

LIMITATION ON FREEDOM OF SPEECH AND ALLOWABLE GOVERNMENTAL CONTROL

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Abstract

This paper explores the nuances of freedom of expression, delving into its meaning, historical context, and limitations, as well as the governmental controls that regulate it. It examines the constitutional provisions that justify restrictions on this freedom, particularly in relation to the press, as enshrined in Sections 39 and 22 of the Nigerian Constitution, 1999 (amended). The role of the media in a democracy is underscored, highlighting its capacity to shape public opinion and mobilize thought. While freedom of expression is a fundamental right, it is not absolute, and the press is expected to exercise this freedom responsibly. The paper will analyse relevant case laws and the importance of a free and independent media in a democratic society like Nigeria, where the media's influence can be pivotal in shaping national discourse

Keywords: Freedom of Expression, Restriction, Derogation, Government, Democracy, Constitution and Human Rights.

1. INTRODUCTION

The modern principle of constitutionalism demands that constitution itself must make provision for limitations as well as state the reasons for which they are imposed¹. It is, therefore, worthy of note that some constitutions have limitation and derogation imposed on the rights declared in them, whilst others contain no expressly stated limitations as in the case of the constitution of United States of America. On the other hand, in the case of Nigeria, the constitution has expressly provided limitations and derogation.

Formulation of effective interpretation to the derogation of freedom of expression based on authorities from older democracies and the need for safeguarding the country from the likely harm this expression could cost the nation. The constitution provided for other public interference, derogation and limitation.

What does Derogation mean? Derogation is a legal term of art², and the term is also used in catholic canon law³, but we are interested in the definition of human rights law, and the term may carry the additional meaning of a national legislature suspending an obligation for a legitimate objective, usually a national security exception or some other extraordinary circumstance relating to the maintenance of public order.⁴

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¹ Abdullah M. Muhammad, Dee-Sage Nigeria Limited, Lagos.

² Chirwa, Danwood Mzikinge: Chenwi, Lihari,eds (2016), The protection of economic, social and cultural Rights in Africa. Cambridge University Press,p56.

³ Manual of Canon law p69.

⁴ Costelloe, Daniel (2017), legal consequences of peremptory norms in international law Cambridge University Press. p65. ISBN9781107145030.

Freedom of Expression is a fundamental human rights, are enshrined in Article 19, of the Universal Declaration of Human Rights, and we can infer that there are five freedoms of expression. These are speech, religion, press, assembly, and the right to petition the government.

What is Freedom of Expression? Freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers, is how article 10 of Human Right Act of the UK, puts it.⁵

Section 39 of the constitution of the Federal Republic of Nigeria , 1999 (amended) (herein called “constitution”), provides that; every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

Black’s law dictionary defines “Derogation” as “partial repeal or abolishing of a law, as by a subsequent act which limits its scope or impairs its utility and force”. It is sometimes used, loosely, to mean abrogation, as in the legal maxim, *lex piosterior derogate prior* (“a subsequent law derogates the previous one”).⁶

According to West; Encyclopaedia of American Law, derogation “implies the taking away of only some part of a law”, or it is a “partial repeal of a law, usually by a subsequent act that in some ways diminishes its original intent or scope”⁷

The definition of Freedom of Expression, according to this paper, is every person has the natural right to freely express himself through any media without interference by authority, or fear of persecution. However, the paper believes, the authority can justify curtailing this freedom, for defence, public safety, public order, public morality or public health, and other constitutionally allowed derogation.

It is a strong belief of this researcher, that no human rights are absolute and the state authority should be empowered to diminish these rights. These rights should carry with them special duties and responsibilities.

How these rights did come about? James Madison (1751- 1836), is credited to be the chief author of Bill of Rights, and thus of the first amendment to the US constitution, was the foremost champion of religious liberty, freedom of speech and freedom of the press in the founding era. James Madison (the 4th President of US President; 1809- 1817) played a central role in drafting, explaining, and rectifying the constitution: after it was rectified to seek to reassure its critics by adding guarantees of fundamental liberties.

This paper intends to turn a searchlight on the areas which lack cohesive judicial reviews in the Nigerian constitution. It shall examine how some judges were somewhat involved in very charged emotional or political situations in their reviews and discuss in *parri-passu* the

⁵ <https://www.equalityhumanrights.com>. Article 10 of Human Rights Act, UK.

⁶ Black Henry Campell.1910, Black’s law dictionary. West Pub.

⁷ Lehman, Jeffrey: Phelps, Shirelle (2005), West’s Encyclopedia of American Law Vol. 1, (2ed). Detroit. Thomson/ Gale. P.67. ISBN9780787663742.

limitations and derogation, by Justices of the Supreme Court of the US and contrast it with scanty judicial reviews of Nigerian jurisprudence especially the lack of judicial will by the Supreme Court in Nigeria to be emotionally charged and resolve these political situations that have arisen in Nigeria, since our two experiences of democracy between 1979-1983 and 1999 to date and then proffer some recommendations.

2. CONVENTIONAL AND UNCONVENTIONAL SPEECH

It is not the purpose of this segment to rehash the contentions about free speech. The primary goal is to delimit the category of speech that falls within constitutional protection. It is necessary to provide a brief explanation of speech and its interrelations with other acts. Professor Thomas Emerson, considered one of the most prominent modern legal scholars, in a contribution to work representing expression, wrote “the functions of expression and principles means to protect expression in such areas are different from those in the main system, and that different legal rules may therefore, be required”⁸. Although some actions and behaviours fall outside speech forms⁹, focus will be directed to the meaning of expression through different views.

The distinction between speech and the action of a free speech clause is relevant to question about the meaning of speech, while some of the communication falls outside, speech and has no meaning (for example, ‘speaking loudly’ in libraries). Some expression conduct the meaning to listener in more than pure speech, therefore, this act falls in the heart of the ‘free speech doctrine; such as in picture and film speech¹⁰. Thus, drawing a line between speech and conduct requires an understanding of the latter meaning of speech. The aims of this paper are not to discuss the meaning of speech from the linguistic perspective, but rather to search for the meaning that falls under legal protection. This discussion, then, revolves around the questions:

1. What is the meaning of speech?
2. What kinds of acts or symbols are covered by the freedom of speech principle?

It is important to draw a line between protected and unprotected speech. Moreover, according to Justice Black, the distinction between speech and conduct is the first step towards distinguishing between protection and protected speech. It would be easy for courts to uphold the regulation of any form of protection that can be regarded as unprotected speech.¹¹ In other words, “distinction is essential if we wish to maintain the boundary between legislature and judicial roles in a democratic society.”¹² One important clarification is required before we continue; the general principle that everyone shall have the right to freedom of speech is not itself a controversial issue, yet differences of opinion arise regarding the meaning of speech. The speech that will be discussed here could be defined as the communication of an idea, information and artistic sentiment through means that are linguistic, pictorial or traditionally artistic. Thus, in order to examine this issue, many legal views should be taken into account to clarify the line between speeches, in its pure form, on the one hand and communicative conduct on the other.

⁸ Thomas Irwin Emerson, *The System of Freedom of Expression*, (Random House Trade (1970) p.20.

⁹ Barendt, p79.

¹⁰ Andres Mole Velazquez, *‘Autonomy, Freedom of Speech and Mental Contamination’*; (University of Warwick 2007). p.18.

¹¹ *Labour Board V. Fruit Packers*, 372 US. 58, 1964.

¹² *Miller v Civil City of South Bend*, 1990.

Finally, the meaning of speech will not serve the context of freedom of speech ration. It may help to understand the situations that revolve around the theories of freedom of speech. Communication of political, economic, social, religious and other, issues is not excluded from the general principle of speech, but the only issue raised here is that concerning the kind of speech that needs to be contextualised as speech and time falls under the freedom of expression principle.

3. CONVENTIONAL SPEECH: PURE SPEECH

3.1 Written and Spoken Words

Since pure speech is considered the most common form of speech, it is significant to specify the meaning of it. The different opinions that are raised by many scholars illustrate this fact. Locke¹³ and Frederick Copleston¹⁴ found speech devoid of any act. However, others completely oppose the former opinion, such as Tien,¹⁵ who found that nothing can be excluded from speech, Gardiner, opined that speech does not become speech unless it has four main elements “a speaker, listener, words, and things to be spoken about”¹⁶, while the written word, which is introduced by books, magazines, newspaper, and the internet (social media), can deliver idea to the reader or listener, the spoken word is considered to have a stronger effect on an audience than other kinds of words¹⁷.

Inspite of the fact that there are different kinds of speech, either in the printed word¹⁸ or thoughts which differ in some ways from words and symbols¹⁹, they are all covered by freedom of speech concept. Thought is a kind of communication among members of society and a way to convey an idea from one to another. The philosopher John Locke made a strong link between ideas and words. To Locke, words are the external translation of invisible idea that are held by men, and thoughts enable one to express his/her feelings via articulate sounds more effectively than be any other natural connection. Thus, without thoughts, words cannot practice their primary function in delivering idea and words are useless (According to Locke “idea which everyone thinks on, or intends by that name, is apparently very different in men using the same language. For example, some link gold with the colour yellow and anything having worth or value, therefore, a person is affected by the ideas that he has rather than words itself”²⁰. Commenting on Locke’s theory, Kretzmann argued that Locke introduced two main ideas supporting his claim “to apply words to signify immediately other than one’s own idea”. First, speech is the mark of the speaker’s idea that is always delivered by sound. Second, words are nothing without an idea, and when one uses words to deliver his/her idea, they create a meaningful phrase.”²¹

¹³ John Locke, *An Essay concerning Human Understanding* (Eliz Holt 1700). p. 328.

¹⁴ Frederick Copleston, F. Copleston ‘*A History of Philosophy: Modern Philosophy: The British Philosophers Part 11: Berkeley to Hume. (vol.5)*’ [1964] Garden City, NY: Image. p102.

¹⁵ Lee Tien, ‘Publishing Software as a Speech Act’ (2000) 15 *Bark. Tech LJ* 629 p. 638,

¹⁶ Alan Henderson Gardiner, *The Theory of Speech and Language* (1932) Abstract.

¹⁷ Richard Moon, *The Constitution Protection of Freedom of Expression*, (University of Toronto Press 2009 p.28.

¹⁸ Barendt, p.75

¹⁹ Copleston, (n14) p.102.

²⁰ See Locke’s theory, pp 282,283,363,364.

²¹ Norman Kretzmann, ‘The Main Thesis of Locke’s Semantic Theory’ (1968) 77. *The Philosophical Review* 175. p87.

However, Locke did not address how the meaning that we apply to words can be subjected to different interpretations. In other words, words are not necessary to be understood as they are in our minds²². It should be noted that the definition of the meaning of speech is related to many factors. Gardiner argued that, “speech is elastic so that two sentences with the same words may have entirely different meanings depending on the various factors concerned, such as sentence form, words order, meaning of silence and the use of various parts of speech.”²³ Speech without communication and clear ideas cannot be pure speech.²⁴

At an international level, the European convention for the protection of human rights and fundamental freedom (ECHR) and the first Amendment to the U.S, constitution are no exceptions in the context of using the ultimate meaning of words. According to Diez, “the meaning of words is dependent on their discursive context: that this context is not rigid but inconstant.”²⁵ Thus, the core of free speech is not just pronouncing some words: rather, it is an exchange of experience and all community interests.²⁶

Speech, whether the spoken or written word: plays, films, videos, photographs, cartoons and paintings all fall under the speech umbrella. Furthermore, in order to understand speech, three elements should be available: (1) The time of speech (2) Who is targeted by speech (3) The possible consequences of speech. Clearly the core of speech is to communicate, deliver and participate with others and any restriction or limit on this right will directly affect the freedom of speech. For example, when individuals have an idea, they usually express it by communicating with others with any kind of speech, but when the idea is restricted by law or force, the benefits and advantages of the idea would be useless²⁷. Thus, it is not too much of an exaggeration to say that speech as a concept requires many factors to complete speech system.

3.2 Speech v Conduct

Many law philosophers are concerned with defining and justifying the theories that deal with speech acts²⁸, when traditional views have limited freedom of speech, in pure speech or verbal utterance, other views are expanded to include different types of freedom of speech such as talking and writing²⁹ and ‘speech-plus-conduct and expressive conduct’. This expansion gives free speech further dimension to be more general and advances.³⁰

²² Tiager and Dickerson , p.26.

²³ Gardiner, (n16) Abstract.

²⁴ David Braddon-Mitchell and Caroline West, ‘What is Free Speech’? (2004) 12 *Journal of Political Philosophy* 437. p.440.

²⁵ Thomas Diez, “Speaking Europe”, The Politics of Integration Discourse’ (1999) 6 *Journal of European Public Policy* 589. p.610.

²⁶ Martin Philip Golding. *Free Speech on Campus*, Rowman & Littlefield 2000.p.17.

²⁷ Nigel Warburton, *Free Speech: A Very Short Introduction* (OUP Oxford 2009) p.5.

²⁸ Franklyn Saul Haiman ‘Speech Acts’ and the First Amendment (SIU Press 1993), p.10.

²⁹ . Mariane constable, ‘Law as Claim to Justice: Legal History and Legal Speech Acts’ (2011) 1 *UC Irvine L. Rev.* 631, 632).

³⁰ Ken I Kench, ‘How Conduct Became Speech and Speech Became Conduct: A Political Development Case Study in Labour Law and Freedom of Speech’ (2006) 8 *U. Pa. J. Const. L.* 255. p.265

The value of conducts in the process of freedom of speech development is fundamental, as Hayek asserted, in the constitution of liberty, concerning the importance of action and its functional role in the creation of surrounding typical factors that are suitable for freedom of expression. Hayek's idea did not focus on action as a kind of speech but rather described the core of action as derived from practices and experiences which ultimately reflect on the value of action³¹. In addition, exercising the free speech act has improved over time. This is obvious through new technology, such as a TV broadcasts, Facebook, and Twitter, which are seen as new ways of practising "speech act".³²

Moreover, the core conduct can be seen through beliefs and opinions which are often considered the appropriate way to convey message more than pure speech³³. The fact that the speech and action are protected under many countries institutions is remarkable and cannot be denied. However, the overlap between speech and action should not draw attention away from the primary component in the freedom of speech process. In other words, what should have more regulation than another action or verbal conduct? According to Robert Trager and Donna Dickerson the clarity and meaning of actions other than oral expression,³⁴ lead to the fact that regulated action is more of a priority than outright expression for many reasons. First, action in its content may have a negative impact, which can cause physical harm, prevent rights and interfere with other interests of the expression process. So preventing this kind of action is an important approach to protecting people from such harmful conduct. Dealing with this kind of conduct is more important than other acts, because in the short term, the consequences of negative conduct may cause imminent danger. Second, generally the results of actions cannot be hidden. For example, pointing a knife at a person because of his opinion or beliefs cannot carry any other meaning than the threats of danger. By contrast, oral speech can carry different meanings in one sentence. For instance: 'I hate black people' would likely include many situations in which the statement is not racial. For example, someone might be at odds with black man, so these facts draw the line between speech and action in real practice. Generally, the topic of oral speech is controversial and subject to many aspects that determine what kind of speech it is and its objectives, as opposed to the opposite action which often has only one interpretation.³⁵

Beside what is discussed above, there is another view which differentiates between speech and conduct. There is the importance of dealing with such speech as an action which falls outside free speech protection. This view does not state that speech and action have equal protection, but rather draws the lines between acceptable and unacceptable speech. For example, speech that incites violence, terrorism and racism falls outside the speech umbrella, thus it should be judged as action. This view clarifies the standard judgement which categorises speech forms depending upon the strict view cannot accept conduct as a part of speech.³⁶ While some find that delivering an idea by acts is a kind of free speech, others are short and cell for distinguishing between conduct and oral speech such as Justice Black. The idea centred on the negative impact of

³¹ Friedrich August Hayek, *The Constitution of Liberty: the Definitive Edition*, Vol. 17 (Routledge (2013). p.138

³² Haworth, p.30.

³³ Lillian R. Bevier. 'The first Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle.' (1978), *Stanford Law Review* 299. p. 319.

³⁴ Trager and Dickerson at p.19.

³⁵ Ibid, pp.18 - 19.

³⁶ Robert B. McKay, 'Preference for Freedom' (1939) 34 *NYUL Rev.*1182. p.1196

conduct that normally affects public life; therefore, conduct or speech should be regulated. He said, “I have no doubt the general power of Louisiana to bar at picketing on its streets and highway. Standing, patrolling or marching back and forth on streets is conduct, not speech, and as conduct can be regulated or prohibited.”³⁷ This view is consistent with the idea that purposes drawing the line between speech and action on the basis of violence, coercion and threatening state security. In the case of picketing, for instance, picketing includes speech and conduct. In the legal view, gathering information between speech and conduct may cause conflict in the protecting principle. Thus, the separation between them keeps pure speech away from such conduct, which normally includes unprotected elements³⁸.

Alexander Meiklejohn said, “the legislature has both the right and the duty to prohibit certain forms of speech”³⁹. Clearly, beside drawing the line on speech forms, this view opens if the consequences or the value of other conduct is more or equal to the freedom of speech.⁴⁰ This view is consistent with Baker’s view when he said, ‘barring state-imposed prohibitions of substantively valued conduct greatly increase opportunities for minorities to develop new logics and new realities the notion that replaces objective truth.’⁴¹

So, what is the particular reason that lies behind freedom of speech or freedom of action? What was in Richard Moon’s mind when he said, “our discussion of freedom of expression is framed as constitutional argument, it may become nature to think of the freedom as individual right against state interference”⁴², or when Scanlon noted that ‘there will be cases where protected acts are held to be immune from restriction despite the fact that they have as consequence harms which would normally be sufficient to justify the imposition of legal sanction.’?⁴³ It should be noted here that Scanlon has defined harmful actions in six cases, for more details.⁴⁴

These views do not merely illustrate the conjunction between speech and acts; rather, they clarify the importance of actions between individual interest and state regulation. According to Baker, protecting acts as a kind of speech from restriction is vital for developing and processing communities through increasing their experiences and awareness.⁴⁵ Lesser or no understanding of the nature of the relation between an individual’s actions and the state might have negative effects on both sides. For example, prohibiting or censoring such speech distorts and impedes these activities without people being satisfied or understanding the reason for banning, which may constitute their public condemnation and can be conflicts between the state and individuals.

It seems that categorising harmful speech one general concept would be Insufficient. However, Scanlon defined the two ways which could justify any restriction of acts of expression: (a)

³⁷ *Cox v Louisiana*, 379 US559, 581 (1965), see also, Harry Kalven Jr., ‘Upon Rereading Mr Justice Black on the First Amendment’ (1966) 14 *UCLA L. Rev.*428. p.448.

³⁸ L. Frederick Neff, *Amalgamated Food Employers Local 590 V. Logan Valley Plaza, INC.*: ‘The Right to Picket in a Privately Owned Shopping Center’ (1963) 73 *DIC.L. Rev.*519. p.521.

³⁹ A. Meiklejohn, *Free Speech and its Relation to Self-Government* (1948). p.18.

⁴⁰ Schauer, *Free Speech: A Philosophical of Enquiry*,. p.8.

⁴¹ Baker, p.89.

⁴² Moon, p.219.

⁴³ Thomas Scanlon, ‘A Theory of Freedom of Expression’ (1972) *Philosophy and public AFFAIRS* 204. p.213.

⁴⁴ *Ibid*, at pp. 210,211.

⁴⁵ Baker.

Harms to certain individuals which consist, in their coming to have false beliefs as a result of those acts of expression. (b) Harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression led the agents to believe for increased their tendency to believe) these acts to be worth performing”⁴⁶.

In addition, by classifying some immoral conduct such as whole speech or absently as acts of expression rather than another kind of speech, speech act supporters find it a practical approach to easy the task for those who distinguish between the issues that should be directly subjected to the law from the cases that should be subject to additional control through the law⁴⁷. Review, Generally Haiman Focus on the social control of organizing such harmful conduct under the law, and he behaves the drawing the line between pure speech and actions is a crucial step towards a free society.

There is another opinion upheld by Samuel Nelson, Who recognises that the theoretical view of freedom of speech does not depend on freedom whether it is speech or action but rather, the core of freedom focuses on the potential harm that might arise from conduct,⁴⁸ words and actions are derived from the same principles, which is based on the consequence of expression. A threat to national security, For instance, may cause harm to state by both words and actions are capable of harming others, so they should be subjected to the same regulations.⁴⁹

3.2.1 Regulating Pure and Action Speech

Although there are many opinions that have asserted the equality between pure speech and action as a type of freedom of expression, this does not mean that the two conducts should be subjected to the same regulations. The only way speech and action can be differentiated is by isolating any harm from the being pure speech.⁵⁰

According to Cox, restrictions or permission in many laws that deal with freedom of speech do not rely on right bases: rather, they depend on the cases situation. For example, spreading rumours may be changed in order to maintain security. These norms can apply to both speech and action.⁵¹ This view is consistent with the idea which is states that every action permitted unless there is logical reason to restrict it⁵². Thus, it can be seen from the two views that pure speech and action speech are not immune from restriction. Moreover, Holmes goes beyond the former view as it assented that on some cases the intent to cause harm would justify the restriction of free speech.⁵³ However, intention to communicate needs more effort to decide whether it encompasses the meaning of speech or not. In *People v. Most* held that ‘[a] breach of the peace is an offence. It may be committed by written word or even by spoken words, provided

⁴⁶Scanlon p.213.

⁴⁷ See Haiman.

⁴⁸ Samuel P. Nelson, *Beyond the First Amendment: The Politics of Free Speech and Pluralism*, (JHU Press 2005) p. 147).

⁴⁹ See Schauer, *Free Speech: A Philosophical Enquiry*, p. 64. See also Susan Hurley, ‘Limitation, Media Violence, and Freedom of Speech’ (2004) 117 *Philosophical Studies* 165. p.191.

⁵⁰ See Haiman (n.47) p.2.

⁵¹ Archibald Cox, *Freedom of Expression* (I Universe 1999) p.5.

⁵² See Greenawalt, ‘Speech, Crime and the Uses of Language’, p.10.

⁵³ *Abrams v. United States*, 250 US. 616, 627 (1919). p.5.

they tend to provoke immediate violence”⁵⁴. These norms can apply to both speech and actions. This view is consistent with the idea which states that every action is permitted unless there is a logical reason to restrict.⁵⁵

Justice Oliver Wendell Holmes asserted the importance of surrounding circumstances in determining whether such an act should be protected or not. For Justice Holmes, “(t)he question in every case is whether the world used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substance evils that congress has a right to pervert”⁵⁶. For example, in the case of *Rice V. Paladin*⁵⁷, the fourth circuit decided that the surrounding circumstances of criminal culpability played an important role in determining the practical elements that assist in.

In addition, the surrounding circumstances can transfer speech from protected rights. For instance, political speech is generally protected under the free speech principle, but when the speech calls for incitement during war time, the situation would be changed from protected to unprotected speech. This case, the task of courts in dealing with each case separately from others, it can be said that it is true that the freedom of speech has been unprotected under many international conventions. However, under the (ECHR), for instance, in such circumstances the protection cannot be overbroad and treated with some type of free expression separately from another case without thereby committing to its protection in every situation.⁵⁸

The distinction between protecting and unprotecting conduct is a controversial measurement. For example, a transfer authority allows solicitation for assisting the community, and by contrast, prevents the poor from begging is not covered by the free speech concept, because it is action, not expression. The dilemma of speech does not stand on the limitation of protection: rather, it extends for to justify any speech restriction. For example, when the state restricts speech or conduct, the restriction should be justified.⁵⁹

3.2.2 Unconventional Speech: Communicative Conduct

After explaining different forms of speech which helped to clarify the position on conventional speech, it is important now to have a look at the forms of action that fall under free speech protection. Communicating ideas through forms of expression other than writing or speaking is vital to determining the protection that should be applied. According to Thomas Emerson, “the focus of inquiry must be directed toward ascertaining what is expression and therefore to be given the protection of expression and what is action and limits expression is the line that can separate them.”⁶⁰ The potential meaning of speech makes this right functional; consequently. “Free speech is defined not by what it is, but by what it does.”⁶¹

⁵⁴ *People v. Most*, (1902) 171 NY 423.

⁵⁵ Greenawalt, *Speech, Crime and the Use of Language* (n.118). p.10.

⁵⁶ *Schenck V. United States* (1919) 249 US 47 . See also Lonn Weissblum, incitement to violence on the world wild web; can web publishers seek first Amendment Refuge’ (1999) 6 Mich Telecomm and Tech L. Rev. 35 p.40.

⁵⁷ *Rice v Paladin Enterprises*, 96-2412 (1997).

⁵⁸ P. Bernt Hugenholtz. ‘Copyright and Freedom of Expression in Europe’ (2001).

⁵⁹ Susan J. Brison *Speech, Harm and the Mind Body Problem in the First Amendment*, Jurisprudence (1998) 4 Legal Theory 39 - 41.

⁶⁰ See Trager and Dickerson at p18.

⁶¹ See Schauer. *Free Speech: A Philosophical Enquiry*, p.91.

Some forms of expression such as words, painting, sculptures and flags, are types that fall within symbolic expression. Attempts to convey ideas or emotions to other people by symbolic forms, rather than words or pictures, are common. The distinct meanings of symbols themselves are given meaning further dimension. According to Wasserman, “Any attempt to protect the symbol assigns that preferred message to it.”⁶²

The broad concept of symbolic expression helps to dissolve potential difference between speech and non-speech conduct the distinction between speech and action in reality does not exist. Rather, the boundaries that revolve around speech and action or protected and unprotected speech are not from social or economic consequences but are related to political factors.⁶³

According to Josh Cohen, “[i]n a society with relatively poor and powerless groups, members of those groups are especially likely to do badly when the regulation of expression proceeds on the basis of vague standards whose implementation depends on the discretion of powerful actors.”⁶⁴

While there is no obvious distinction between expression and conduct, generally, non-communicate or non-speech activities are subject to more regulation than are communication⁶⁵. In order to clarify conduct that is more than just the communication of ideas, a wide vision should be focussed on the reasons rather than the type of conduct or speech.⁶⁶ It should be noted here that the methods of communication are varied, but the most important factor is to define the limitation on communication and whether it falls within the scope of free speech principle or not⁶⁷. Since, in some cases, the distinction between experience conduct or symbolic speech and speech associated with conduct is vague, and some verbal speech has wide constitutional protection, research in symbolic which accompanies pure speech may review such vagueness. According to Schauer “in defining ‘speech’ we are not just attempting to describe something, rather we are trying to carve out categories of activity and give to the activities this circumscribed a particular degree of protection.”⁶⁸

4. The Right Not To Speak

Very different type of expression is joined under the label ‘symbolic speech.’⁶⁹ The right not to speak is applied to convey messages as an alternative approach to speech and falls under free speech protection⁷⁰. In the words of Justice Murphy, “[t]he right freedom of thought and of religion, as guaranteed by the constitution against state action, includes both the right to speak freely and the right to retain from speaking at all.”⁷¹

⁶² Howard M Wasserman, ‘Symbolic Counter Speech’ (2003) 12WM. and May Bill Rts J. 367 p.391.

⁶³ Frederick Schauer; ‘On Deriving is-Not From Ought-Not (1993) 64 *U.Colo.L.Rev.* 1087. p.1092.

⁶⁴ Joshua Cohen; *Philosophy, Politics, Democracy; Selected Essays* (Harvard University Press) 2009 p.124. See Stephen E Gottlieb; ‘Speech Clause and the Limits of Neutrality, The (1986) 51 *Aib.L.Rev.* 19 p.24.

⁶⁵ See Schauer: ‘On deriving is-not from Ought Not, p.1090.

⁶⁶ See Sadurski, p.44.

⁶⁷ See Schauer, *Free Speech: A Philosophic Enquiry* at p.96.

⁶⁸ *Ibid*, p.91.

⁶⁹ Sheldon H.Nahmod, ‘Sacred Flag and the First Amendment’ (1990) 66 *Ind L.J* 511. p.512.

⁷⁰ Howard M. Friedman, ‘Why do you Speak that way-Symbolic Expression Reconsidered’ (1987) 15 *Hastings Const. LQ* 587. P588).

⁷¹ *West Virginia State Board of Education v. Barnette* (1943) 317 US 645.

This right has a strong link with the authority/self-expression principle more than any other principle. This is because the autonomy principle serves the interests of those speakers who want to be silent.⁷² Most regulations related to freedom of expression widely discuss the freedom of speech, but there may be times when a person prefers to express his or her ideas by silence or declining to participate in such activities. The right to not speak, or negative freedom of speech,⁷³ is a substantial and objective basic for democratic society. According to Chief Justice Burger, “[t]he right to speak and the right to refrain from speaking are complimentary components of the broader concept of ‘individual freedom of mind.’”⁷⁴ This opinion is based on the grounds that the freedom not to speak or the right to be silent is equal to the right to be speak and this equality believe that the right to be silence is justifiably subject to the same limitations that apply to speech.⁷⁵ Furthermore, the U.S. Supreme Court found that protection of freedom not to speak is essential for a democratic society and without this right, freedom is incomplete⁷⁶. The fact that silence would justify a high degree of free speech protection indicates there is ambiguity in understanding the nature of public and private speeches. As while wrote “[s]ilence is plainly necessary to any kind of speech, for without silence the words and phrases and syllables cannot be distinguished from each other or from the note that surrounds them.”⁷⁷

Although the right to silence is an independent form of speech, there are difficulties in treating right to silence cases because of lack of a solid legal bars⁷⁸. The insufficient principle of the right to silence has been obvious over centuries when people had no right to keep silent in cases related to religious or political beliefs. According to Bosmajian, “the freedom not to speak has not yet been developed into an applied, clearly defined legal principle, stand or doctrine; as have been other ‘corollary’ and ‘cognate’, ‘rights’.”⁷⁹

In right-to-silent cases, the conflict between lower and higher authority is obvious. In *West Virginia State Board of Education v. Barnette*, the US Supreme Court rejected the board of education and asserted the children’s right not to salute the American flag because of their religious belief. The court held that a local government has no power to restrict people’s feelings, opinions, or faith, which is guaranteed under the first Amendment⁸⁰. It’s noteworthy that religious freedom falls under the umbrella of freedom of speech protection in U.S.A. Similarly, in the case of *Keyishian v. Board of Regents*, the U.S Supreme Court upheld the right of state employees not to be compelled under the United States district court for the western district of New York to an oath of loyalty that they were not members of ‘subversive organisations’⁸¹. In short, both cases are a mode of free thinking. As a result of this statues which force or compel people to salute a flag or affirm allegiance are unconstitutional because they are enacted to limit free speech.

⁷² Anna M. Taruschio, ‘The First Amendment, the Right Not To Speak and the Problem of Government Access Statutes (1999) 27 *Fordham Urb. LJ*1001. p.1012.

⁷³ See Taruschio, p.1001.

⁷⁴ *Wooley v. Maynard* (1977) 430 US 705, 714. See Bosmajian Haig., *The Freedom Not to Speak*, NYU Press, 1999’, p.426.

⁷⁵ Rice, George P. “The Right to be Silent”, *Quarterly Journal of Speech* 47.4 (1961): 349-354. p.351

⁷⁶ *Wooley v. Maynard* (1977) 430 U.S 705.

⁷⁷ James Boyd White, ‘Free Speech and Valuable Speech: Silence, Dante and the Marketplace of Ideas’ (2003) 51 *UCLA L. Rev* 799. p.800.

⁷⁸ Rice, George P. “The Right to be Silent”, *Quarterly Journal of Speech* 47.4 (1961): 349-354, p.354.

⁷⁹ Bosmajian, Haig. *The Freedom not to Speak*. NYU Press (1999), p.426,440.

⁸⁰ *West Virginia State Board of Education v. Barnette* (1943) 319 US 624.

⁸¹ *Keyishian v. Board of Regents* (1967) 389).

What has been discussed illustrate that the protection of the right not to speak is not absolute, which means we face a right-to-silence case. The question here is not whether such a case is undisputable: the question posed is whether silence should be protected or not, that is when the right to silence falls under freedom of speech guarantees the concept of free silence is neither carefully classified nor accurately used in many regulations. In fact, this ambiguity gives room for judges and legal scholars to explore the destructive feature of this right on a freedom of speech basis.

The argument here will be to examine the limitations of free speech on both theoretical and practical norms. Thus, the aim is to clarify the limitations found in theory and in practice. The work explores the different implications of free speech, and how such speech differs from one case to another.

The fact is that freedom of speech has long been held to have limits. In the words of Justice Blackmun, “if all expressive activities must be accorded the same protection, that protection will be scant”.⁸² What Blackmun presents is merely a manner of describing a very exact scrutiny of freedom. Although many scholars emphasised that freedom of speech protects different forms of speech.⁸³ Harmful speech, for instance may have negative effect on personal dignity. In the words of Heyman, ‘free speech is a right that is limited by the fundamental rights of other individuals and by the community as a whole.’⁸⁴

Discussion at this stage should be focused not on the speech that gains constitutional protection, rather on how far the speech has protection, unlike in the last part, in the words of Hurley when he inquires when the harmful speech can be excluded from free speech protection. In other words, when will the speech move from free speech to harmful or offensive speech, the purpose of discussing this is to provide a convincing justification for excluding some types of legal speech protection.⁸⁵

Indeed, the importance of these rights is obvious: speech that negates these conditions would undermine its own normative basis. However, while recognising that some kinds of speech should be restricted, we should inquire about the limitations of freedom of expression that should apply under the National Laws, especially when the issue is related to public safety, defamation, privacy and national security. The provision of international law by states should be limited or derogated by their constitution. In other words, discussion on these rights should be focused on a case-by-case basis.

5. What Speech Should Be Derogated Or Limited

In many societies, free speech is a worthy right that deserve constitutional protection and some constitution, for example, that of Nigeria provided for their limitations and derogation and all modern constitution do the same. An individual cannot enjoy speech in relation to others unless

⁸² *RA v City of St. Paul* (1992) 505 (90-7675) US 377.

⁸³ . Decew, J and Quot, ‘Free speech and Offensive Expression and Quot:- Google Scholar. p.85. Some speeches such as offensive words, are excluded from constitution protection. See *Chaplinsky v New Hampshire* (1942) US 568, 315.

⁸⁴ S.J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, (1998) Boston University Law Review p.1279.

⁸⁵ See Hurley p.165

they recognise him as free person. However, some type of speech are excluded from free speech protection as Heyman says, “free speech is a right that is limited by the fundamental rights of other individuals and community as a whole”.⁸⁶ There is no country that would protect free speech without limitation. In other words of Van Mill, “(e)very society places some limits on the exercise of speech because it always takes place within a context of competing values”.⁸⁷

Alexander and Horton make a similar point when they suggest that speech is simply valuable and its principle subject to different categories.⁸⁸ Thus, all agree on the importance of free speech for the individual and collective alike, there is no society that would protect free speech without limitation. Speech is important because people find it essential to express their opinions and feelings. However, whatever reasons we offer to protect speech can also be used to show why some kinds of speech can also be used to show why some kinds of speech should and might no longer have grounds for protection. In the words of Judith Decaw, ‘despite all the arguments in favour of maximal freedom of expression, both the positive effects of allowing maximal freedom of expression and negative consequences of restriction and suppression, the first Amendment clearly does not guarantee protection of all expression’.⁸⁹

In the *Chaplinsky v New Hampshire*, case for example, the Supreme Court very clearly insisted that the free speech is not an unlimited right. Speech that contains ‘lewd and obscene, the profane, the libellous’, and other words fall outside free speech protection.⁹⁰ According to Justice Brennan, profane speech has strict scrutiny more than normal speech, basically because it is not at the ‘core of first Amendment protection.’⁹¹ The wide variety of speech requires extending the speech argument to cover negative speech. Speech that causes harm and offence is considered in general terms, the common reasons behind speech restriction. Limiting free speech by establishing unprotected categories of expression, accordingly to Trager and Dickerson, is crucial to protect free speech from such danger. Therefore, the following discussion is not to argue the general principle of freedom of speech, rather to make a clear understanding of when speeches that cause harm or offence can be restricted and fall outside free speech protection.⁹²

6. Justification of limiting Freedom of Expression

Freedom of expression has special values, which require expanding our knowledge to depart from the narrow justification of legal arguments that are based on solid principles, indeed, legal arguments become an exact structural analysis of positive speech, to suggest more precisely, we can and should ask about the justifications of free speech, we also need to know the potential link between the justifications of freedom of expression speech and understanding it’s limitation. Ronald Dworkin says, ‘there is “constitutive”, reasons for freedom of speech: respect for individual autonomy, responsibility, etc.’.⁹³ The question raised by Dworkin is whether a

⁸⁶ Ibid, at p.1279.

⁸⁷ Van Mill David, *Freedom of Speech*, <http://Plato.stanford.edu/entries/freedom-speech/HintBouDest> Accessed 6th Aug, 2017.

⁸⁸ L. Alexander and P. Horton, ‘Impossibility of a Free Speech Principle’ (1983) NW. UL Rev p. 1322.

⁸⁹ Decaw, J. “Free Speech and Offensive Expression”, *Social Philosophy and Policy*, 21.2 (2004) p.85

⁹⁰ *Chaplinsky v New Hampshire*, (1943) US 568 2315.

⁹¹ See Shiffrin, ‘The First Amendment, Democracy, and Romance’, at p.23.

⁹² See Trager and Dickerson at p.112.

⁹³ R. Dworkin, *Freedom’s law: The Moral Reading of the American Constitution* (1999) p.200,201

distinctive role can be derived from legal theories that go beyond the general understanding of freedom of speech to balance, the researcher prefers the view of the right to free expression being derogated when it will harm public safety, and it can be justified through the law. The aim is to formulate the limitation of freedom of expression and speech in the clearest and most precise fashion possible, which could serve both as an evaluative guideline and be suitable for a range of cases, covering different types of speech and expression. Rather than relying on a single interpretation of certain theories about speech being protected, about the search for truth, individual autonomy and democracy. This paper will discuss these values from different views. The goal is to provide, to a certain extent, an overview of a familiar set of assumption about the content of the value of freedom of expression and speech.

7. Democracy and Self-Government

This segment examines also this argument of democracy and self-government. In the previous sections, a common emphasis on the importance of exercising freedom, whether at the individual or at the collective level. Unlike the former theories, the argument from democracy characterises with its capacity to overcome the modern time variables in many western states.⁹⁴ This theory included many cases (*Time, Inc. v Firestone* (1976) 424 US 448,457.

This theory, rests mostly on the development and advancement of society as a whole through public participation, and therefore, it can be called political speech or self-government and many cases.⁹⁵ For Blasi, this theory “holds that each member of the polity, no matter how eccentric or humble, occupies a vital role in the governing process and this enjoys a right to hear and be heard on all matters relevant to governance”.⁹⁶

Alexander Meiklejohn who is considered the most influential 20th century philosopher of free speech in the United States and other 20th century scholars thought that self-government was the core value of free speech⁹⁷. The importance of freedom of speech is inherited from the value of self-government, which in turn plays a crucial role in determining the conception of democracy.⁹⁸ Post argues that “democracy self-governance requires that public opinion be broadly conceived as a process of ‘collective self-definition’ that will necessarily precede and inform any specific government action or inaction”.⁹⁹

According to this view, public opinion is a necessary constraint on the democratic and governmental processes and is appropriately essential for the progress of a society as a whole. The democratic argument, according to Moon, intended to highlight the importance of free speech to remain immune from constitutional restrictions.¹⁰⁰ At the same time, the freedom implies democracy as a process for specifying and implementing people’s choices.¹⁰¹ This point about the limit between freedom of speech and democracy has been taken up by many commentators. Raz, for instance, maintains that freedom of expression is an essential element

⁹⁴ Barendt (n.1) p.18.

⁹⁵ This theory included many cases (*Time, Inc. v Firestone* (1976) 424 US 448,457. *New York Times Co. v. Sullivan*, (1964) 376 US 254,269. *Hutchinson v. Proxmire*, (1979) 443 US 111,134).

⁹⁶ Vincent Blasi, ‘the checking value in first Amendment 1986 DUKE L.J. 589 (1986) 1 Duke Law Journal p.603).

⁹⁷ See Trager and Dickerson , at p.99.

⁹⁸ See Baker, at p.30.

⁹⁹ R. Post, ‘The Constitutional Status of Commercial Speech’, (2000) *UCLA L. Rev.* p.302.

¹⁰⁰ See Moon, p.14.

¹⁰¹ See Baker, p.31.

through three aspects. Firstly, no government can be classified as democratic without being open to freedom of speech. Secondly, freedom of expression is prerequisite of exchange and diversity in cultures. Lastly, freedom of expression concerns a governmental process through observing its work.¹⁰² Free expression, in this regard, is distinctive manner that leads to “alerting the polity to the facts or implications of official behaviour, presumably triggering responses that will mitigate the ill effects of such behaviour”¹⁰³ Accordingly; freedom of speech is a central engine for democratic society.¹⁰⁴

In their reading of the implications of the theory of democracy and self-government, some legal scholars,¹⁰⁵ such as Alexander Meiklejohn, discussed that citizens have the right to express their feelings, opinions without interference.¹⁰⁶ Indeed, the importance of the self-government theory emerges from the argument its reliance on many valuable aspects that characterises the argument from other theories.¹⁰⁷ The distinctive role of free speech is derived from the fact that “the people need free speech” because they have decided the govern themselves.¹⁰⁸ Thus, two aspects should be applied to achieve citizen participation in democracy. Firstly, people must have enough sources to collect the information that meet with their requirements. Secondly, there must be no barriers between citizens and government officials and people are the ones who need to address the government with its mistakes. Both requirements of democracy lead to an emphasis on the power of citizens in guidance with the government policy. If the government is democratic, it is for people to decide what the limitations are of the government, especially when the matter’s related to the government is performance, because as citizens, they have an obligation towards their government and therefore, towards the various works undertaken by government.¹⁰⁹

In its simplest form, the argument for democracy is somewhat paradoxical when considered between popular will and the state’s power. Meiklejohn was clear when he addressed this issue, as he said, “Just as our agents must be free in their use of their delegated powers, so the people must be free in the exercise of their reserved powers”¹¹⁰ as for extending democracy to include different forms of speech, except those that may cause harm to others¹¹¹ therefore, he puts forward four areas that must be protected to ensure the applicability of democracy, namely, 1. Education, 2.Philosophy and 3.The sciences, literature and arts, and 4. Public discussion of Public Issues¹¹²: Obviously, the ‘prizes’ show that the exercise of self-government requires being open to others and enabling people to send and receive ideas, which ultimately reflects positively on public good. Therefore, any communication that lacks social utility should fall outside legal concerns.

¹⁰² Joseph Raz,, ‘Free Expression Personal Identification’, (1991) *11 Oxford Journal of Legal Studies* 303. p324

¹⁰³ See Blasi, at p.546.

¹⁰⁴ See Baker, at p.28.

¹⁰⁵ Spinoza, Hume, Kant, Discussed democracy. See Schauer, *Free Speech: A Philosophical Enquiry*, p..36.

¹⁰⁶ See Meiklejohn, *Free Speech and its Relation to Self-Government*, at p.2.

¹⁰⁷ See Barendt, at p.18.

¹⁰⁸ Baker, at p.30.

¹⁰⁹ Raphael David Daiches, *Problem of Political Philosophy*, Cambridge University Press (1970) p.85

¹¹⁰ See Meiklejohn ‘The First Amendment is an Absolute’, at..256.

¹¹¹ See Moon, at p19.

¹¹² Meiklejohn, (n.110) at p.256Clearly, these preconditions highlight the democratic society’s requirements. Also, it characterizes, democratic theory from the two previous theories.

In his reading of the implications of the democratic government, Professor Cram has discussed that the state's power derives from popular sovereignty. When the people express their opinions about various ideas freely, especially political matters, without governmental restrictions, popular sovereignty can be achieved.¹¹³

Accordingly in societies that do that do not allow people to express their opinions in various ways, the value and societal development would be undermined.¹¹⁴ Indeed, communicating in public is the side purpose of free speech protection. Raz maintains that “to be protected (speech) has to be public... address or made available to the public or any section of the public”.¹¹⁵

This argument emerges as important through the various national and international entities that are asserted on the protection of democracy and the right of individuals to have access to information. The first example is The Universal Declaration of Human Rights in Article 19, which asserted that protection of freedom of expression should include, “seek, receive and import information and idea.... regardless of frontier.”¹¹⁶

Similarly, the European Convention on Human Rights recognises the importance of access of information in Article 10(i), Where it declares that the right of freedom of expression “include(s) freedom to hold opinions and to receive and import information and ideas without interference by public authority”.¹¹⁷ Based on Article 10 in *Ozgur Gundem v Turkey*, the court stated, “freedom of expression was precondition of a functioning democracy and would not depend merely on a state's is duty not to interfere, but might require positive measures of protection.”¹¹⁸ On the National level, many countries also inclusion of access to information to their constitution does not imply direct meaning to the right of democracy or access to information, the text itself appears to emphasises these freedom of speech as it says, “congress shall make no law....abridging the freedom of speech...and to petition the Government for redress of grievances”¹¹⁹

The Nigerian constitution in section 39 also asserted on the right of the people to access to information, stating in 39(1) “(E)very person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and import ideas and information without the interference..” The argument for democracy, as its name indicates, requires public participation in making the choice. It is against the tenets of governmental monopoly or “licenses” that considerably gives authority more priority over citizens.¹²⁰

¹¹³ I. Cram, contested words: Legal Restrictions on freedom of speech in Liberal Democracies (2006) p.14

¹¹⁴ Barendt (n.1) p.47

¹¹⁵ Raz, ‘Free Expression and Personal Identification’ (n.402) pp.303, 304

¹¹⁶ Universal Declaration of Human Rights <http://www.un.org/En/Universal-Declaration-Human-Rights/> Accessed 5th Aug, 2023

¹¹⁷ The European Convention on Human Rights <http://www.Echr.coe.int/Documents/convention-ENG.pdf> Accessed 5th Aug, 2023. In *Autronic AGV > Switzerland*, the court said the right access to information is granted by the law; therefore, under Article 10 of the convention, the state has no authority to prevent people from this right, *Autronic AGV. Switzerland* (1990) 12726/87 ECHR.

¹¹⁸ *Ozgur Gundem V. Turkey*, 23144/93 (2000) ECHR

¹¹⁹ First Amendment to the US constitution

¹²⁰ Kl Kerch, freedom of speech. Rights and Liberties under the law (2003), p.212.

The space and respect is given to the people to offshoot from the principle of democracy. Discussion on the issue of public interest and criticizing leaders cannot exist without reliance on the theory. In addition, the distinctive approach that is applied by the democracy argument, as Barendt discussed, has a big influence on institutions of civil society and its members,¹²¹ thus, it is not too much of an exaggeration to say that this argument combines two main elements, which are an individual's freedom and the public interest. Indeed, the framers deemed it necessary to create the democratic theory, rather than merely including democracy within distinction, we could reasonably decide that the argument is more beneficial as discussed, than other theories and more likely to serve individuals and society alike and that the theory thus deserves a greater degree of constitutional protection than other theories. In this regards, liberty and freedom are "not just the right that reflects the functional part of democracy",¹²²

8. Limitation of Democracy and Self-Government

It is evident from the preceding account of the principle of democracy that the argument is confronted with two main limits. First, 'is the concept of democracy' Second 'is the scope of governmental interference' As the theory parts public goes as its top priority, it does not define any limitation for this practice.¹²³ Therefore, the call for clarifying the principle has become an important theme in the paper.

The view that finds political speech to be a means of self-government can be characterised by its highest value than other forms of speech.¹²⁴ Moon believes political speech has at the core of freedom of expression, which is principally concerned with democratic deliberation (system). Also Blasi recognises that the "theory of political community known as "self-government", which holds that each member of the polity, no matter how eccentric or humble, occupies a vital role in the governing process and thus enjoys a right to hear and be heard on all matters relevant to governance"¹²⁵

Therefore, the theory should be limited to political speech. The supporter for this opinion claimed that the forms of speech, especially those that demean people, should be limited.¹²⁶ Robert Bork contends, "Constitutional protection should be accorded only to speech that is explicitly political"¹²⁷ This argument is criticised for being limited on certain respects.¹²⁸

This narrow scope has been expended by many scholars to cover other forms of speech. Although the Meiklejohn doctrine is not based on one form of speech, political speech occupies a wide range of his discussion on democratic process. This fact is evidence in the first amendment, which categorises political speech as its top priority more than any other form of speech. In

¹²¹arendt (n.1) p.18

¹²² Haider Dziyauddin, 'A Comparative, study of freedom of Expression and Right to privacy in Relation to the Press in Malaysia and the United Kingdom' (University of Newcastle (2005) p.26

¹²³ Sadurski (n.19) p.31.

¹²⁴ See Moon p.16.

¹²⁵ see Blasi (n.396) p.524

¹²⁶ Trager and Dickerson (n.12) p.107

¹²⁷ RH Bork, 'Neutral Principles and some first Amendment problems' (1971) Ind. LJ. p.20

¹²⁸ See Lee C. Bollinger, the tolerant society: freedom of speech and Extremist speech in America (Oxford Press) 1986 p.46).

Meiklejohn's account, citizens need to make a wise decision on the issues that confined them. He writes, "the welfare of the community requires that those who decides issues, shall understand them. They must know what they are voting about. The focus of Meiklejohn is this on broadening the horizon of the individuals. This in turn, requires the theory to be enlarged. It is difficult to make clear judgments if the citizen conception of democracy or self-government is limited. Some scholars acknowledge the importance of this proponent and therefore include "the novelist, the poet, the painting, to their argument."¹²⁹ Meiklejohn, said, free speech and its relation to self-government.¹³⁰ "The numerous forms of expression received acceptance from many democracy advocates and are seen as essential tools in the first amendment".¹³¹

Another aspect of this theory that needs to be addressed is its reliance on collective rather than individual action. Meiklejohn's account, for instance, is not based on speech that is related to private speech but rather on the general interest that is based on social debates. He asserted on the importance of undermining the commitment of 'public' collective participation to protect public interest. He justifies that this news as private speech is just seeking his own interest. Therefore, the speech that does not fall within collective or public concept does not deserve constitutional protection¹³².

9. Observations

The paper effectively analyzes the principle of freedom of expression and its constitutional limitations within Nigeria, referencing comparative perspectives from the United States. However, certain portions extend beyond the territorial scope, diluting the focus on Nigeria's constitutional and judicial framework. The Nigerian Constitution, particularly Sections 39 and 45, provides explicit legal bases for limiting freedom of expression, yet practical enforcement remains inconsistent. Judicial interpretation in Nigeria continues to be cautious, often avoiding robust engagement with controversial free speech cases. Additionally, socio-political realities - such as insecurity, ethno-religious sensitivities, and weak institutional enforcement - further constrain the exercise of free expression.

It is also observed that while international conventions inspire Nigeria's legal provisions, their domestic application remains limited due to insufficient legislative domestication and weak judicial activism.

10. Recommendations

The following recommendations are herein proffered:

¹²⁹ Harry Kalven Jr. 'the metaphysics of the law of obscenity' (1960), the Supreme Court Review 1. p.16.

¹³⁰ n.138, p.25.

¹³¹ Bollinger, p.48. Moon argues that "these expressions deserve some protection and have sought to fit these other form of expression into the democratic account" (Moon (n.55) P.15) Professor Cass Sunstein, also stresses that the extended protection of the argument of democracy to include other forms of speech is vital to the individual's values. (Cass R. Sunstein, Democracy and the problem of free speech (1995) P.123) However, this late broadness in the conception of the political speech does not "directly feed the democratic process", therefore it should be limited. (Baker (n.91) P.26, see also LR. Bevier, 'the first Amendment and political speech: An inquiry into the substance and limits of principle' (1978) Stanford Law Review P. 299-317).

¹³² Alexander Meiklejohn, Political freedom: The constitutional powers of the people (1948) p.79,80. See also, Moon (n.55) p.15, see also Bollinger, the tolerant society: freedom of speech and Extremist speech in America, p.258).

1. **Limit Research Scope to Nigerian Jurisdiction:** Future studies should concentrate primarily on Nigeria's constitutional, statutory, and judicial treatment of free speech to maintain territorial relevance and analytical depth.
2. **Strengthen Judicial Interpretation:** Nigerian courts should adopt a more purposive interpretation of constitutional guarantees of free speech to align with democratic principles while balancing national security and public order.
3. **Promote Legal and Civic Awareness:** There is a need for civic education and sensitization on the limits of free expression to reduce misuse while empowering citizens to assert their rights lawfully.
4. **Review and Harmonize Legislation:** Laws such as the Cybercrimes Act, Public Order Act, and Broadcasting Codes should be reviewed to ensure they do not unduly infringe upon constitutionally guaranteed freedoms.
5. **Enhance Institutional Accountability:** Regulatory and enforcement bodies must operate transparently to prevent the abuse of governmental control mechanisms over speech and the press.

11. Conclusion

The significant influence of many arguments on the freedom of speech laws does not mean that these theories are entitled to different levels of protection. Rather, they generally are subjected to the same principle of protection.¹³³ Free speech theories relate to justifying the principle. More strictly, free speech cannot be named free speech without solid foundation that is able to justify an individual's speech. Many forms of speech such as pornography, hate speech and defamation are speech in their ample concept, but because free speech has a special normative, not every speech is eligible to be under free speech protection. According to Professor Schauer, Freedom of speech "focus is on what free speech can do for the individual, either as speaker, or as listener or both".¹³⁴

Even though freedom of speech exists in this narrow space, it does not mean that other forms of speech, such as art, fall outside the freedom of speech protection. Rather, different justifications for freedom of expression have opened the scale for varying protection. This fact can be recalled when Sunstein says "(a)ny simple or unitary theory of free speech value would be obtuse".¹³⁵ The study of the three theories illustrates how a combination of the three values-truth, self-fulfilment and democracy and self-government-affect the limitation of freedom of speech is practice. Indeed, the content of freedom of speech protection cannot be justified unless there is a clear contribution to good, whether for the individual or public alike. In other words, it can be said that the three arguments are a cornerstone for legitimising freedom of speech and that "(f)reedom of expression, like other important rights is supported by a number of overlapping justifications".¹³⁶

¹³³ F. Schauer, 'must speech be special' (1983) NW. U.L. Rev. p.1291.

¹³⁴ Schauer, 'Must speech be special' (n.461). p.1290.

¹³⁵ Cass Sunstein, 'Democracy and the problem of free speech' (1995) Publishing Research Quarterly 58. P.xx, See also Moon (n.77) p.8(n.2).

¹³⁶ Moon (n.77) p.8.