibition, Prevention, etc.) Act 2015 (No 15 of 2015); Cybercrimes (Prohibition, Prevention, etc.) (Amendment) Act 2024 (No 6 of 2024).

² Cybercrimes Act 2015, ss 22-26

³ Constitution of the Federal Republic of Nigeria 1999 (As Amended), s 39(1).

⁴ Constitution of Nigeria 1999 (As Amended), s 39(3) & s. 45

⁵ Constitution of Nigeria 1999, s 39(1).

⁶ (2017) LPELR-42794(CA) Per Helen Moronkeji Ogunwumiju, JCA (Pp 27 - 28 Paras D - E)

invalidate any law that is reasonably justifiable in a democratic society - a. for the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of Courts or regulating telephony, wireless broadcasting, television or the exhibition of cinematograph films; or b. imposing restrictions upon persons holding office under the Government of the Federation or of a State, members of the armed forces of the Federation or members of the Nigeria Police Force or other Government security services or agencies established by law.

Relying on the above provisions, the Supreme Court in *Ukegbu v NBC*⁷ held that the Nigerian Broadcasting Code restricting/controlling the direct relay of foreign news is a law that is reasonably justifiable in a democratic society within the meaning of Section 39(3) of the 1999 Constitution. It neither contravenes nor is it inconsistent with other provisions of the Constitution.

In addition to the exceptions provided under Section 39(3), the above section is subject to the overriding provisions derogating provisions of Section 45 of the 1999 Constitution. Section 45(1) permits limitations 'reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health.'⁸ In *Tayo v. A.G of the Federation*⁹ the court held that Section 45 provides: 'Nothing in Sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society - (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom of other persons.' It is clear, that the action of the Public Officers is for the interest of the public safety and public health.' From the above provisions, the constitutional guarantee to freedom of expression can be watered down in the overriding interest of public morality, public safety, defence or order.

The Nigerian courts have developed a rich jurisprudence on this provision. In *Attorney-General of Lagos State v Dosunmu*, the Supreme Court established the 'reasonableness test' for limitations on fundamental rights.¹⁰ The African Charter on Human and Peoples' Rights, to which Nigeria is a party, guarantees freedom of expression under Article 9, with permissible limitations only as provided by law and necessary for respect of others or national security.¹¹ Thus, the ground for striking down the provisions of any law for violating the constitutional freedom of expression is unreasonableness. Once the law or its provision is reasonable in a democratic society, it will be upheld.

3. The Cybercrimes Act: Speech-Criminalising Provisions

Section 22: Identity Theft and Impersonation: Section 22 criminalises identity theft and impersonation. This provision is relatively unproblematic from a free speech perspective, as it targets fraudulent conduct rather than expression.¹²

Section 24(1)(a): 'Grossly Offensive' Messages: Section 24(1)(a) criminalises the use of a computer system to 'knowingly and intentionally' send a message that is 'grossly offensive, pornographic or of an indecent, obscene or menacing character.'¹³ The term 'grossly offensive' is subjective and lacks objective definition. An attempt at an imprecise definition will pose a challenge as what constitutes grossly offensive may be relative depending on the individual and the clime. Further, the Act failed to offer a definition of the term

⁷ (2024) LPELR-80161(SC), Per Jummai Hannatu Sankey, JSC (Pp 68 - 68 Paras C - E)

⁸ Constitution of Nigeria 1999, s 45(1)

⁹ (2025) LPELR-80687(CA)

¹⁰ AG Lagos State v. DOSUNMU (1989) LPELR-3154(SC)

¹¹ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 9.

¹² Cybercrimes Act 2015, s 22.

¹³ Cybercrimes Act 2015, s 24(1)(a).

grossly offensive, thus leaving its meaning open to vagaries of interpretation. The penalty is severe and involves a fine of up to N7, 000,000 or imprisonment for up to three years, or both.¹⁴

Section 24(1) (b): Causing 'Annoyance' or 'Insult': Section 24(1)(b) criminalises sending a message 'for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, ill will or needless anxiety.'¹⁵ This provision criminalises mere 'annoyance' and 'insult'-categories of speech that are protected under constitutional free speech guarantees. In *FRN v. Agba*, a journalist was prosecuted for a Facebook post criticising a government official, raising concerns about the use of the Act to suppress dissent.¹⁶

Section 24(2) (c): Racist and Xenophobic Material: Section 24(2) (c) criminalises the distribution of 'racist or xenophobic' material.¹⁷ While the intention to prohibit hate speech is legitimate, the provision lacks a clear definition of these terms and does not include a defence of truth or public interest. The penalty is up to N10, 000,000 or imprisonment for five years.¹⁸

4. Comparative Jurisdictions

South Africa

South Africa's Constitution protects free speech under Section 16, with limitations permitted under Section 36 only if 'reasonable and justifiable in an open and democratic society.'¹⁹ The Cybercrimes Act 2020 criminalises certain speech but incorporates constitutional defences. In *S v. Mamabolo*, the Constitutional Court held that criminal defamation must be narrowly construed to avoid chilling protected speech.²⁰ In *Islamic Unity Convention v Independent Broadcasting Authority*, the Court struck down vague hate speech provisions, requiring that restrictions be precisely defined.²¹

Kenya

Kenya's Constitution protects free speech under Article 33.²² The Computer Misuse and Cybercrimes Act 2018 has been criticised for overbreadth. In *Geoffrey Andare v. Attorney-General*, the High Court held that vague speech restrictions violate constitutional guarantees.²³ In *Okiya Omtatah v. Attorney-General*, the Court struck down provisions criminalising 'false information' as insufficiently defined.²⁴

United Kingdom

Section 127 of the Communications Act 2003 criminalises sending 'grossly offensive' messages.²⁵ The provision has been criticised for vagueness. In *DPP v. Collins*, the court held that 'grossly offensive' must be assessed objectively, but the standard remains uncertain.²⁶ The Online Safety Act 2023 establishes a new regulatory framework, shifting from criminalisation to platform regulation.²⁷ The European Court of Human Rights has addressed similar issues. In *Delfi AS v. Estonia*, the Court held that liability for third-party

¹⁴ Cybercrimes Act 2015, s 24(1).

¹⁵ Cybercrimes Act 2015, s 24(1)(b).

¹⁶ *C.O.P v. Jalingo* (2026) LPELR-83623(CA)

¹⁷ Cybercrimes Act 2015, s 24(2)(c).

¹⁸ Cybercrimes Act 2015, s 24(2).

¹⁹ Constitution of the Republic of South Africa 1996, ss 16, 36.

²⁰ *S v. Mamabolo* (2001) ZACC 17; 2001 (3) SA 409 (CC), para 45.

²¹ *Islamic Unity Convention v. Independent Broadcasting Authority* (2002) ZACC 14; 2002 (4) SA 294 (CC), para 38.

²² Constitution of Kenya 2010, art 33.

²³ *Geoffrey Andare v. Attorney-General* (2016) eKLR (High Court of Kenya).

²⁴ *Okiya Omtatah v. Attorney-General* (2020) eKLR (High Court of Kenya), para 62.

²⁵ UK Communications Act 2003, c 21, s 127.

²⁶ *DPP v. Collins* [2006] UKHL 40; [2006] 1 WLR 2223, para 12.

²⁷ UK Online Safety Act 2023, c 32, ss 10-15.

comments may violate free speech if safeguards are inadequate.²⁸ In *Sanchez v. France*, the Court held that criminalisation of insulting a head of state was disproportionate.²⁹

5. Constitutional Analysis

Vagueness

The void-for-vagueness doctrine requires that criminal laws be sufficiently clear to give notice of prohibited conduct and prevent arbitrary enforcement.³⁰ Section 24(1) (a)'s 'grossly offensive' and Section 24(1)(b)'s 'annoyance' and 'insult' fail this test. What constitutes 'annoyance' is inherently subjective, inviting selective prosecution.

Overbreadth

The overbreadth doctrine prohibits laws that sweep too broadly, punishing protected speech alongside unprotected speech. Section 24(1)(b) criminalises speech causing 'insult' - a category that includes core political speech. As the Supreme Court of Nigeria held in *Gani Fawehinmi v. President FRN*, political criticism, even when insulting, is protected.³¹

Proportionality

Even where a legitimate aim exists (example, preventing hate speech), the means must be proportionate. The severe penalties under Section 24- up to three- or five-years imprisonment- are disproportionate for minor speech offences.³²

Absence of Defences

The Act lacks constitutional defences available in defamation law, including truth, fair comment, and public interest.³³ A person who accurately reports racist conduct could be prosecuted for distributing 'racist material.'

6. Reforms for Nigeria

Legislative Amendments. Section 24(1) (a) should be amended to target only 'credible threats of violence.' The phrase 'grossly offensive' should be deleted. Section 24(1) (b) should be repealed entirely. Section 24(2)(c) should define 'racist or xenophobic material' by reference to the Rabat Plan of Action's six-part threshold test, requiring incitement to imminent violence.³⁴

Constitutional Defences: The Act should be amended to incorporate defences of truth, public interest, and reasonable comment by borrowing leaf from section 14 of South African Cybercrimes Act 19 of 2020.

Proportionate Penalties: Maximum penalties should be reduced. Imprisonment should be reserved for credible threats of violence; other offences should carry fines or community service.³⁵

Prosecutorial Safeguards: Prosecutions under Section 24 should require prior written approval of the Attorney-General of the Federation, with reasons recorded, to prevent abusive prosecutions.

²⁸ *Delfi AS v. Estonia* (App No 64569/09, 2015) ECtHR, para 156.

²⁹ *Sanchez v. France* (App No 45581/15, 2021) ECtHR, para 87.

³⁰ *Gani Fawehinmi v. President FRN* (2007) 10 NWLR (Pt 1042) 1 (SC), para 32. This is also the purport of Section 36(1) of the Constitution of the Federal Republic of Nigeria (As Amended) which that an offence must be defined and the punishment prescribed in a written law before can be tried and convicted therein.

³¹ *Gani Fawehinmi v. President FRN*, *supra*

³² Cybercrimes Act 2015, s 24(1)-(2).

³³ See *FRN v. The Punch Nigeria Ltd* (2018) 9 NWLR (Pt 1625) 1 (CA) (fair comment defence in defamation).

³⁴ UN Human Rights Council, 'Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence' (2012) para 22-29

³⁵ Kenyan Computer Misuse and Cybercrimes Act No 5 of 2018, s 28 (reduced penalties after constitutional challenge).

7. Conclusion

The Nigerian Cybercrimes Act, in its current form, violates constitutional free speech guarantees, particularly section 24 of the Act. The provisions are vague, overbroad, and lack adequate safeguards. Comparative jurisdictions- South Africa, Kenya, and the United Kingdom- offer models for reform. Nigeria should amend the Act urgently to align with international human rights standards and its own Constitution. Free speech is the foundation of democratic society; its criminalisation should be reserved for the most serious harms, not for messages that cause mere ‘annoyance.’