

Limiting rights or testing limits? The constitutional paradox of legislative criminalisation of fundamental rights

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Abstract

The two major constitutional legislative procedures for controlling unbridled exercise of rights are the civil limitation and criminalisation of such actions. Legislatures employ these same modalities when they rely on constitutional limitation clause to limit fundamental constitutional rights. The objective of this paper is to interrogate legislative criminalisation of fundamental constitutional rights as a tool for the limitation of fundamental constitutional rights of persons. The methodology is doctrinal. Among other things, this paper will show that the constitutional basis for any criminalisation regime is not just the constitutional legislative power to legislate on any aspect of fundamental constitutional right matters. It is also legislatures' constitutional legislative power to legislate on the least crucial aspect of a fundamental constitutional right that

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must be operative. Upon further finding that this crucial aspect of fundamental constitutional right matter is inoperative, the paper recommends that courts and legislatures exculpate themselves from this constitutional legislative anomie.

Keywords: Compelling state interest, constitutional legislative competence, direct criminalization, fundamental constitutional right, national constitution

1 Introduction

In most federal democracies of the world,¹ the national constitutions do not contain penal provisions,² as these are usually left to be taken care of by ordinary statutes.³ The above statement is also the position of the Nigerian Supreme Court⁴ on the Constitution of the Federal Republic of Nigeria (CFRN) 1999.⁵ The consequence is that a state's power to punish acts constituting offences is mostly competently conferred, not by the national constitutions, but by their derived ordinary statutes. The constitutional competence of the federal or state legislatures within a state to create and punish offences is not at large, but is clearly conferred on the respective legislatures by the national constitutions. It is trite law that for a legislature to have the competent authority to enact a law on a constitutional legislative matter which has been appropriately, constitutionally assigned to the legislature, the legislature shall have a competent constitutional legislative power to legislate on an equally competent constitutional legislative matter.⁶ Under the United States (US) national constitution,⁷ the power of the US federal legislatures to make

¹ Including Nigeria, United States of America (U.S.) and Canada.

² There are some exceptions, for instance the U.S. Constitution.

³ U.S. employs constitutional criminalization with other constitutional c stratagems.

⁴ In *Attorney General of Abia State & 2 Ors v Attorney-General of the Federation & 33 Ors* (2006) 2 All NLR 24.

⁵ Cap C23 Laws of the Federation of Nigeria (LFN) 2004 (CFRN).

⁶ See in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (CanLII) 184; CFRN s 4 & 318(1) and Parts I, II & III of the Second Schedule. Similar provisions are found in the constitutions of other federations.

⁷ See CRS Report R43023, Charles Doyle, Congressional Authority to Enact Criminal Law: An Examination of Selected Recent Cases (CRS Report R43023, 2013) <https://crsreports.congress.gov> accessed 19 April 2025.

criminal laws is provided for by the Necessary and Proper Clause,⁸ Commerce Clause,⁹ Article I, Section 8, Clause 10,¹⁰ Spending Clause,¹¹ and the Military Clause.¹² Federal constitutional legislative matters are enumerated in the relevant legislative list. Although the US constitution has granted the federal legislatures extensive legislative powers,¹³ that constitution only explicitly empowered the Congress to enact criminal law in only three places: punishment of counterfeiting US securities and current coin;¹⁴ definition and punishment of piracies and felonies committed on the high seas, and offenses against the law of nations;¹⁵ and crime of treason.¹⁶ The remaining congressional competence to enact criminal laws are found in the implementation power of the US Congress, that is, the constitutional legislative competence to enact laws necessary and proper to the implementation of those other powers,¹⁷ including the authority that by implication includes the authority to enact reasonably related criminal laws.¹⁸

The Necessary and Proper Clause of the US constitution allows the Congress to legislate criminal enactments when reasonably related to Congress's constitutionally enumerated powers. Even at that, this latter federal constitutional criminal competence is not unlimited. The US federal government, being a creature of the US constitution,¹⁹ can only enjoy authorities that are traceable back to the constitution. The US Congress, as an arm of US government, is also not left out of this limited government;²⁰ as the Congress's criminal law legislative

⁸ U.S. Constitution art I s 8 cl 18; *U.S. v Comstock* (2010) 560 US 126, 130 S Ct 1949.

⁹ U.S. Constitution art I s 8 cl 3; *National Federation of Independent Business v Sebelius* (2012) 567 US 519, 132 S Ct 2566.

¹⁰ See *United States v Smith* (1820) 18 U.S. (5 Wheat.) 153, 158-59. The US Supreme Court interprets the Clause to have three distinct grants of power.

¹¹ U.S. Constitution art I s 8 cl 1; *South Dakota v Dole* (1987) 483 U.S. 203, 207-208.

¹² U.S. Constitution art I, s 8, cl 11, 12, 13, 14, 16; see also *U.S. v Brehm* (2012) 691 F.3d 547, 549 (4th Cir).

¹³ U.S. Constitution art I, s 1 (granting all legislative powers therein to U.S. Congress).

¹⁴ *ibid* art I s 8 cl 6.

¹⁵ *ibid* art I s 8 cl 10.

¹⁶ *ibid* art III s 3.

¹⁷ This clause enables a constitutional legislative power to legislate on ancillary or incidental aspects of a constitutional legislative matter.

¹⁸ US Constitution art I s 8 cl.

¹⁹ *Reid v Covert* (1957) 354 U.S. 1

²⁰ *United States v Morrison* (2000) 529 U.S. 598

power and matters are not boundless. US Congress is shackled with limitations of federalism,²¹ and limitations of individual persons' fundamental constitutional rights. In most federations also,²² states are partially sovereign and autonomous, and unless the national constitution takes away state power and gives it to the federal government, the states have broad residual authority to regulate activities within the state.²³ Most criminal laws at the state level are therefore derived from the state's general police powers, or authority to make and enforce criminal law within their geographic boundaries.²⁴

The Nigerian criminal law framework, for the federal or state legislatures, is not the same as that of the US. In Nigeria, criminal and civil constitutional legislative competence of the federal and state legislatures is composed of constitutional legislative powers and constitutional legislative subject matters neatly arranged for civil and criminal legislations.²⁵ Within Item 68 of Part I of the Second Schedule²⁶ are the constitutional legislative matters for the federal legislation of criminal laws. Constitutional legislative federal criminal matters are in Part III of the Second Schedule²⁷ as the incidental and supplementary matters to the other enumerated matters in the Second Schedule to the CFRN. The constitutional legislative criminal subject matters for state legislatures are the incidental and supplementary matters to the other unremunerated matters in the Second Schedule to the CFRN. In this way, the federal legislatures are the only competent authority to enact federal criminal laws as incidents to the realization of the objects in enumerated matters,²⁸ while the state legislatures are the only

²¹ The limitations that flow from the fact the constitution emerged as a compact between the sovereign it created and the sovereigns that created it, as espoused in Kenneth R Thomas, *Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power* (CRS Report RL30315, 2013)

²² Including U.S. and Nigeria.

²³ *Brecht v Abrahamson* (1993) 507 U.S. 619, 635; *Patterson v New York* (1977) 432 U.S. 197, 201.

²⁴ See Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (Columbia University Press 2005) 18–28.

²⁵ See CFRN s 4 (harbouring all the constitutional legislative powers), and the Second Schedule (harbouring the constitutional legislative subject matters).

²⁶ *ibid*

²⁷ *ibid*

²⁸ CFRN Second Schedule.

competent authorities to enact state criminal laws as incidents to the realization of the objects in the unremunerated matters in the Second Schedule to the CFRN.²⁹

Fundamental constitutional rights are those rights of persons which stand above the ordinary laws of the land, and which in fact is antecedent to the political society itself. It is a primary condition to a civilized existence.³⁰ According to the Court in *Asemota v Yesufu & Anor*,³¹ fundamental right is an undoubted inalienable right which corresponds to a *jus naturale*, a natural law.³² Fundamental rights are so basic that they are inserted into the national constitutions. In Nigeria, for instance, fundamental rights are inserted in sections 33-45 of the CFRN,³³ while section 46 of the CFRN provides for the constitutional enforcement of the rights.³⁴ In the US, fundamental rights under the US constitution are primarily outlined in the Bill of Rights, which consists of the first ten amendments to the US constitution.³⁵ These amendments, like sections 33-45 of the CFRN, directly or impliedly, guarantee fundamental rights such as freedom of expression, privacy, movement, life and liberty. The Fourteenth Amendment to the US constitution provides further protections against state actions that infringe upon fundamental rights. Unlike the constitutional provision for the judicial enforcement of fundamental rights in Nigeria, there is no such provision in the US constitution; but an alleged state violation of fundamental right creates 'constitutional tort,' a cause of action that is distinct from any otherwise available state tort remedy.³⁶ Constitutional tort or

²⁹ See also *Attorney General of Abia State & 2 Ors v Attorney-General of the Federation & 33 Ors*. (2006) 2 All NLR 24.

³⁰ See *Ransome-Kuti v The Attorney General Federation* (1985) 2 NWLR (PT. 6) 211.

³¹ (1981) 1 NSCR 420 (Eso, JSC).

³² O. Awolowo, *Path to Nigerian Greatness* (Fourth Dimension 1981).

³³ *Raymond S. Dangote v Civil Service Commission, Plateau State & Ors* (2001) 4 SCNJ Page 131.

³⁴ *Mitin v COP Bayelsa State* (2023) 12 NWLR (Pt. 1898) 259 (SC).

³⁵ It also includes the 14th Amendment to the US constitution.

³⁶ A mostly academic term originating posterior to the Supreme Court's decision in *Monroe v Pape* 365 U.S. 167 (1961), which held that the civil action code for deprivation of rights, provides a separate federal remedy for individuals suing state or municipal government officers who have violated their constitutional rights.

constitutional damages claim is also used in the context of Bivens actions.³⁷

Apart from the national constitutional legislative obligation to protect the exercise of the fundamental constitutional rights, countries also ratify international human right treaties³⁸ with the singular aim of ensuring the respect and protection of these rights. With this enormity of protection and value placed on the fundamental rights of persons, national legislatures, in their bid to provide some constitutionally permitted limitations to an unbridled exercise of these fundamental constitutional rights, go to the length of criminalising the exercise of the rights. The question underlying this paper is: can a legislature that has enormous constitutional obligation to respect and protect fundamental constitutional rights, directly criminalise the exercise of those fundamental rights? The objective of this paper is to resolve the issue that arises where an ordinary law of legislatures who are cognisant of the enormous constitutional obligation to respect and protect fundamental constitutional rights of persons, directly criminalises the exercise of the right. The methodology is doctrinal. The paper is organized in five parts, including Part One, this Introduction. Part Two investigates if fundamental constitutional rights can be directly criminalised. Part Three provides instances of direct criminalisation of fundamental rights in national laws. The concept of indirect criminalisation of fundamental rights is the focus of Part Four, while Part Five concludes the paper.

2 Can fundamental constitutional rights be directly criminalised?

Criminalisation of an act simply means to 'define it as a crime in the substantive criminal law, and thus to render those alleged to have engaged in it liable to be prosecuted and tried, and to render those convicted of it liable to criminal punishment'³⁹ This work is not set out to unravel the understanding of the scope and content of the criminal law, or an understanding of the criminalization regime, or

³⁷ Which are lawsuits under federal common law for constitutional violations committed by federal government employees.

³⁸ These treaties include the three International Bill of Rights.

³⁹ Antony Duff, *The Realm of Criminal Law* (OUP 2018) 39.

principle such as various versions of the harm principle, the wrongness principle, the sovereignty principle, and so on.⁴⁰ Equipped with the requisite knowledge and understanding that criminalization is a constitutional legislative function⁴¹ while the determination of criminal liability is a constitutional judicial function,⁴² we limit the scope of this enquiry to the constitutional competence of legislatures to enact criminal laws directly on matters of fundamental constitutional rights; knowing that the executive arm of government is under a national or international obligation to respect and protect persons' civil and political (CIPO) rights while enforcing the laws⁴³ made by the legislatures and interpreted by the judiciary.⁴⁴ The governments' bounding obligation regarding persons' CIPO rights, as outlined in national constitutions and international human right treaties⁴⁵ is to respect and ensure that these rights are respected and protected for all persons within their territories and jurisdictions.

The national constitutional obligation, which attaches to executive and legislative functions alike,⁴⁶ includes refraining from infringing on these rights, protecting individuals from being denied these rights, and taking positive actions to facilitate people's enjoyment of these rights.⁴⁷ That constitutional obligation to respect and protect fundamental constitutional rights provides a specific incidental constitutional aspect of fundamental constitutional right matters. Even though that national constitutions do not usually embrace dynamic incorporation of international human right treaties until

⁴⁰ Victor Tadros, 'Criminalization: In and Out' (2020) 14 *Crim L & Phil.* 365 <<https://doi.org/10.1007/s11572-020-09536-7>> accessed 10 April 2025.

⁴¹ Item 2(a) Part III Second Schedule Constitution of the Federal Republic of Nigeria 1999 (as amended).

⁴² *NOSDRA v Mobil Producing Nigeria Unlimited (Exxon-Mobil)* (2018) LPELR 44210 (CA).

⁴³ art 19 of the UN General Assembly, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁴⁴ *NNPC v Trinity Mills Ins Brokers* (2002) LPELR (7142) 1 (Ogakwu, JCA) 14 pp 35-38 paras B-C.

⁴⁵ See the CFRN, 1st-10th & 14th Amendments to the U.S. constitution and the ICCPR statute. Constitution of the Federal Republic of Nigeria 1999 (as amended); U.S. Constitution amends I-X and XIV; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁴⁶ See also *Reid v Covert* (1957) 354 US 1, 5-6.

⁴⁷ This obligation indirectly extends to rights in ICCPR statute.

enacted into the national laws;⁴⁸ yet, dynamic incorporation of international CIPPO rights is no longer necessary as most countries have integrated CIPPO rights into their national constitutions as fundamental constitutional rights.⁴⁹ We have not lost sight that national constitutions and international human right treaties also confer on national legislatures the constitutional legislative power, in limitation clauses, to directly limit some fundamental right matters⁵⁰ while removing other rights from any form of legislative limitation.⁵¹ It is our vehement contention in this work that a constitutional limitation power on fundamental constitutional rights cannot extend to the punishment of the exercise of the limited rights. It cannot be that a legislature, bound by a 'respect-and-protect' obligation to its people's CIPPO rights, and is bestowed with the constitutional legislative power to directly punish the exercise of those CIPPO rights! This is where we unveil the constitutional foundation upon which we base our vehement contention.

Various national constitutions utilize different constitutional stratagems to achieve criminalisation of constitutional legislative matters. These national criminal stratagems, which are not specifically compiled anywhere, include direct constitutional criminalisation of a constitutional legislative matter,⁵² direct constitutional conferment on the legislatures to criminalise constitutional legislative matters,⁵³ and the indirect constitutional conferment on the legislatures to criminalise constitutional legislative matters.⁵⁴ Constitutional legislative matters have their substantive and incidental aspects to them;⁵⁵ and the civil or criminal nature of the eventual legislation depends on which aspect of which constitutional legislative matter is involved.⁵⁶

⁴⁸ CFRN s 12.

⁴⁹ CFRN chap IV.

⁵⁰ See for instance, right to expression and association in sections 39 and 40 of the CFRN.

⁵¹ See for instance, right to life, conscience and right against torture or servitude in sections 33, 34(1)(a & b) and 38 of the CFRN.

⁵² U.S. Constitution art III s 3.

⁵³ *ibid* art I s 8 cls 6 & 10.

⁵⁴ *ibid* art I s 8 cl 18; CFRN Second Schedule pt III.

⁵⁵ See for instance, CFRN Second Schedule pt III; U.S. Constitution art I s 8 cl 18.

⁵⁶ Criminal laws take their origins from the exercise of constitutional legislative power on a constitutionally earmarked substantive or incidental aspect of the constitutional

In the US, the constitution employs three of those stratagems. The first is the direct constitutional criminalisation of the whole of the constitutional legislative matter.⁵⁷ The second is the constitutional conferment of criminalisation power on legislatures on the constitutional legislative matter.⁵⁸ The third is the constitutional conferment of criminalisation power on the incidental aspect of the constitutional legislative matters.⁵⁹ Nigeria and the U.S. employ the third constitutional legislative criminal stratagem, that is, the constitutional empowerment of legislatures to legislate on a constitutionally designated incidental aspect of constitutional legislative matters.⁶⁰ Criminalisation is thus the exercise of a constitutional legislative power on the substantive,⁶¹ constitutionally related⁶² or incidental⁶³ aspects, as the case may be, of a constitutional legislative matter. Nigeria only permits its legislatures to criminalise the incidental aspect of constitutional legislative matters, not the substantive aspect.⁶⁴ In other words, to criminalise a fundamental constitutional right matter, the legislature must have to show that it is conferred with the constitutional legislative power to legislate on an operative incidental criminal aspect of the fundamental constitutional right matter.⁶⁵ By directly criminalising fundamental constitutional rights, the legislatures insist that there is

legislative matter. See U.S. Constitution art I s 8 cl 18. See also Item 68 of pt I and para 2a of pt III of the Second Schedule to the CFRN.

⁵⁷ This involves the criminalisation of the substantive and incidental aspects of the constitutional legislative matter. See US Constitution art III s 3. Nigeria does not have a similar provision.

⁵⁸ Here, the legislatures are at liberty to criminalise either or both of the substantive and incidental aspects of the constitutional legislative matter. See U.S. Constitution art I s 8 cls 6 & 10. Nigeria has no similar provision.

⁵⁹ Here, the legislatures may only criminalise earmarked incidental aspect of the constitutional legislative matter and nothing more. See U.S. Constitution art I s 8 cl 18; See also pt III of the Second Schedule to the CFRN.

⁶⁰ U.S. Constitution art I s 8 cl 18; CFRN Second Schedule pt III; see also *Attorney General of Abia State & 2 Ors v Attorney-General of the Federation & 33 Ors* (2006) 2 All NLR 24.

⁶¹ U.S. Constitution art III s 3.

⁶² *ibid* art I s 8 cl 18.

⁶³ CFRN Second Schedule pt III item 68.

⁶⁴ *ibid* Second Schedule pt III para 2(a) and pt I item 68.

⁶⁵ There is no constitutional legislative competence to criminalise fundamental rights under part III of the Second Schedule to the CFRN.

an operative and available incidental criminal aspect of the fundamental constitutional right matter for them to legislate upon.⁶⁶

The constitutional legislative intention expressed in fundamental right limitation clauses is not for the legislatures to have unreserved control over the exercise of fundamental rights; but for the legislature to safeguard necessary and proportionate public and other private interests from a person's unbridled exercise of his fundamental constitutional rights. The insertion of fundamental rights into national constitutions is at the root of the constitutional legislative intention not to leave the fundamental rights of persons to unreserved legislative control and interference. Criminalisation, under Part III of the Second Schedule to the CFRN, and under the US' Necessary and Proper Clause, is an instrument of enforcement of a constitutional legislative power on an unreserved constitutional legislative matter. In the case of fundamental constitutional right matters, the matters are reserved for the constitution, and the provision of Part III of the Second Schedule to the CFRN cannot be the final criminalisation statement on the matter.

Fundamental right matters, when enacted into the national constitutions, lose their designated criminal aspect, i.e. they lose their incidental criminal aspect that ordinarily applies to every constitutional legislative matter.⁶⁷ In countries where fundamental rights have become protected as constitutional rights, such as Nigeria, Canada, and the U.S., fundamental right matters have no incidental aspect⁶⁸ upon which the legislatures may exercise their

⁶⁶ See *NCP v National Assembly* (2016) 1 NWLR (pt 1492) 1 (CA); *Madu v Mbakwe* (2008) 10 NWLR (pt 1095) 293 CA; *Tukur v Governor of Gongola State* (1989) 4 NWLR (pt 117) 517 (SC); *Amusan v Olawuni* (2002) 12 NWLR (pt 780) 30 at 57 (CA); *R. Benkay (Nig) Ltd v Cadbury (Nig) Plc* (2006) 6 NWLR (pt 976) 338 (CA); *NCP v National Assembly* (2016) 1 NWLR (pt 1492) 1 (CA); *Madu v Mbakwe* (2008) 10 NWLR (pt 1095) 293 (CA); *Tukur v Governor of Gongola State* (1989) 4 NWLR (pt 117) 517 (SC); *Amusan v Olawuni* (2002) 12 NWLR (pt 780) 30, 57 (CA).

⁶⁷ Exercise of fundamental constitutional rights is to be legislatively protected and not punished.

⁶⁸ Though there may be more than one incidental aspect to a fundamental constitutional right matter, national constitutions usually designate a particular incidental aspect to criminal law action. In Nigeria, this incidental aspect is described in the CFRN as 'incidental and supplementary' to other constitutional legislative matters. Read CFRN Second Schedule para 2a of pt III item 68 of pt I ch.

criminalisation powers.⁶⁹ In other words, if fundamental right matters have lost their incidental criminal aspect, where then have the legislatures obtained the constitutional legislative competence to directly criminalize fundamental right matters?⁷⁰ Legislatures do not invent lost incidental matters; in fact, the criminal aspects of constitutional legislative matters are created along with the legislatures themselves by national constitutions.⁷¹ The legislature cannot therefore invent its own incidental criminal aspect⁷² and goes ahead to criminalise its own invention.⁷³ Assuming without conceding that it is argued that legislatures under constitutional limitation clauses enjoy constitutional legislative powers over the substantive and incidental aspects of fundamental constitutional right matters,⁷⁴ then the art and science of constitutional legislative competence will apply.⁷⁵

Valid legislation is all about a proper intercourse between competent legislative powers and competent legislative matters.⁷⁶ To criminalise a fundamental right matter in a jurisdiction where legislatures may only criminalise incidental aspect of constitutional legislative matter, the legislature must have the constitutional legislative power over the substantive and incidental aspects of the fundamental constitutional right matter.⁷⁷ Fundamental rights, before preservation in national constitutions, have acquired a posteriori a special incidental aspect of respect and protection, resulting in a conflict between its special incidental aspect and the

⁶⁹ Nihil ex nihilo fit; you cannot place something on nothing and expect it to stand. See *Macfoy v United Africa Company Ltd* [1961] 3 All ER 1169, 1172 (PC).

⁷⁰ Nihil non-expectant aedificare store.

⁷¹ The creation of the legislatures is assigned old as the creation of constitutional criminal aspects. See eg CFRN s 4, Second Schedule pt I item 68 and pt III.

⁷² Incidental and supplementary fundamental right matter.

⁷³ Criminalisation of fundamental constitutional rights is a constitutional legislative sacrilege.

⁷⁴ For a jurisdiction where the legislatures may only criminalise incidental aspect of a constitutional legislative matter as obtains in Nigeria.

⁷⁵ To apply art and science to constitutional legislative competence, the process must accord with principles of law guiding the application of law to the facts of a case.

⁷⁶ See *In References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (CanLII) 184.

⁷⁷ The Latin maxim is *accessorius sequitur naturam Sui principalis*, i.e. an accessory follows the nature of its principal. See *Tukur v Government of Gongola State* (1989) 4 NWLR (pt 117) 517.

incidental criminal aspect of the fundamental constitutional right matter that is ordinarily available to all constitutional legislative matters. In this conflict of incidental aspects, the incidental fundamental right aspect, which is specific to the fundamental right matters, prevails⁷⁸ over the conflicting incidental criminal aspect that is general to all constitutional matters.⁷⁹

3 Instances of direct criminalisation of fundamental rights in national laws

The balancing test developed by US Supreme Court does not disarm the government of power to trench upon the field in which the US Constitution says 'Congress shall make no law.' Legislatures directly criminalise acts constituting the exercise of a fundamental constitutional right.⁸⁰ In this section, we shall briefly discuss the direct criminalisation of the following fundamental constitutional rights, that is, the criminalisation of the right to: expression, life, privacy, movement and liberty; so as to ascertain their constitutionality or otherwise. National constitutions harbouring fundamental rights may, by different modalities, sanction direct limitation of the rights.⁸¹ This by no means translates to a constitutional authority to criminalize the rights. Section 33 of the CFRN provides as follows:

33(1) Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria. (2) A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary (a) for the defence of any person from unlawful violence or for the defence of property;

⁷⁸ The Latin maxim is *specialibus generalibus derogant* ie, specific provision limits general provision. See *Kraus Thompson Organization v NIPSS* (2004) LPELR (1714) 1, 18.

⁷⁹ The legal maxim is *generalia specialibus non-derogant* ie, general provision does not limit specific provision. See *Ardo v Nyako* (2014) LPELR (22878) 1, 47.

⁸⁰ See defamation laws, vagrancy laws, official secrecy laws, abortion laws, homosexual laws, firearms laws etc.

⁸¹ See CFRN ss 39(3) and 41(2). See also Canadian Charter of Rights and Freedoms s 1.

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(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or (c) for the purpose of suppressing a riot, insurrection or mutiny.

The Firearms Control Act Cap F28 Laws of the Federation of Nigeria (LFN) 2004 directly criminalises the civilian possession of firearms for any reason including for self-defence of life or property. The Act thus criminalises section 33(2) (a) of the CFRN. In the case of *Echo Garrison v Louisiana*,⁸² in its generalities, 'unless a fundamental right is so brigaded with overt acts of criminality, there is nothing that may be criminalised in the exercise of the right'. Contrast the Nigerian law above with the second amendment to the US national constitution, ratified in 1791 along with nine other articles of the United States Bill of Rights, that provides for: 'A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.'

In *SERAP v Federal Republic of Nigeria*,⁸³ the court states that it will hold that access to Twitter being one of the social media of choice to receive, disseminate and impart information is one such

derivative right that is complimentary to the enjoyment of the right to freedom of expression according to the provisions of Article 9(1) & (2) of the ACHPR and Article 19 of the ICCPR.

Rights to firearms are derivative rights that are complimentary to the enjoyment of the right to life in violent-crime societies like Nigeria and US. Although the issue of possession of firearms for private persons' defence of life or property is a state matter, there is curiously no state law on possession of firearms for the defence of life or property in Nigeria. In the midst of this vacuum, the Nigeria Police Force commands members of the general public, vigilantes, watch night men, and neighbourhood watch groups throughout Nigeria,

⁸² (1964) 379 US 64.

⁸³ ECW/CCJ/JUD/40/22 at 23.

who are in possession of firearms, to surrender them to the Commissioner of Police in their states within 21 days.⁸⁴

Section 37 of the CFRN provides that: 'The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.' This fundamental right is directly criminalised by section 229 of the Criminal Code attached to the Criminal Code Act.⁸⁵ The section criminalises a pregnant woman's enjoyment of her privacy to procure her own miscarriage by herself at a gestational age when the pregnancy is still private, and when she can procure her own miscarriage without the need of the assistance of an abortion service provider.⁸⁶ Unlike the US where the right to privacy is an implied right,⁸⁷ privacy right in Nigeria is an express constitutional right.⁸⁸ The Nigerian Same Sex Marriage (Prohibition) Act 2013,⁸⁹ which punishes homosexual relationship between consenting adults even within the privacy of their homes,⁹⁰ is a direct criminalisation of privacy right. Even though there is no express constitutional right to 'private' abortion and homosexual relationship, yet section 37 of the CFRN is broad enough to accommodate abortions and homosexual relationships privately undertaken. Thus, the legislatures have no constitutional competence to criminalise those privacies 'unless the privacy is so brigaded with overt criminal acts.' These provisions criminalising private abortion and private homosexual relationships are state enactments for the Federal Capital Territory (FCT) which does not apply to other states until adopted by them.⁹¹

Section 39 of the CFRN provides as follows:

⁸⁴ Security and safety matters, 'Inspector-General of Police orders recovery of prohibited firearms, weapons, ammunition in Nigeria' Wordpress.com (Lagos, 25 February 2018) <<https://securityandsafetymatters.wordpress.com/2018/02/25/inspector-general-of-police-orders-recovery-of-prohibited-firearms-weapons-ammunition-in-nigeria>> accessed 19 April 2025.

⁸⁵ Criminal Code Act, Cap C38, Laws of the Federation of Nigeria (LFN), 2004.

⁸⁶ See also *Dobbs v Jackson Women's Health Organization* (2022) 597 U.S. 215.

⁸⁷ See *Roe v Wade* (1973) 410 U.S. 113, 163.

⁸⁸ CFRN s 37.

⁸⁹ <https://www.refworld.org/legal/legislation/natlegbod/2013/en/19556> accessed 20 April 2025.

⁹⁰ Same Sex Marriage (Prohibition) Act 2013 s 7(a).

⁹¹ Matters of abortion and homosexual relationship are not enumerated matters.

39(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 authorised by the President on the fulfilment 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 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.

There is nothing in the above section to justify the direct criminalisation of expressions that are not brigaded with overt criminal acts.⁹² A constitutional limitation clause on fundamental constitutional rights cannot anchor the direct criminalisation of the rights. Section 373 of the Criminal Code, devoid of any brigade with overt criminal acts, is an unconstitutional piece of legislation. Section 41 of the CFRN provides as follows:

41(1) every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and no

⁹² Section 373 of the FCT Criminal Code provides: Defamatory matter is matter likely to injure the reputation of any person by exposing him to hatred, contempt, or ridicule, or likely to damage any person in his profession or trade by any injury to his reputation.

citizen of Nigeria shall be expelled from Nigeria or refused entry thereby or exit therefrom. (2) Nothing in subsection (1) of this section shall invalidate any law that is reasonably justifiable in a democratic society- (a) imposing restrictions on the residence or movement of any person who has committed or is reasonably suspected to have committed a criminal offence in order to prevent him from leaving Nigeria; or (b) providing for the removal of any person from Nigeria to any other country to - (i) be tried outside Nigeria for any criminal offence; or (ii) undergo imprisonment outside Nigeria in execution of the sentence of a court of law in respect of a criminal offence of which he has been found guilty: Provided that there is reciprocal agreement between Nigeria and such other country in relation to such matter.

Fundamental right to movement is directly criminalised by section 250 of the Nigerian FCT Criminal Code. The promulgation of the Minor Offenses Act⁹³ has abolished the vagrancy provision in the FCT Criminal Code and Penal Code. The Minor Offenses Act is a state law, and thus has not repealed the vagrancy laws in Criminal Code laws of states in Nigeria. There is no desuetude doctrine in Nigerian jurisprudence.⁹⁴ The failure of the state executive branch to enforce these laws does not result in the modification or repeal of those draconian state laws. While state legislatures have the constitutional legislative power to criminalise movements that brigade with overt criminal acts, state legislatures, in time of peace, cannot criminalize civilians' movement in unrestricted public places and highways if the movement does not brigade with an overt criminal act.

4 The concept of indirect criminalisation of fundamental rights

No power or right is absolute in all ramifications, even if it is stated in absolute terms.⁹⁵ Like most rights, the right secured by the US Second Amendment, which is expressed in absolute terms, is not unlimited.⁹⁶ The lack of a limitation clause in the US Constitution has

⁹³ Cap M16 LFN 2004.

⁹⁴ See also *District of Columbia v John R Thompson Co* (1953) 346 US 100, 113-14.

⁹⁵ Irving Brant, 'Seditious Libel: Myth and Reality,' (1964) 39 N Y U L Rev 1, 18-19.

⁹⁶ *District of Columbia v Heller* (2008) 554 U.S. 570, 626.

not resulted in rights being deemed absolute but rather in the judicial implication of limits.⁹⁷ Thus, a power or right may be statutorily or constitutionally absolute, but loses its absolutism upon ad hoc judicial balancing. Importantly too, each section of national constitutions is absolute.⁹⁸ Since constitutional draftsman is not known to extravagant words or provisions, it is anathematic to construe a section in such a manner as to render other sections redundant or superfluous.⁹⁹

In interpreting provisions of national constitutions, care must be taken not to render any other section redundant or impotent.¹⁰⁰ It therefore follows that, although fundamental constitutional rights are preserved in the national constitutions, it does not therefore mean that some criminal law(s), competently made outside fundamental constitutional right matters, cannot indirectly criminalise a fundamental constitutional right. Indirect control or criminalisation of fundamental constitutional rights occurs when the legislatures enact a criminal law under a constitutional legislative competence outside matters of fundamental rights,¹⁰¹ and the enacted criminal law turns out to be a criminalisation of an act constituting the exercise of a fundamental constitutional right. Such criminal law that faces up against a fundamental constitutional right can only survive if it serves the overriding interest of state to suppress imminent lawlessness.¹⁰² For instance, 'freedom of expression can be suppressed if and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it.'¹⁰³

There is a world of difference between the criminalisation of a fundamental constitutional right matter, and the criminalisation of matters that do not relate to fundamental constitutional rights, even when both equally impede the exercise of the fundamental

⁹⁷ Stephen Gardbaum, 'The Myth and the Reality of American Constitutional Exceptionalism,' (2008) 107 *Mich L Rev* 391, 40.

⁹⁸ See *Opara & Anor v Amadi & Anor* (2013) LPELR 20747(SC).

⁹⁹ *NURTW & Anor v RTEAN & Ors* (2012) 10 NWLR (pt 1307) 212.

¹⁰⁰ See *Opara & Anor v Amadi & Anor* (2013) LPELR 20747 (SC).

¹⁰¹ Under the overriding interest of state occasioned by an imminent lawlessness.

¹⁰² *Garrison v Louisiana* (1964) 379 U.S. 64.

¹⁰³ *Roth v U.S.* 354 U.S. 514.

constitutional rights. Care must be taken to differentiate acts of persons; as some acts may mimic the exercise of fundamental rights, while in reality, they are not.¹⁰⁴ The state can only succeed if it is able to show that the act committed falls outside the fundamental constitutional right of the person exercising his fundamental constitutional right. In *Gertz v Robert Welch Inc*,¹⁰⁵ the Supreme Court of the US differentiates between speeches that may cause 'harm' and speeches that may cause 'unjustified harm'. Speeches that may cause 'harm' are classified as fundamental constitutional rights that cannot be criminalised, while speeches that may cause 'unjustified harm' are considered outside the protected fundamental constitutional rights. The SCOTUS establishes that 'speech advocating illegal conduct is protected under the First Amendment' unless the speech is likely to incite 'imminent lawless action'.¹⁰⁶ Indirect criminalisation is therefore the criminalisation of a fundamental constitutional right exercised with the intent to cause imminent lawlessness.¹⁰⁷

In balancing the right of speech and other speech protective harms, only the proof or a showing of a compelling state interest can rebut the resulting presumption of invidious purpose.¹⁰⁸ According to the Court, the test is whether such an advocacy is directed to the incitement or production of imminent lawless action, and is also likely to incite such an action.¹⁰⁹ As originally formulated,¹¹⁰ the test is whether the words are such that create a clear and present danger that will bring about the substantive evils that the legislatures have the constitutional right to prevent.¹¹¹ Such a compelling state interest may consist, for example, of the likelihood that the words will produce any of the following: some acts of subversion,¹¹² result in a

¹⁰⁴ Speech that causes 'harm' is differentiated from speech that causes 'unjustified harm' in *Gertz v Robert Welch Inc* (1974) 418 U.S. 323.

¹⁰⁵ (1974) 418 U.S. 323.

¹⁰⁶ *Brandenburg v Ohio* (1969) 395 U.S. 444.

¹⁰⁷ In *Countertermen v Colorado* (2023) 600 U.S. 66, SCOTUS hold the standard of the defendant's intent to be subjective.

¹⁰⁸ Usually described as the likelihood that the speech produces a clear and present danger of a substantive evil that the state has a right to prevent.

¹⁰⁹ *Brandenburg v Ohio* (n 106) 447.

¹¹⁰ By Justice Holmes.

¹¹¹ *Schenck v U.S.* (1919) 249 U.S. 47, 52.

¹¹² *Dennis v U.S.* (1951) 341 U.S. 494.

breach of public peace¹¹³ or cause an unjustified harm¹¹⁴ to another individual's reputation.¹¹⁵

In *Arthur Nwankwo v The State*,¹¹⁶ the court held that the legislature has the constitutional legislative power to make ordinary laws that deepen or enhance fundamental constitutional rights, so as to enhance the enjoyment of the rights, and not to impede or restrict those rights. The ordinary laws advocated in Arthur Nwankwo do not seek to criminalise fundamental constitutional rights. Thus, where constitutional legislative power has been conferred on fundamental constitutional right matters, laws may be made for the extension or civil limitation of fundamental rights, but never for the criminalisation of the rights. *Counterterm v Colorado*¹¹⁷ separates acts constituting the exercise of a fundamental constitutional right from acts constituting true threat using court's determined category of *mens rea*; and finds at the end that the complained acts fell within the appellant's fundamental constitutional right. Criminalisation of fundamental constitutional rights is an imposition of conditions inconsistent with the free exercise of the fundamental constitutional rights.¹¹⁸ This unconstitutional control of fundamental rights has already been deprecated by the Nigerian courts.¹¹⁹ It is trite that any law restricting the method or mode of exercising a fundamental right guaranteed by the CFRN will be inconsistent with the CFRN.¹²⁰

A cursory look at the various criminal defamation laws in Nigeria will quickly reveal that what is criminalised in those laws is the substantive aspect of the fundamental constitutional right matter of expression, and not the incidental aspect of state interest like true

¹¹³ *Chaplinsky v New Hampshire*, (1942) 315 U.S. 568.

¹¹⁴ A valid restriction must target only unjustified harm, meaning speech made for purposes outside the constitutionally protected values of expression.

¹¹⁵ *Gertz v Robert Welch Inc* (1974) 418 U.S. 323.

¹¹⁶ 228 6 NCLR (1985).

¹¹⁷ (2023) 600 U.S. 66.

¹¹⁸ Any law which imposes conditions inconsistent with the free and unrestrained exercise of that right, is void to the extent of such inconsistency'. See *Adediran and Akintujoye v Interland Transport Ltd* (SC 119 of 1987) [1991] NGSC 2, 115, 116 (Karibi-Whyte, JSC).

¹¹⁹ *Adediran and Akintujoye v Interland Transport Ltd* (SC 119 of 1987) [1991] NGSC 2.

¹²⁰ *George Timinimi v Ramsome Awiliki & Ors* (2021) LPELR-54637(CA).

threat of violence or unjustified harm.¹²¹ The prohibitions of the true threat and unjustified harm aspect of overriding state interest accords with constitutional dictates, notwithstanding that the prohibitions may extend to impede the free exercise of the fundamental rights of expression enshrined in the constitution.¹²² While the criminalisation of acts that threaten imminent danger of violence may be constitutional upon ad hoc judicial balancing, the criminalisation of the fundamental constitutional right matter of expression itself is menacingly unconstitutional and void under national constitutions that preserve fundamental rights. As held by Olatawura JCA in *Arthur Nwankwo*: 'To retain section 51 of the Criminal Code, in its present form, that is even if not inconsistent with the freedom of expression guaranteed by our Constitution, will be a deadly weapon to be used at will by a corrupt government or a tyrant.'¹²³

The fears of Olatawura JCA have even been compounded by the promulgation and enforcement of the Cybercrime (Prohibition and Prevention) Act 2015. As if to overcompensate for the many pushbacks on the defamation laws, the Cybercrimes Act, which has disingenuously handed over state crimes to federal legislatures,¹²⁴ is now the toast of elements in and around government, so much so that the slightest expression of dissent, scrutiny or criticism, protected under section 39 of the CFRN, is visited with arrest, detention and criminal prosecution for one or more of the so-called cybercrimes. These cybercrimes are essentially rehashes of direct fundamental right prohibitions in state Criminal Code of the Nigerian FCT rather than prohibitions of true threat of violence or unjustified harm occasioned by expression.

In *Aviomoh v Commissioner of Police*¹²⁵ the Nigerian Supreme Court appears to say that the Criminal Code defamation law before them is made under section 45(1) of the CFRN, and legislatures criminalise expression, relying on the limitation clause in section 45(1) of the

¹²¹ *Gertz v Robert Welch Inc* (1974) 418 U.S. 323.

¹²² *Garrison v Louisiana* (1964) 379 U.S. 64, 74.

¹²³ *Arthur Nwankwo v The State*, (1985) 6 NCLR 228.

¹²⁴ The offences in the Act appear to be state offences.

¹²⁵ (Pt 1819) 69, 120 4 NWLR (2022).

CFRN. While we respectfully do not consider that section 45(1) of the CFRN is a limitation clause for sections 37-41 of the CFRN,¹²⁶ we respectfully contend that even if section 45(1) of the CFRN were a limitation clause, the apex court has not evaluated the constitutional relationship between a limitation clause on one hand and criminalisation on the other hand. We submit with utmost respect that a fundamental right limitation clause does not confer on the legislatures the constitutional legislative power to criminalise fundamental constitutional rights.¹²⁷

The procedure for criminalisation is straightforward: the legislatures look at a constitutional legislative matter, and proceed to identify their constitutional legislative competence over the operative aspects of the matter. If the legislatures discover that there is no operative incidental criminal aspect to the matter, as it is the case with fundamental constitutional right matters, the legislatures cannot go any further. It becomes their duty to carry out every other constitutional legislative function conferred on them regarding the matter, save criminalisation.¹²⁸ Section 373 of the FCT Criminal Code law cannot have been constitutional as that there is no requirement of true threat, or that situates the offence outside direct criminalisation of expression,¹²⁹ as there would have been no valid criminal liability on an accused person exercising their fundamental constitutional rights. It is the legislative insertion of true threat requirement in a criminal defamation law that makes it a valid criminal law. If not, section 373 of the Code is just an invalid piece of legislation, being unconstitutional.

In Nigeria for instance, superior courts are constitutionally entitled to declare unconstitutional ordinary statutes void under section 1(3)

¹²⁶ Our consideration on this issue is outside the scope of this work.

¹²⁷ A constitutional competence to limit a right matter does not automatically translate to a constitutional competence to criminalise the right matter. Criminalisation is only an instrument of primary constitutional regulation. See also *U.S v Bond* (2012) 681 F.3d 149, 159 (3d Cir.).

¹²⁸ *Barenblatt v U.S.* (1959) 360 U.S. 109.

¹²⁹ *Garrison v Louisiana* (1964) 379 U.S. 64, 74.

of the CFRN 1999.¹³⁰ Legislatures may also repeal unconstitutional laws made by them. Human right courts and treaty bodies have developed a test to establish whether a measure limiting a non-absolute right is legitimate on the basis of provisions such as article 19 of the International Covenant on Civil and Political Rights (ICCPR). The test involves providing answers to the following queries: Is there a legal basis for the measure limiting the right? Does the limitation on the right pursue a legitimate aim; if so, is the limitation necessary to achieve the legitimate aim, and is the extent of the limitation proportionate in pursuit of the identified legitimate aim? Is the restriction non-discriminatory?¹³¹ While direct criminalisation will never pass this test,¹³² indirect criminalisation is required to pass the test to stand.

The SCOTUS has held that absolute fundamental constitutional rights are but presumptive protections rebuttable by the showing of a compelling interest of the state, and narrow tailoring.¹³³ The right to free speech reflects a presumption of protection of persons to say or express themselves in any manner whatsoever; it is only overridden where the state can show that the speech is intended and likely to incite imminent lawless action.¹³⁴ In *Brandenburg v Ohio*,¹³⁵ the SCOTUS held that the government cannot punish a person for expressing his opinion, even if the opinion is considered offensive or defamatory, unless the speech rises to the level of inciting imminent violence to others. The Brandenburg standard requires that an expression must be of a nature that it is likely to cause a clear and present danger of substantial harm to the community or to others

¹³⁰ The Supreme Court of Nigeria has done same on many occasions including the case of *Attorney General of Abia State & 2 Ors v Attorney-General of the Federation & 33 Ors* (2006) NGSC 45; (2006) 2 All N.L.R. 24.

¹³¹ These tests, though have been applied to criminal and civil limitations in different jurisdictions of the world (see *Aviomoh v COP & Anor* (2021) LPELR-55203 SC), have no legal basis for direct criminalisation of fundamental constitutional rights.

¹³² The first query is the nemesis of all criminal limitation of fundamental constitutional right, as there is no legal basis supporting its criminalisation.

¹³³ *Schenck v United States* (1919) 249 U.S. 47, 52. See also *Dennis v United States*, 341 U.S. 494 (1951); *Chaplinsky v New Hampshire*, 315 U.S. 568; *Gertz v Robert Welch, Inc.* (1974) 418 U.S. 323; *United States v Stevens* (2010) 559 U.S. 460, 468.

¹³⁴ *Brandenburg v Ohio* (n 106).

¹³⁵ (1969) 395 U.S. 444.

before it can be considered punishable under criminal defamation laws.

The law is trite in the US¹³⁶ that the only way the state can show that the act of the defendant does not constitute an exercise of their guaranteed fundamental constitutional rights is by proving that such act was done with intent to incite a lawless action which the state is obligated to quench; and not showing that the act of the person exercising their fundamental constitutional right violated an extant criminal law.¹³⁷ The First Amendment to US constitution has, since its enactment in the US, permitted restrictions on a few historic categories of speech. These categories include defamation, fraud, incitement, obscenity, and speech integral to criminal conduct¹³⁸ that are far removed from the core values of freedom of expression. The SCOTUS has determined that shouting 'fire' in a crowded theatre in order to cause a disturbance is not considered a protected right to expression for the purpose of the guaranteed fundamental constitutional right to freedom of expression of US citizens.¹³⁹ Expression is protected by the national Constitutions if its dissemination promotes known purposes of the right, namely: the promotion of the democratic process in the state; the exercise of individual autonomy to create and express opinions, and to freely transfer and receive information to and from other persons; and the promotion or discovery of the true meaning of things through the enrichment of the marketplace of ideas. If an expression promotes any of these outlined objects or goals, then it is of a substantive positive social value, and the fundamental constitutional right to freedom of expression shall naturally apply to it without state restrictions.¹⁴⁰

In *Lawrence v Texas*,¹⁴¹ the court invalidates criminal sodomy laws in 14 states of the US. The SCOTUS held that intimate consensual sexual conduct is part of the fundamental right to liberty protected by the

¹³⁶ And ought to be even trite in Nigeria going by the clear texts of the CFRN.

¹³⁷ See for instance *Garrison v Louisiana* (1964) 379 US 64, 74.

¹³⁸ *United States v Stevens* (2010) 559 U.S. 460, 468.

¹³⁹ *Schenck v United States* (1919) 249 U.S. 47, 52.

¹⁴⁰ Fiss, 'Money and Politics' (1997) 97 *Colum L Rev* 2470, 2477-78.

¹⁴¹ (2003) 539 U.S. 558.

Fourteenth-Amendment substantive due process. It is therefore immaterial that the act of sodomy is considered immoral by some sections of the state, as the sectional feeling of immorality alone does not satisfy the second arm of the requirement for criminalization which is the 'compelling state need' alternatively referred to as 'the overriding interest of the state'. The US court in *Robinson v California*¹⁴² reasoned that addiction is a status, not voluntarily chosen conduct, and held that an ordinary civil law criminalising drug addiction is a violation of the constitutional protection against cruel and unusual punishment. In *Powell v Texas*,¹⁴³ Justice Thurgood Marshall was of the ex-cathedra opinion that Robinson so viewed brought the Court close to the substantive criminal law; and that unless Robinson was seen from that perspective, it would be difficult to see any limiting principle that would serve to prevent the Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate decider of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the US.¹⁴⁴

5 Conclusion

In view of constitutional and international treaty obligations to respect and protect fundamental rights, there is no constitutional legislative power available to the legislatures, to criminalise fundamental constitutional rights. In view of the preservation of fundamental rights in national constitutions, there is no operative incidental criminal aspect of the fundamental constitutional right matter available for legislative criminalisation. It is clarified that while national constitutions provide legislatures with wide constitutional legislative power to criminalise enumerated and unenumerated matters, constitutional limitation clauses, in conferring on legislatures the power to limit fundamental right matters, have been unable to confer constitutional legislative power over the incidental criminal aspect of the fundamental constitutional right

¹⁴² (1962) 370 U.S. 660.

¹⁴³ (1968) 392 U.S. 514, 533.

¹⁴⁴ Stuntz, 'The Pathological Politics of Criminal Law' (2001) 100 *Mich L Rev* 505; Singer and Husak, 'Of Innocence and Innocents: The Supreme Court and Mens Rea since Herbert Packer' (1999) 2 *Buff Crim L Rev* 861; Michaels, 'Constitutional Innocence' (1999) 112 *Harv L Rev* 828; Packer, 'Mens Rea and the Supreme Court' (1962) *Sup Ct Rev* 107.

matter. Most of the time, the constitutional basis for criminalisation is not only the constitutional legislative power over the substantive aspect¹⁴⁵ of the constitutional legislative matter, but the constitutional legislative power over the incidental aspect¹⁴⁶ of the matter. To have chosen to render the criminal aspect of a constitutional legislative matter incidental while placing the civil aspect substantive, framers of national constitutions have shown clear intent that legislatures have no constitutional legislative competence to wield their criminalisation power on every constitutional legislative matter, particularly where the constitution itself has demonstrably implied contrary incidental aspect to a specific constitutional legislative matter like that seen in fundamental constitutional right matters. The paper recommends that courts and legislatures exculpate themselves from this constitutional legislative anomie.

¹⁴⁵ The substantive aspect enables civil legislation extending or limiting fundamental constitutional rights.

¹⁴⁶ The incidental aspect enables criminal legislation limiting fundamental constitutional rights.