

From Digital Authoritarianism to Platforms’ Leviathan Power: Freedom of expression in the digital age under siege in Africa

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Abstract

The right to freedom of expression on the internet is under constant siege in Africa due to the actions of States and social media platforms. Many African States have been implementing various authoritarian techniques to trammel freedom of expression in the digital age, including internet shutdowns, repressive national security laws, internet censorship and digital surveillance. Social media companies, on the other hand, exert unbridled power over user-generated contents on their platforms. Their discretionary power to moderate content continues to threaten the right to freedom of expression in Africa. For example, the tug of war between the Nigerian government and Twitter following Twitter’s removal of President Buhari’s speech epitomises how social media platforms are policing free speech in Africa. I argue that African States must end the practice of digital authoritarianism and robustly respect and protect freedom of expression on the internet based on a human rights-based approach in limiting speech. Beyond superficial human rights vocabulary, platforms must also take human rights seriously and ensure that content moderation practices are guided by human rights-based approach.

Key terms:

Freedom of expression · Digital age · Content moderation · Human rights ·
Digital authoritarianism · African human rights law

DOI <http://dx.doi.org/10.4314/mlr.v15i2.5>

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Received: 30 July 2021

Accepted: 20 November 2021

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The author is grateful to Christopher Nyinevi for his generous comments on the earlier version of this article. The author also wishes to thank participants of a conference titled “Contemplating content moderation in Africa” at the RightsCon21 – jointly organised by Open Internet for Democracy Initiative and Oxford Internet Institute, University of Oxford, which was held on 9 June 2021 where part of this article was initially presented.

Suggested citation:

Yohannes Eneyew Ayalew (2021), “From Digital Authoritarianism to Platforms’ Leviathan Power: Freedom of expression in the digital age under siege in Africa”, 15(2) *Mizan Law Review*: 455-492

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Frequently used Acronyms

ACmHPR	The African Commission on Human and Peoples’ Rights
ECOWAS	Economic Community of West African States
UNGPs	UN Guiding Principles on Business and Human Rights

“Today, a few private companies, driven to expand shareholder value, control social media. And yet the rules of speech for public space, in theory, should be made by relevant political communities, not private companies that lack democratic accountability and oversight. If left alone, the companies will gain ever greater power over expression in the public sphere.” David Kaye, *Speech Police* (2019)

1. Introduction

The use of the internet is speedily increasing across the African continent. Millions of Africans are using social media platforms for varying purposes including political discourse, social development and self-expression.¹ However, freedom of expression in the digital age faces a number of challenges in Africa, such as threats from States and social media platforms.

The advent of the internet in Africa is a recent phenomenon. The first network in sub-Saharan Africa was created in 1988 at Rhodes University in South Africa.² In 1991, the first data packet transmitted from sub-Saharan Africa was sent from South Africa to the US, which in turn, heralded the arrival of the internet in Africa.³ In the past two decades, African countries have experienced a steady growth in internet penetration from 0.78% in 2000 to 43% in 2020 with an estimated 590 million people using the internet.⁴ As of 31 December 2020, the number of internet users in Europe was estimated at around 87.7% of the population. This translates to about 727.5 million people, almost two times higher than the number in Africa.⁵

¹ Special Rapporteur on Freedom of Expression and Access to Information in Africa, Commissioner Lawrence M. Mute, *Inter-Session Activity Report*, Presented to the 65th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia (21 October to 10 November 2019) para 34. *See also* African Declaration on Internet Rights and Freedoms, launched at the 18th annual Highway Africa Conference at Rhodes University in Grahamstown, South Africa on 7th September 2014).

² Towela Nyirenda-Jere and Tesfaye Biru (2015), *Internet Development and Internet Governance in Africa*, (Internet Society) at 6.

³ *Ibid.*

⁴ International Telecommunications Union, *Global and Regional ICT Data* <<https://bit.ly/3EgSDLE>> (accessed 20 July 2021). *See also* Internet World Stats, *Internet Penetration in Africa* (31 December 2020), <<https://bit.ly/3EbhW1J>> accessed 21 July 2021.

⁵ Internet World Stats, *Internet in Europe stats in 2020*, <<https://bit.ly/3yHV4pv>> accessed 21 July 2021

Thus, Africa is still lagging behind the rest of the world in internet penetration since it is still well below the global average of 64.2%.⁶

In Africa, the digital divide –where individuals and communities experience uneven distribution of access to the internet– is still too high. The African Union has launched Agenda 2063 as a noble initiative to tackle the socio-economic challenges facing the continent in its efforts to achieve development under the tenets of Pan-Africanism.⁷ The Agenda includes goals to create a digital economy and connect Africa through high-speed internet.⁸ Parallel to this, universal access to the internet is one of the aspirations that States commit under the UN Sustainable Development Goals (SDGs).⁹ African States must redouble their efforts to achieve these goals and bridge the digital divide.

However, the increasing internet penetration in Africa has not been without challenges. Freedom of expression in the digital age is coming under siege. Various measures by States and social media platforms are muzzling individuals' speech on the internet.¹⁰ For example, several African governments are turning to authoritarian practices, including internet shutdowns, repressive national security legislation, digital surveillance and internet censorship to control political narratives and consolidate their power.¹¹ From the outset, it shall be noted that the problem of digital

⁶ Ibid.

⁷ African Union, *Agenda 2063: The Africa We Want*. (African Union Commission, 2015).

⁸ Ibid, Goal 72 (g) 'ICT: a continent on equal footing with the rest of the world as an information society, an integrated e-economy where every government, business and citizen have access to reliable and affordable ICT services by increasing broadband penetration by 10% by 2018, broadband connectivity by 20 percentage points and providing access to ICT to children in schools and venture capital to young ICT entrepreneurs and innovators and migration to digital TV broadcasting by 2016.'

⁹ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, goal 9 target 9.c.

¹⁰ See, for example, Admire Mare (2020), 'State-Ordered Internet Shutdowns and Digital Authoritarianism in Zimbabwe', 14 *International Journal of Communication* 4244–4263; and Yohannes Eneyew Ayalew (2019) 'The Internet shutdown muzzle(s) freedom of expression in Ethiopia: competing narratives' 28 *Information & Communications Technology Law*, 208-224.

¹¹ Fredrik Erixon and Hosuk Lee-Makiyama, (2011) 'Digital Authoritarianism: Human Rights, Geopolitics and Commerce', *The European Centre for International Political Economy (ECIPE)*, ECIPE Occasional Paper No. 5/2011, at 1. See also Charlotte Cross (2021), 'Dissent as cybercrime: social media, security and development in Tanzania,' 15 *Journal of Eastern African Studies* 442.

authoritarianism does not mean the same thing the world over, both in democratic and non-democratic countries.

Sometimes, democratic countries may find themselves in digital authoritarianism. For example, as shall be shown below, South Africa was accused of implementing digital surveillance despite the country being ruled by a democratic government. Democracies elsewhere like India are notorious for shutting down the internet frequently. It is to be noted that all states have at least three types of duties, namely the duty to *respect*, *protect*, and *fulfil* rights.¹² These obligations universally apply to all rights, including freedom of expression on the internet and entail a combination of negative (respect) and positive (protect and fulfil) duties.¹³ When the States implement digital authoritarianism, it entails dereliction of their duty to respect and protect the right to freedom of expression on the internet.

While social media platforms (like Facebook, Twitter, and YouTube) have been lauded by many for being open spaces for self-expression,¹⁴ there is no doubt that their arbitrary content moderation practices are also problematic.¹⁵ The recent row between Nigerian government and Twitter following the latter's takedown measure of the President's post is a case in point.¹⁶ It illustrates how platforms are providing to themselves enormous powers to moderate content and police freedom of expression in the digital age.

¹² See, for example, Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds.), *Economic, Social, and Cultural Rights: A Textbook*, (Kluwer Law International, 2001) 23-28.

¹³ UN Human Rights Committee (HRC), *General Comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, paras 7-8.

¹⁴ See for example, Terje Skjerdal and Sintayehu Gebru, (2020), 'Not quite an echo chamber: ethnic debate on Ethiopian Facebook pages during times of unrest', 42 *Media, Culture & Society*, 365-379; and Edward Orehek and Lauren J. Human (2017), 'Self-Expression on Social Media: Do Tweets Present Accurate and Positive Portraits of Impulsivity, Self-Esteem, and Attachment Style?' 43(1) *Personality and Social Psychology Bulletin*, 60-70.

¹⁵ Tomiwa Ilori (2020), 'Content Moderation is Particularly Hard in African Countries,' (Slate, August 12, 2020) <<https://bit.ly/3peub9K>> accessed 21 July 2021. See generally Emily B. Laidlaw, (2015) *Regulating Speech in Cyberspace: Gatekeepers, Human Rights and Corporate Responsibility* (Cambridge University Press), at 12-35.

¹⁶ Yusuf Alli *et al.* (2021), 'Twitter ban: Buhari, Atiku, 98 others to lose 160m followers,' (*The Nation*, June 6, 2021) <<https://bit.ly/3smDypO>> accessed 21 July 2021.

Freedom of expression may embrace speech that offends, shocks or disturbs a State or a section of the society under the established case law of the African Court on Human and Peoples' Rights.¹⁷ It follows that a high degree of tolerance is required from African States and social media platforms in a democratic society unless a given speech crosses the threshold of hate speech and stirs up imminent violence. However, this article does not assume that the same level of obligations for States and social media platforms exist under international human rights law, as explained under the third section. I argue that African States and platforms should robustly respect and protect freedom of expression in the digital age by aligning their actions with the substantive, process and procedural pillars of the human rights-based approach to limiting rights.

The next section highlights the origins and justifications of freedom of expression in Africa. In so doing, it briefly unpacks the development of freedom of expression in pre-colonial, colonial and post-colonial times. This is followed by a discussion on four theoretical justifications of freedom of expression: discovery of truth, self-fulfilment, participation in a democracy and critique of the government. The third section considers whether, and to what extent the human rights-based approach is an antidote to the various limiting measures on freedom of expression in the digital age. The fourth section interrogates how freedom of expression in the digital age is under siege in Africa from digital authoritarianism by African States and leviathan power of platforms. The content of the right to freedom of expression under African human rights law, including its dimension in the digital ecosystem is examined at great length under the fifth section.

2. Origins and Justifications for the Protection of Freedom of Expression in Africa

2.1 A brief account to the origins of freedom of expression in Africa

Freedom of expression has evolved across different stages in African history. The degree and level of development of the concept varies in pre-colonial, colonial and post-colonial times. Some have argued that pre-colonial Africa had no concept of human rights nor any culture of freedom of expression, and therefore these communities were not practicing human

¹⁷ *Ingabire Victoire Umuhoza v. Republic of Rwanda*, African Court on Human and Peoples' Rights (ACtHPR), Application 003/2014 (judgement) 24 November 2017, Paras 143-162.

rights.¹⁸ But Fernyhough has refuted these claims and argues that much of Africa was characterised by a “preoccupation with law, customary and written, and with legal procedure.”¹⁹ He points out, for example, in Ethiopia, through the system called ‘*Beleha-Le beleha*’ has historically relished litigation, self-expression and debate, and the lengthy cross-examination of witnesses.²⁰ For these reasons, the protection of individual rights was quite important to many societies in Africa.²¹ Nevertheless, the protection of freedom of expression in pre-colonial Africa is not well documented.²²

During the colonial period, most Africans were denied their fundamental rights and freedoms.²³ Colonialism caused devastating moral harm, material plunder and loss of countless lives because the colonialists took the natives’ land, and exploited their resources.²⁴ These aspects of colonialism along with slavery and forced labour resulted in political domination and in gross violations of human rights²⁵ including apartheid, and inhumane and

¹⁸ See for example, Jack Donnelly (1982), ‘Human Rights and Human Dignity: An Analytic Critique of Non-Western Human Rights Conceptions’, 76 *American Political Science Review*, 303; See also Jack Donnelly(1984), ‘Cultural Relativism and Universal Human Rights’, 6 *Human Rights Quarterly*, 400-419; Rhoda E. Howard and Jack Donnelly (1986), ‘Human Dignity, Human Rights, and Political Regimes,’ 80 *American Political Science Review*, 802; and Rhoda E. Howard (1992) ‘Dignity, Community and Human Rights’ in Abdullahi A An-Na’im (ed.) *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press), at 81-102.

¹⁹ Timothy Fernyhough (1993), ‘Human Rights and Precolonial Africa’, in Ronald Cohen, & et al (eds) *Human Rights and Governance in Africa* (University Press of Florida) 56. See also A.J.M. Milne (1986), *Human Rights and Human Diversity: An Essay in the Philosophy of Human Rights* (State University of New York Press), at 115.

²⁰ Fernyhough *supra* note 19, at 62.

²¹ Makau Mutua (1995), ‘The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties’, 35 *Virginia Journal of International Law* 351.

²² William E. Adjei (2012), *The Protection of Freedom of Expression in Africa: Problems of Application and Interpretation of Article 9 of The African Charter on Human and Peoples’ Right* (Unpublished PhD thesis, the University of Aberdeen), at 51.

²³ See generally Ndabaningi Sithole (1968), *African Nationalism*, (Oxford University Press).

²⁴ Thomas Hodgkin (1957), *Nationalism in Colonial Africa*, (New York University Press), at 5.

²⁵ Minasse Haile (1984), ‘Human Rights, Stability, and Development in Africa: Some Observations on Concept and Reality’, 24 *Virginia Journal of International Law* 591-592.

degrading treatments, torture and the denial of local self-determination.²⁶ In many African colonised States, due to the repressive colonial policy of divide and rule, there were dichotomies of ‘citizens’ and ‘subjects’ and ‘superior’ and ‘inferior’ racial groups.²⁷ Due to these policies, the large majority of Africans were deprived of the enjoyment of their fundamental rights,²⁸ including the right to freedom of expression.

The post-colonial era, especially during the 1960s, signalled the end of colonialism across the continent and pointed to an optimistic dawn of human rights in general, and freedom of expression in particular. However, there was a lack of practical protection of rights in the newly independent African States. A feature of the colonial legacy brought to Africa was authoritarian survival, which meant that governments of independent States often times applied the same rules of engagement as used by the colonialists.²⁹ As a result, post-colonial Africa is replete with stories of regimes which, having acquired unrestrained powers in the interest of public welfare, have proceeded to abuse State powers in furtherance of their personal interests and in disregard of every concept of legality and human rights.³⁰ In this regard, Asante contends that sedition laws enacted by colonial governments provided handy models for their African successors to fetter freedom of expression in Africa.³¹ The colonial heritage of sedition laws in Nigeria, for example, had the effect of silencing dissent and freedom of expression.³²

²⁶ For further explanation on the effects of colonialism, see U.O. Umzurike (1971), ‘The African Slave Trade and the Attitudes of International Law Towards It’, 16 *Howard Law Journal*, 334; and S.K.B. Asante (1969) *infra* note 29,

²⁷ Mahmood Mamdani (1996), *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press), at 11.

²⁸ Address delivered by Leopold Sedar Senghor, President of the Republic of Senegal (1979) reprinted in Christof Heyns (ed.) (1999) *Human Rights Law in Africa: Martinus Nijhoff*. An address delivered at the opening of the Meeting of African Experts preparing the draft African Charter in Dakar, Senegal from 28 November to 8 December 1979.

²⁹ S.K.B. Asante (1969), ‘Nation Building and Human Rights in Emergent African Nations’, 2 *Cornell International Law Journal* 88, at 103.

³⁰ *Ibid.*

³¹ *Id.*, at 88. See also Tomiwa Ilori (2020), ‘Stemming digital colonialism through reform of cybercrime laws in Africa,’ *Yale Law School Information Society Project Blog*, (June 19, 2020) <<https://bit.ly/3plhJ8d>> accessed 21 July 2021, and Justine Limpitlaw (2016), ‘It’s time for Africa to throw off its colonial legal shackles,’ *DW Akademie* (28 April 2016) <<https://bit.ly/32gfEBc>> accessed 21 July 2021.

³² See *the Director of Public Prosecutions v. Chike Obi* (Supreme Court of Nigeria, FSC 56/1961) [1961] 10 (06 April 1961).

Yet, post-colonial Africa saw the rise of human rights-friendly constitutions and regional human rights treaties protecting the freedom of expression in Africa, as expounded under the fifth Section. For example, a number of African States have incorporated provisions regarding the protection of freedom of expression in their constitutions. These include the Central African Republic (CAR),³³ Egypt,³⁴ Ethiopia,³⁵ Ghana,³⁶ and South Africa.³⁷ However, the right to freedom of expression continues to be shackled in many authoritarian African countries.³⁸ Now, the unbridled and leviathan power of social media platforms has brought another menace for the protection of freedom of expression in the digital age. As a result of these illegitimate interferences by States and social media platforms, the right to freedom of expression remains under incessant siege in post-colonial Africa.

2.2 Justifications for the protection of freedom of expression

There are at least four jurisprudential justifications for the protection of the right to freedom of expression.³⁹ *First*, freedom of expression enables the discovery of truth. Throughout history, this has been the strongest argument for free speech based on the importance of open discussion to the discovery of the truth.⁴⁰ Drawing on the views of John Stuart Mill, truth may be regarded as an autonomous, and an essential good, or its value may be supported by utilitarian considerations concerning progress and the development of society.⁴¹ The other conception of the truth argument is the 'marketplace of ideas' doctrine. The theory of the marketplace of ideas is

³³ Central Africa Republic's Constitution of 2016, art 15.

³⁴ Constitution of the Arab Republic of Egypt [Egypt], 18 January 2014, art 65.

³⁵ Constitution of the Federal Democratic Republic of Ethiopia, 21 August 1995, art 29(2).

³⁶ Constitution of the Republic of Ghana [Ghana], 7 January 1993, art 21(1).

³⁷ Constitution of the Republic of South Africa [South Africa], 10 December 1996, art 16 (1).

³⁸ Saskia Brechenmacher & Thomas Carothers (2019), *Defending Civic Space: Is the International Community Stuck?* Carnegie Endowment for International Peace Working Paper, (October 22, 2019), at 1.

³⁹ Frederick Schauer (1982), *Free speech: a philosophical Enquiry* (Cambridge University Press), at 7-10.

⁴⁰ J. S. Mill: *On Liberty* and other Writings, Edited by Stephan Collini (Cambridge University Press, 1989), at 53-115.

⁴¹ *Ibid.*

expressed in the famous US Supreme Court dissenting opinion of Justice Oliver W. Holmes.⁴²

A *second* justification for freedom of expression is that it enhances individual self-fulfilment. This means that freedom of expression is an *intrinsic*, independent good, leading to the development of more reflective and mature individuals thereby benefiting the entire society.⁴³ This theory inclines to a rights-based approach.⁴⁴ The African Declaration on Freedom of Expression and Access to Information underlines the importance of freedom of expression for self-fulfilment, and it states that “freedom of expression is crucial and indispensable for the free development of the human person”.⁴⁵

Third, freedom of expression enables citizens to participate in a democracy.⁴⁶ Alexander Meiklejohn has suggested that the primary purpose of the First Amendment of the United States Constitution, which protects freedom of speech,⁴⁷ is to protect the right of all citizens to understand political issues in order to participate effectively in the working of democracy.⁴⁸ Similarly, Cooray argues that freedom of speech is the *sine qua non* of a democratic society.⁴⁹

Freedom of expression is considered as a foundational stone for every democratic society under the established case law of the African human

⁴² *Abrams v. United States*, Supreme Court 250 U.S. 616 (1919) P. 250 U. S. 630.

⁴³ Tom Campbell (1994), ‘Rationales for Freedom of Communication’, in Tom Campbell and Wojciech Sadurski (eds) *Freedom of Communication* (Aldershot) 33-34.

⁴⁴ General Comment No 34, *supra* note 13, para 2 ‘freedom of expression is indispensable conditions for the full development of the person.’

⁴⁵ Declaration of Principles on Freedom of Expression and Access to Information in Africa, Lawrence Mute, *the Special Rapporteur on Freedom of Expression and Access to Information in Africa report* (2019) Principle 1(1)

⁴⁶ General Comment No 34(2) *supra* note 13, para 2 ‘freedom of expression constitutes the foundation stone for every free and democratic society.’

⁴⁷ The Constitution of the United States, (1791) Amendment 1, ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.’

⁴⁸ Alexander Meiklejohn (1948), *Free Speech and Its Relation to Self-Government* (Harper and Brothers Publishers), at 26-94.

⁴⁹ Leonard James Mark Cooray (1988), *The Australian Achievement: From Bondage to Freedom* (ACFR Community Education Project).

rights law.⁵⁰ As a result, freedom of expression exercised through the new media, such as the internet in new democracies, has been praised as the “oxygen of democracy.”⁵¹ In this respect, Benedek postulates that “If freedom of expression is the oxygen of democracy then the internet is the atmosphere, where people are living, breathing and exercising their freedom of expression.”⁵² This claim is compelling in the sense that there is a growing reliance on the internet in the digital age. Given this growing reliance, its importance as a conduit for free expression and thus for democratic engagement is arguably greater than ever before.

The *fourth* theoretical justification for freedom of speech is based on the assumption that there are reasons to be suspicious about the government.⁵³ This means freedom of expression acts as a litmus test to assess and critique the way a government operates in governance, administration, human rights protection, and other socio-economic issues. Freedom of expression can also play a valuable role as an instrument for social development. As Amartya Sen argues, the right to freedom of expression and to a free press is not only compatible with the right to development, but complementary to it.⁵⁴ Sen suggests that “no country that vigorously ensures freedom of expression will experience famine.”⁵⁵ According to Sen, open debate, discussion, and a critical press are essential in any society, both in normal or turbulent times, and countries with a good record of free press and freedom of expression will not sustain famine because the press can report the government’s inaction or failure.⁵⁶

⁵⁰ See *Kenneth Good v Botswana*, ACmHPR Communication 313/05, 26 May 2010, para 197; *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, ACmHPR Communication 323/06, 12 October 2013, para 246; and *Lohé Issa Konaté v. Burkina Faso*, ACtHPR, Application 4/2013, Judgment, 5 December 2014, para 145.

⁵¹ Freedom of expression and information is the oxygen of democracy – say Council of Europe leaders at meeting of Council of Europe, European Union and OSCE leaders on promoting and reinforcing freedom of expression and information at the pan-European level in Luxembourg (1 October 2002). See Benedek *infra* note 52.

⁵² Wolfgang Benedek (2013), *Freedom of Expression and the Internet (Council of Europe)*, at 24.

⁵³ Schauer *supra* note 39, at 85-86.

⁵⁴ Amartya Sen (1999), *Development as Freedom* (Oxford University Press), at 153; and see generally Amartya Sen (1989), ‘Food and Freedom’, 17 *World Development* at 769.

⁵⁵ Sen (1989), *Id.*, at 776.

⁵⁶ *Ibid.*

In sum, there are a number of reasons why freedom of expression is important, including its significance in the discovery of truth, self-fulfilment, participation in a democracy, and critique of the government. These positive outcomes help us understand why the right must be defended.

3. Dimensions of Human Rights-based Approach for Gauging States and Social Media Platforms

The human rights-based approach is the oldest approach to assess the lawfulness of any restrictions on human rights, including freedom of expression in the digital age.⁵⁷ When it comes to evaluating digital authoritarianism and content moderation, this approach serves as a frame to interrogate the actions of States and social media platforms.

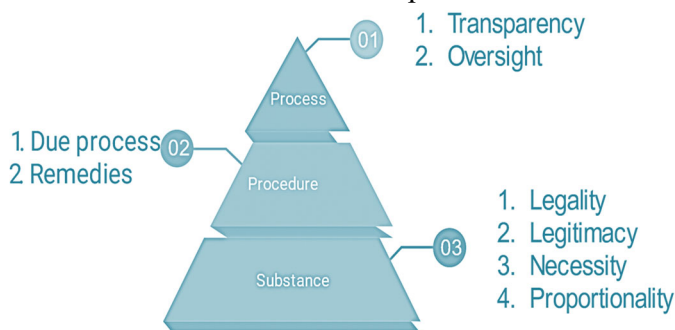


Figure 1: Pyramid of the Human Rights Based Approach

(Source: -Center for Advancement of Rights and Democracy (CARD) Research report 'Rights Deplumed' (2021) p.29)

Human rights-based approach is incorporated under various instruments in African human rights law.⁵⁸ The African Commission on Human and Peoples' Rights (commonly referred as the quasi-judicial body) recommends a human rights-based approach as one mechanism to alleviate threats in the

⁵⁷ See Barrie Sander (2020), 'Freedom of Expression in the Age of Online Platforms: The Promise and Pitfalls of a Human Rights-Based Approach to Content Moderation,' 43 *Fordham International Law Journal* 939; and Thiago Dias Oliva (2020), 'Content Moderation Technologies: Applying Human Rights Standards to Protect Freedom of Expression,' 20:4 *Human Rights Law Review*, 607–640; and Giovanni De Gregorio (2020), 'Democratising Online Content Moderation: A Constitutional Framework', 36 *Computer & Security Law Review*, 1-17.

⁵⁸ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), arts 9 and 27.

digital age.⁵⁹ It has also adopted specific Guidelines addressing internet shutdowns in Africa –which sets out a number of non-binding expectations for States and private actors.⁶⁰

Human rights-based approach hinges on three inter-related dimensions. These are: substantive, process and procedural dimensions.⁶¹ The *substantive dimension* has four components, namely legality, legitimacy, necessity and proportionality, which dictates States and platforms to align their various limiting measures with African human rights law.⁶² The *process dimension* encompasses transparency and oversight mechanisms that States and platforms should follow before implementing limiting measures on the right. The *procedural dimension* embraces due process and remedial measures that guide States and platforms before and after imposing limiting measures.

3.1 Components of the substantive dimension

The first component of the substantive dimension is *legality*. The principle of legality refers to the requirement that any limiting measures imposed upon the right to freedom of expression by States and platforms should be provided by law. This implies States must enact a clear, accessible and unambiguous law before implementing authoritarian techniques as discussed below in Section 4.1.

The African Charter on Human and Peoples' Rights clearly incorporates the legality standard as: "Every individual shall have the right to express and disseminate his opinions within the law."⁶³ The phrase 'within the law' is a claw-back clause under the African Charter which restricts the enjoyment of

⁵⁹ African Declaration, *supra* note 45, Principles 9 and 39,

⁶⁰ The African Guidelines on Access to Information and Elections in Africa (the Guidelines) adopted by the African Commission on Human and Peoples' Rights on 10 November 2017, during its 61st Ordinary Session in Banjul, The Gambia, Principle 27.

⁶¹ The application of human rights-based approach in the digital age is widely discussed in the landmark report of the former UN Special Rapporteur on freedom of expression and opinion, David Kaye –addressing the regulation of user-generated online content, (Content moderation report) A/HRC/38/35 (2018).

⁶² For detailed analysis on substantive dimensions, *see* generally Yohannes Eneyew Ayalew (2020) 'Assessing the limitations to freedom of expression on the internet in Ethiopia against the African Charter on Human and Peoples' Rights' 20 *African Human Rights Law Journal* 315-345.

⁶³ African Charter, *supra* note 58, art 9(2).

the right.⁶⁴ The African Commission⁶⁵ has interpreted this clause contained in article 9(2) to mean that any restrictions on freedom of expression has to be 'provided by law'⁶⁶ and also must conform to international human rights norms and standards relating to freedom of expression and should not jeopardise the right itself.

Thus, the phrase 'within the law' must be interpreted with reference to international norms which can provide grounds for the limitation on freedom of expression.⁶⁷ Recently, in *Amnesty International Togo et al v. Republic of Togo*, the Economic Community of West African States (ECOWAS) Community Court of Justice (ECOWAS Court) expounded on the legality requirement by ruling that an internet shutdown made without clear legal procedure was illegal.⁶⁸

While human right law creates a vertical obligation on States parties to a treaty in relation to individual rights holders, this does not mean that social media platforms are not required to be responsive to human rights commitments.⁶⁹ Platforms are under social expectation to respect freedom of expression on the internet on the basis of the UN Guiding Principle on

⁶⁴ See, for example, Richard Gittleman (1982), 'The African Charter on Human and Peoples' Rights: a Legal Analysis,' 22 *Virginia Journal of International Law* 691; Gino J Naldi (2001), 'Limitation of Rights Under the African Charter on Human and Peoples' Rights: The Contribution of the African Commission on Human and Peoples' Rights,' 17 *South African Journal on Human Rights* 110, and Sandhiya Singh (2009), 'The impact of clawback clauses on human and peoples' rights in Africa,' 18 *African Security Studies* 100.

⁶⁵ *Scanlen & Holderness v. Zimbabwe*, ACHPR (2009) para 112, the Commission notes that the meaning of the phrase 'within the law' in Article 9(2) must be considered in terms of whether the restrictions meet the legitimate interests, and are necessary in a democratic society. In addition, the concept of "within the law" employed in the Charter cannot be divorced from the general concept of the protection of human rights and freedoms.

⁶⁶ *Liesbeth Zegveld and Mussie Ephrem v. Eritrea*, at the 34th Ordinary Session of the ACmHPR held from 6th to 20th November 2003, in Banjul, Communication 250/02, paras 59-60.

⁶⁷ *Malawi Africa Association and Others v. Mauritania*, ACmHPR Communications No. 54/91-61/91-96/93-98/93-164/97_196/97-210/98, para 102.

⁶⁸ *Amnesty International Togo et al v. Republic of Togo*, ECOWAS Community Court of Justice, JUD No. ECW/CCJ/JUD/09/20 (June 25, 2020), para 45.

⁶⁹ UN Human Rights Committee (HRC), General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 8. See John H. Knox (2008), 'Horizontal Human Rights Law', 102 *The American Journal of International Law* 1-47.

Business and Human Rights (UNGPs).⁷⁰ Although the UNGPs has an authoritative value in providing guidance for the activities of non-state actors, including social media platforms, its normative rules are considered as soft laws bereft of legally binding force. Yet, platforms are required to make their community standards and terms of service accessible to users, and their bylaws must be clear and unambiguous in their formulations.⁷¹

For example, Facebook Oversight Board has recently upheld Facebook's decision on January 7, 2021, to restrict former President Donald Trump's access to posting content on his Facebook page and Instagram account.⁷² Despite this, the Board expressed its concerns on Facebook's imposition of an 'indefinite' restriction, which is seemingly vague and undefined in its Community Standards.⁷³

The second limb of substantive dimension is *legitimacy*. This implies that any measures taken by States and platforms that restrict the right to freedom of expression have to be in conformity with communal interest such as national security, public health and morality or the right of others.⁷⁴ The African Charter, while delineating the limits of the right to freedom of expression under article 9, implicitly lists the limitation grounds.

However, article 27(2) of the Charter states that 'the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'.⁷⁵ In *Amnesty International Togo et al* case, the ECOWAS Court indicated that there are few legitimate grounds from which the right to freedom of expression could be limited. These include public interest, national security, public health, and public order.⁷⁶

⁷⁰ UN Human Rights Council, *Protect, respect and remedy: a framework for business and human rights: report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie, 7 April 2008, A/HRC/8/5. See United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights* (Geneva, United Nations, 2011) principle 4.

⁷¹ General Comment No 34 *supra* note 13 para 25.

⁷² Donald Trump case, Facebook Oversight Board, Case decision 2021-001-FB-FBR (2021), part 8.3 (I) at 28.

⁷³ *Ibid.*

⁷⁴ Sander, *supra* note 57, at 973.

⁷⁵ African Charter, *supra* note 58, art 27.

⁷⁶ Amnesty International Togo *et al* case, *supra* note 68, para 45

The third component of substantive dimension is *necessity*. This means that the right to freedom of expression on the internet can be limited by States and platforms only if it is *necessary* in order to protect one of the legitimate objectives set out above. While this standard is implicit under the African Charter, the African Declaration provides useful guidance as to the necessity requirement by providing that a limitation has to originate from a pressing and substantial need.⁷⁷ In *Ingabire Umuhoza v. Republic of Rwanda*, the ACtHPR found that the conviction of the applicant was not necessary in a democratic society⁷⁸ although the court agreed on the Rwandan government's prayers to apply the principles of margin of appreciation, including criminalising denial of genocide.⁷⁹

The last substantive touchstone is *proportionality*. States and platforms can restrict rights if the restriction is proportional to the objective such a restriction seeks to achieve. This means States and platforms have to demonstrate that the tools chosen to achieve legitimate objectives are proportionate so as to protect the rights or reputations of others, national security, public order, public health or morals.⁸⁰ Applied to the right to freedom of expression online, while this test allows for some restrictions of internet access, it does not give States and platforms exorbitant leverage to muzzle the right holder.⁸¹

3.2 Process of actions and the procedure dimension

In addition to the above substantive standards, States and platforms should address concerns regarding *process* of actions leading up to restriction, notably transparency and oversight.⁸² For example, internet shutdown or digital surveillance measures must be transparent and such actions must be reviewed by an oversight body. Non-transparent orders will thus jeopardise the lawfulness of the process.⁸³ The content moderation process (transparency and oversight) of platforms should establish a policy commitment to meet their responsibility to respect and carry out ongoing

⁷⁷ African Declaration, *supra* note 45, Principle 9(4) (a-b).

⁷⁸ Ingabire case, *supra* note 17, paras 162.

⁷⁹ *Id.*, para 145.

⁸⁰ African Declaration, *supra* note 45, Principle 9(4) (b-c).

⁸¹ Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Republic of Zimbabwe, ACmHPR Communication 284/03, para 178.

⁸² *Id.*, Principle 39(3).

⁸³ See The Santa Clara Principles on Transparency and Accountability in Content Moderation (2018), Principle 1-3.

human rights due diligence through for example, clear rule-making, and decision making.⁸⁴

The UNGPs require platforms, among other things, to conduct due diligence to meaningfully 'identify, prevent, mitigate and account for' actual and potential human rights impact throughout the company's operations and to provide for, or cooperate in, the remediation of adverse human rights impacts associated with their business.⁸⁵ This means platforms' potential impacts should be addressed through prevention or mitigation.⁸⁶ Importantly, platforms should allow participation from stakeholders (users, civil society and marginalised groups) when they make rules governing content. However, this is the most problematic area where platforms are criticised for surreptitious rule making.⁸⁷

The final dimension of human rights-based approach is *procedure*. This implicates the duty of States and platforms to devise some procedural guarantees for right holders.⁸⁸ These include the provision of due process of law and remedial measures. Under UNGPs, actual impacts of platforms that have already happened should be a subject for remediation.⁸⁹ When platforms erroneously suspend, remove or terminate users, they should institute robust remediation programmes, which may range from reinstatement and acknowledgment to settlements related to reputational or other harm.⁹⁰ The UNGPs, and in particular Pillars Two and Three, provide detailed guidance as to what this means in practical terms and are thus a source of guidance for content moderation practices of social media platforms.

3.3 Caveats against the perception of the approach as silver bullet

In general, a human rights-based approach may help us to circumscribe digital authoritarianism by States and platform's leviathan power. However, it is not a silver bullet for tackling all challenges that unfold in the digital age.⁹¹ Firstly, both States and platforms are not always amenable to the three-pillars of human rights-based approach. Social media companies may

⁸⁴ Sander, *supra* note 57, at 990.

⁸⁵ UN Guiding Principles, *supra* note 70, principles 16-24.

⁸⁶ *Id.*, principle 17 commentary.

⁸⁷ Sander, *supra* note 57, at 989.

⁸⁸ UN Guiding Principles, *supra* note 70, principle 39(4).

⁸⁹ *Id.*, principle 22.

⁹⁰ Content moderation report, *supra* note 61, para 59.

⁹¹ *Id.*, at 968.

also try to commit (and seemingly a lip service) to the vocabulary of human rights to aggrandise their petty deeds. This is in part the result of what Barrie Sander has described as “marketised conception of human rights law” –that places emphasis on the negative obligation of States to refrain from unjustifiably interfering with the right to freedom of expression on the internet.⁹² Thus, the prevailing marketised conception of human rights amongst social media platforms and the general public is a stumbling-block to a more structural enforcement of human rights during content moderation.⁹³

Finally, apart from the human rights based approach, there are other regulatory frames such as data protection laws, criminal laws, electoral and administrative laws, antitrust and competition laws.⁹⁴ The next section discusses how the right to freedom of expression on the internet is under siege in Africa due to the actions of States and platforms.

4. Freedom of Expression on the Internet under Siege in Africa

4.1 Digital authoritarianism in Africa

Digital authoritarianism has become a growing challenge in many African countries and continues to pose a threat to freedom of expression in the digital age. It is a situation where authoritarian regimes embrace and adjust digital communications and technologies for political ends including repressive practices such as censorship, panopticon form of surveillance and blocking or shutting down internet services completely.⁹⁵ “Networked authoritarianism”, an earlier version of digital authoritarianism refers to a situation whereby a single regime controls wide ranging conversations about the country’s problems on websites and social media platforms.⁹⁶

⁹² Barrie Sander (2021), ‘Democratic Disruption in the Age of Social Media: Between Marketized and Structural Conceptions of Human Rights Law,’ 32 *European Journal of International Law* 176. On market-friendly paradigm of human rights, see generally Upendra Baxi (2008), *The Future of Human Rights* (Oxford University Press, 3rd ed), at 276.

⁹³ Ibid.

⁹⁴ Sander, *supra* note 57, at 1006.

⁹⁵ Mare (*supra* note 10) 4248 and see Rebecca MacKinnon (2011), ‘Liberation technology: China’s “networked authoritarianism”, 22 *Journal of Democracy*, 32–46. See also Arne Hintz and Stefania Milan (2018), ‘Through a glass, darkly: Everyday acts of authoritarianism in the liberal West’, 12 *International Journal of Communication*, 3939–3959.

⁹⁶ MacKinnon, Id., at 33.

Digital authoritarianism is manifested in many African countries through a global infrastructure project called the Belt and Road Initiative (BRI) which is sponsored by the Chinese government. Through the BRI, China transfers technology which advocates its vision of a government-supervised internet across the globe including to Africa.⁹⁷ With regard to its repercussions on freedom of expression, the BRI project has influenced many African States in at least three ways: (1) by advocating the Chinese model of 'internet sovereignty' in African nations; (2) by exporting authoritarian surveillance technology to African States;⁹⁸ and (3) by deploying artificial intelligence technology and data-mining techniques across Africa.⁹⁹

In 2019, the former African Commission Special Rapporteur on Freedom of Expression and Access to Information in Africa highlighted several authoritarian practices that may amount to digital authoritarianism.¹⁰⁰ These include, internet shutdowns, internet censorship, repressive national security legislation and digital surveillance. This article briefly discusses them below.

a) Internet shutdown

It is the hallmark of authoritarian governments around the world.¹⁰¹ This claim is true in 22 African countries where internet shutdowns were imposed from 2014-2019; 77% of them are authoritarian and the rest are hybrid or semi-authoritarian governments.¹⁰² AccesNow, a digital rights organisation based in the United States, has documented that the internet was intentionally switched off in twelve African countries in 2020. Justifications

⁹⁷ Willem Gravett (2020), 'Digital neo-colonialism: The Chinese model of internet sovereignty in Africa', 20 *African Human Rights Law Journal* 125-146; Paul Mozur *et al* (2019), 'Made in China, exported to the world: The surveillance state' (*The New York Times* 24 April 2019) <<https://nyti.ms/32ggduO>> accessed 21 July 2021.

⁹⁸ Alina Polyakova and Chris Meserole (2019), 'Policy brief: Exporting digital authoritarianism: The Russian and Chinese models' (*Brookings Institution*), <<https://brook.gs/3J2mk6X>> accessed 21 July 2021.

⁹⁹ Arthur Gwagwa and Lisa Garbe (2018), 'Exporting repression? China's artificial intelligence push into Africa' 17 December 2018 *Council on Foreign Relations*, <<https://on.cfr.org/30J1bP7>> accessed 21 July 2021. See eg, Angola, Ethiopia and Zimbabwe.

¹⁰⁰ African Commission Special Rapporteur, *supra* note 1, paras 36-44.

¹⁰¹ Evgeny Morozov (2011), *The Net Delusion: how not to liberate the world* (Public Affairs), at 93.

¹⁰² See Collaboration on International ICT Policy in East and Southern Africa (CIPESA) report (2019), *Despots and Disruptions: Five Dimensions of Internet shutdowns in Africa*, at 4.

given by States included fighting fake news or hate speech, maintaining public order and national security and keeping the integrity of national exams.¹⁰³ More worryingly, the aggressive behaviour of social media companies in content moderation, have sometimes prompted African governments to shut down some platforms. In the wake of the removal of President Buhari's post, for example, Twitter's operation in Nigeria has been suspended indefinitely since 5 June 2021.¹⁰⁴

The African human rights law has copious normative standards that forbids internet shutdowns. For instance, the 2017 African Commission Guidelines on Access to Information and Elections in Africa unequivocally prohibits internet shutdowns during elections.¹⁰⁵ Similarly, the 2019 African Declaration of Principles on Freedom of Expression and Access to Information prohibits any disruption of access to the internet.¹⁰⁶ Despite being non-binding instruments, these norms prohibit internet shutdown.

In the case of *African Freedom of Exchange and 15 others v. Algeria and 27 others*,¹⁰⁷ civil societies brought a strategic litigation before the African Commission on Human and Peoples' Rights against 28 African countries who deliberately shutdown the internet between 2016-2019.¹⁰⁸ However, African Commission struck down the case by reasoning that the matter was brought based on general and vague allegations.¹⁰⁹ In *Amnesty International Togo et al case*,¹¹⁰ the ECOWAS Court in 2020 held that the government of Togo violated individuals' rights to freedom of expression on the internet when it shut down the internet in 2017. This makes the African human rights law very progressive in terms of having a norm prohibiting internet

¹⁰³ AccessNow (2021), *Shattered Dreams and Lost Opportunities, A year in the fight to #KeepItOn*, (3 March 2021), at 2. The African countries that implemented shutdown in 2020 include: Algeria, Burundi, Chad, Egypt, Ethiopia, Guinea, Kenya, Mali, Sudan, Tanzania, Togo, and Uganda. See also Tomiwa Ilori (2021), *Life Interrupted: Centering the Social Impact of Network Shutdowns in Advocacy in Africa*, (Global Network Initiative (GNI) report), at 12.

¹⁰⁴ The Federal Ministry of Information and Culture, Nigeria, *Press release on Suspension of Twitter*, (5 June 2021), <<https://bit.ly/3Fg50ca>> accessed 21 July 2021.

¹⁰⁵ African Guidelines, *supra* note 58, principle 26.

¹⁰⁶ African Declaration, *supra* note 47, principle 38(2).

¹⁰⁷ *African Freedom of Exchange and 15 Others v. Algeria and 27 others*, African Commission on Human and Peoples' Rights (ACHPR) Communication 742/20 (7 August 2020) paras 43-45.

¹⁰⁸ *Ibid*, para 3

¹⁰⁹ *Ibid*.

¹¹⁰ *Amnesty International Togo et al case*, *supra* note 68, para 45.

shutdown and would be a bulwark for the protection of human rights in the continent where internet shutdowns are common.¹¹¹

b) Internet censorship

It is another growing threat to the free speech rights of bloggers, journalists and individuals online.¹¹² Internet censorship refers to the use of technology that blocks pages by reference to certain characteristics, such as traffic patterns, protocols or keywords, or on the basis of their perceived connection to content deemed inappropriate or unlawful.¹¹³ The former African Commission Special Rapporteur indicated in his report that African States were applying content blocking techniques which restrict access to particular sites or applications.¹¹⁴

The first recorded case of internet censorship in sub-Saharan Africa occurred in Zambia in 1996. The Open Net Initiative (ONI) observed the presence of technical Internet filtering in four sub-Saharan African countries in 2008-2009 –Ethiopia, Nigeria, Uganda, and Zimbabwe. However, Ethiopia has unblocked hundreds of websites since 2018 as part of political reforms under a new government.¹¹⁵

c) Repressive national security legislation

Despite repeated pushbacks from civil societies and rights groups, repressive national security laws are still used to drown out individuals who speak truth to power, including political dissenters, bloggers, journalists, and individuals in some African countries. Although African courts continue to play a role in pushing back national security legislation, they are still used in countries such as Burkina Faso¹¹⁶, Egypt¹¹⁷, Kenya¹¹⁸ and Rwanda.¹¹⁹

¹¹¹ Yohannes Eneyew Ayalew (2020), 'Public International Law and Internet Shutdowns: Time to unpack emerging norms?' *Groningen Journal of International Law (GROJIL) Blog* (July 13, 2020) <<https://bit.ly/3spJFcK>> accessed 21 July 2021.

¹¹² African Commission Special Rapporteur, *supra* note 1, para 37.

¹¹³ ARTICLE 19 (2016), *Freedom of Expression Unfiltered: How blocking and filtering affect free speech*, (Policy Brief), at 7.

¹¹⁴ African Commission Special Rapporteur, *supra* note 1, at para 37.

¹¹⁵ Berhan Taye et al., (2018) 'Ethiopia: Verifying the unblocking of websites', <<https://bit.ly/3pbYMoc>> accessed 21 July 2021.

¹¹⁶ Adopted by Burkina Faso's National Assembly on 21 June, the law provides for harsh penalties for online fake news and for "reporting on terrorism or on the security forces whose consequences could compromise public order and the conduct of security operations." See Reporters without Borders, (2019) 'Burkina Faso: legislative threat to press freedom must be declared unconstitutional' <<https://bit.ly/3FdT0YF>> accessed 21 July 2021.

d) *Digital Surveillance*

This is another mechanism commonly implemented by States to intrude into individual's privacy and freedom of expression in Africa. The 2019 African Declaration expressly prohibits any form of digital surveillance undertaken by States unless authorised by law.¹²⁰ More recently, the 2021 African Commission Resolution requires States to align their use or development of artificial intelligence (AI), robotics or other digital technologies with African human rights law. This is a significant step to discourage digital surveillance and to further uphold privacy and freedom of expression in the digital ecosystem.¹²¹ For example, the South African government's practice of bulk surveillance activities and foreign signals interception –to interfere with the privacy and speech rights of anyone, including South Africans– was declared unlawful and invalid by the High Court in 2019.¹²² The Constitutional Court affirmed this judgement in 2021.¹²³

¹¹⁷ In Egypt the Law No. 180 of 2018 obliges personal social media accounts with 5,000 followers to come under media regulations. See ARTICLE 19 (2018), *Egypt: 2018 Law on the Organisation of Press, Media and the Supreme Council of Media: Legal Analysis*, at 1. There is a similar concern under Article 7(4) the Ethiopian Hate Speech and Disinformation Prevention and Suppression Proclamation 1185/2020, which can ultimately create a chilling effect on the individual's free speech.

¹¹⁸ On 31 July 2019, the Kenyan High Court declared Section 84D of the Information and Communications Act unconstitutional for criminalizing publishing of obscene information in electronic form. The Court found that the provision was drafted in an ambiguous and overly broad manner that will limit freedom of expression. See Kiruti Itimu, (2019) 'High Court Declares Section of the Kenya Information and Communication Act as 'Unconstitutional' (Techweez, July 31, 2019) <<https://bit.ly/3FhJjff>> accessed 21 July 2021.

¹¹⁹ Kelly Rwamapera, (2019), 'Rwanda's Supreme Court decriminalizes cartooning, except for president.' (The Independent, April 25, 2019) <<https://bit.ly/3e7iDyn>> accessed 21 July 2021. See also African Commission Special Rapporteur *supra* note 1 para 20.

¹²⁰ African Declaration, *supra* note 47, Principle 41.

¹²¹ The African Commission on Human and Peoples' Rights (ACmHPR), 473 Resolution on the need to undertake a Study on human and peoples' rights and artificial intelligence (AI), robotics and other new and emerging technologies in Africa - ACHPR/Res. 473 (EXT.OS/ XXXI) 2021, 25 February 2021, para 1.

¹²² Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others, *High Court of South Africa, Gauteng Division*, (25978/2017) [2019] ZAGPPHC 384 (16 September 2019) para 165.

¹²³ *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others*, *South African Constitutional Court*, 279/19 ZACC 3 (2021) paras 135.

Overall, many African governments more than ever before, find themselves in the digital authoritarianism track. They are using digital technologies (and often with the succour of private contractors) to cut, censor, suppress and surveille the internet and digital communication. This has the effect of gagging freedom of expression of their people.

4.2 Leviathan power of social media platforms

Like sovereign States, social media companies are asserting leviathan power over user-generated contents in their platforms. Their ever-increasing power is now evident from the arbitrary and controversial take down decisions they make in their spaces.¹²⁴ They are applying unruly standards on user-generated contents and invariably employ aggressive practices of content moderation similar to what Nicholas Suzor described 'the lawless rule of tech'.¹²⁵ This article seeks to forward some options on how this unbridled power of platforms over user-generated contents can be tamed.

There is no comprehensive definition to the concept of content moderation despite some earlier attempts.¹²⁶ The recent glossary of the UN Committee on the Rights of the Child in General Comment No 25 (2021) defines moderation as: "[t]he practice of monitoring and reviewing user-generated content against pre-determined rules to remove content deemed impermissible, either automatically or using human moderators."¹²⁷ This implies that content moderation is a practice by content moderators (be it humans or artificial intelligence (AI)) who can review and monitor a certain

¹²⁴ The Economist, (2017) 'Internet firms face a global techlash' (12 August 2017), <<https://econ.st/3GZUMgw>> accessed 21 July 2021. See also Jack M. Balkin (2011) 'Free Speech is a Triangle', *118 Columbia Law Review* 2035 and Gregory P Magarian (2021), 'The Internet and Social Media,' in in Adrienne Stone and Frederick Schauer (eds) *The Oxford Handbook of Freedom of Speech* (Oxford University Press), at 354.

¹²⁵ See generally Nicolas P. Suzor, (2019), *Lawless: The Secret Rules That Govern Our Digital Lives* (Cambridge: Cambridge University Press), at 89-102.

¹²⁶ For example, Sarah Roberts defines content moderation as the organised practice of screening user-generated content (UGC) posted to Internet sites, social media and other online outlets, in order to determine the appropriateness of the content for a given site, locality, or jurisdiction. See Sarah T. Roberts (2016), 'Commercial Content Moderation: Digital Laborers' Dirty Work' *Media Studies Publications* 12, at 1-11. See also Sarah T. Roberts (2017), Content moderation, in *Encyclopedia of Big Data*. UCLA e-scholarship, <<https://bit.ly/3qajfZJ>> accessed 21 July 2021.

¹²⁷ See UN Committee on the Rights of the Child (CRC) General Comment No. 25 (2021) 'Children's rights in relation to the digital environment' Glossary (12 February 2021).

content by social media users against pre-determined rules, including community standards or policies, and will be removed if deemed to be illegal. Ultimately, content moderation aims to achieve certain objectives. It protects one user (or group) from another through removing offensive, vile or illegal contents. Moreover, platforms want to present their best face to new users, partners, advertisers and the general public.¹²⁸

The *modus operandi* of content moderation varies from platform to platform depending on the size, resource, purpose and organisational practices.¹²⁹ In this regard, Robyn Caplan, distinguishes three major approaches to content moderation: artisanal, community-reliant and industrial approaches.¹³⁰ The *artisanal* approach involves smaller-scale case-by-case curation of content by teams of handful human moderators executed manually.¹³¹ Platforms like *Medium* and *Vimeo* use this approach. This approach is commended for its attention to local contexts.¹³² The second one is *community-reliant* approach which typically combines overarching policy decisions by a small team of company employees with a larger group of volunteer human reviewers.¹³³ Platforms such as *Wikimedia* and *Reddit* are cases in point. This approach engages its users in the actual moderation.¹³⁴

The third track is an *industrial approach* which typically relies upon large-scale bureaucracies of tens of thousands of human reviewers to enforce community standards that are defined by separate policy teams.¹³⁵ *Facebook*, *Twitter* and *YouTube* are examples of platforms that use this approach. The industrial approach is increasingly using algorithmic tools to flag hate speech and illegal contents.¹³⁶

¹²⁸ Tarleton Gillespie (2018) *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (Yale University Press), at 5.

¹²⁹ Robyn Caplan (2018), 'Content or Context Moderation: Artisanal, Community-Reliant, and Industrial Approaches', *Data and Society*, 15; and See generally Kate Klonick (2018), 'The New Governors: The People, Rules, and Processes Governing Online Speech', 131 *Harvard Law Review* 1598.

¹³⁰ Caplan, Id., at 16.

¹³¹ Id., at 17.

¹³² Id., at 18.

¹³³ Id., at 20.

¹³⁴ Id., at 21.

¹³⁵ Id., at 23

¹³⁶ Id., at 23.

Content moderation is a challenging undertaking, and undeniably, it is a tightrope act.¹³⁷ On the one hand, when platforms are hypersensitive about removing potentially harmful content, particularly in the absence of any oversight, due process and accountability mechanisms, they may end up policing speech.¹³⁸ This has been the case, for example, when YouTube removed several channels documenting human rights and humanitarian law abuses in Syria.¹³⁹ While proactive takedown efforts and an increase in granularity and detail in the provision of individualised notices to users for their impugned contents is commendable, aggressive –*at times* partisan–curation of contents chills freedom of expression in Africa. Frustrations towards platforms are on the rise in many African countries over aggressive, arbitrary content removals.

On the other hand, if platforms are less aggressive and less sensitive, they run the risk of leaving hateful content to spread, potentially contributing to the outbreak of mass violence offline. Critics have noted several instances where platforms were inactive in moderating content that helped foment mass violence.¹⁴⁰ Myanmar can be an example.¹⁴¹ In this respect, an independent UN Fact-Finding Mission found that Facebook had not done enough to prevent the spread of hate speech targeting the Rohingya ethnic minority in Burma, leaving them vulnerable to attack by the public at a time

¹³⁷ See Yohannes Eneyew Ayalew (2021) 'Uprooting hate speech: The challenging task of content moderation in Ethiopia', *Center for International Media Assistance (CIMA) Blog*, 27 April 2021, <<https://bit.ly/3GPVflw>> accessed 23 July 2021.

¹³⁸ David Kaye (2019), *Speech Police: The Global Struggle to Govern the Internet* (Columbia Global Reports), at 112-126.; See generally Jillian C. York (2021), *Silicon Values: The Future of Free Speech under Surveillance Capitalism* (Verso Publishing).

¹³⁹ Abdul Rahman Al Jaloud *et al.* (2019) *Caught in the Net: The Impact of "Extremist" Speech Regulations on Human Rights Content* (A joint report of Electronic Frontier Foundation, Syrian Archive and Witness), at 1-11. A similar concern was also raised before when Facebook deleted a famous Vietnam war photo from its platform. See generally Alice Ross and Julia Carrie Wong (2016), 'Facebook Deletes Norwegian PM's Post as "Napalm Girl" Row Escalates', *The Guardian* (9 September 2016), <<https://bit.ly/3qfneo3>> accessed 23 July 2021.

¹⁴⁰ Barrie Sander (2019), 'Mass Atrocities in the Age of Facebook—Towards a Human Rights-Based Approach to Platform Responsibility, Part-I' (*OpinioJuris Blog*, 16 December 2019), <<https://bit.ly/32ecPRx>> accessed 23 July 2021.

¹⁴¹ Steve Stecklow (2018), 'Hatebook: Why Facebook Is Losing the War on Hate Speech in Myanmar', *Reuters Special Report* (15 August 2018) <<https://reut.rs/3ebYfw6>> accessed 23 July 2021.

when the military was perpetuating human rights violations against them.¹⁴² Now, there is growing concern that a similar pattern is unfolding in some African countries, such as Ethiopia.¹⁴³ Poignantly, the Ethiopian Human Rights Commission recently found that the spread of unregulated hate speech on the social media –in the wake of the assassination of Hachalu Hundessa– effectively abetted crimes against humanity in Ethiopia.¹⁴⁴

Reverting to the row between the Nigerian government and Twitter, the saga has sparked debates on the propriety and legality of content removal in Africa and beyond. On 1 June 2021, the Nigerian President Muhammadu Buhari posted his views on Twitter account threatening punishment for regional secessionists blamed for attacks on government buildings.¹⁴⁵ He said: “Many of those misbehaving today are too young to be aware of the destruction and loss of lives that occurred during the Nigerian Civil War. Those of us in the fields for 30 months, who went through the war, will treat them in the language they understand.” Twitter removed the President’s post claiming that such speech violates the platform’s abusive behaviour policy.

When we look at Twitter’s policy on abusive behaviour, it reads: “You may not engage in the targeted harassment of someone, or incite other people to do so. We consider abusive behaviour an attempt to harass, intimidate, or silence someone else’s voice.”¹⁴⁶ While the platform believes in freedom of expression and open dialogue, the rationale for this policy is to protect individuals or groups from being silenced or intimidated.¹⁴⁷ This policy aims to facilitate healthy dialogue on the platform, and empower individuals to express diverse opinions and beliefs. As such, the platform seeks to prohibit behaviour that harasses, intimidates, otherwise shame or degrade others, and risk people’s safety.¹⁴⁸

¹⁴² See UN Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, A/HRC/39/CRP.2, (17 September 2018) para 697.

¹⁴³ Jamelle Bouie (2020), ‘Facebook Has Been a Disaster for the World,’ *The New York Times* (18 September 2020), <<https://nyti.ms/3EbbibF>> accessed 23 July 2021.

¹⁴⁴ Ethiopian Human Rights Commission, (2021) “It Did Not Feel Like We Had a Government”: Violence & Human Rights Violations following Musician Hachalu Hundessa’s Assassination, *Investigation Report*, p. 2

¹⁴⁵ Aljazeera (2021), ‘Twitter removes Nigerian president’s ‘abusive’ civil war post,’ (2 June 2021) <<https://bit.ly/3mmRCM9>> accessed 23 July 2021.

¹⁴⁶ See Twitter Rules, *Abusive Behavior* <<https://bit.ly/3J7ekBo>>, accessed 23 July 24, 2021.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

Buhari's tweet was made after series of attacks on Nigerian government offices and buildings in Rivers State, South East region allegedly by banned separatist group, the Indigenous People of Biafra (IPOB).¹⁴⁹ When we assess the impugned speech against the above policy of Twitter, it contains law enforcement languages that may suggest the government's actions as he warned that their force shall be met with force. Simply put, Buhari's speech is not unexpected in the Nigerian context where the country since the infamous Civil War era has faced national unity and security challenges.¹⁵⁰

As explained in Section 2.1 above, African States have since independence been struggling to maintain national unity owing to the impact of colonialism.¹⁵¹ This has been the case in the Nigerian Civil War (also called 30 months war) which ended in 1970. Thus, before removing the above tweet, content moderators of Twitter should have understood the historical context of the speech by considering the trauma of the civil war and the nation's continued struggle in sustaining national unity. Of course, the literal meaning of the post seems to be a statement commonly used in law enforcement and security service.

The subtle meaning of the post indicates that the government will take stern military offensive measures against the rebels. The phrase [we] "will treat them in the language they understand" seems to target the separatists. Immediately after Buhari's post, the leader of IPOB, Namndi Kanu, took on Twitter on 2 June 2021 reacted aggressively saying that "Any army they send to Biafraland will die there. None will return alive even if it means sacrificing my people." This post was removed after three days on 5 June 2021.¹⁵² Some observers criticised President's post before it was removed. They accused him of targeting Igbo people of Nigeria's southeast region where IPOB efforts to revive sentiments over Biafra have prompted a crackdown from government forces in recent years.¹⁵³

Under the established case law of African Court on Human and People's Rights, the content of freedom of expression is wide-ranging. It includes speech that is not only favourable or inoffensive, but also those that "offend,

¹⁴⁹ Ibid.

¹⁵⁰ Ousman Murzik Kobo (2020), "No Victor and No Vanquished" - Fifty Years after the Biafran War', (Origins: Current Events in Historical Perspective, Ohio State University) <<https://bit.ly/3H0aDvw>> accessed 24 July 2021.

¹⁵¹ Minasse, *supra* note 25, at 593.

¹⁵² Yusuf Alli et al, *supra* note 16.

¹⁵³ Aljazeera, *supra* note 145.

shock or disturb” a State or any section of the population.¹⁵⁴ Importantly, in the Malawian case of *Harry Nakandawire et al*, the High Court found that: “The right to freedom of expression should not be restricted to speaking about only those things that delight those in power but also those things that have the potential to displease, indeed annoy them”.¹⁵⁵ It follows that, therefore, the removal of Buhari’s post violates the right to freedom of expression under African human rights law.

It is important to mention the recent statement regarding the concerns of UN Human Rights on this issue stating that “having transparent rules around content moderation and ensuring different views are reflected is also a question of trust in institutions –one of the most precious commodities in democratic societies.”¹⁵⁶ Thus, social media platforms must respect the right of speakers unless the impugned speech crosses the threshold of prohibited speech and foments imminent violence. For this reason, Buhari’s speech should have been tolerated as it did not pass the threshold of prohibited speech in a democratic society. Moreover, the decision and process of the removal were not transparent and even-handed.¹⁵⁷

Overall, the saga of Nigerian President and Twitter raise many questions than answers and will continue to spur controversies. It shall be recalled that content moderation is a tightrope act. Nevertheless, the removal of the post by Twitter will arguably stifle vibrant debate in a democratic society. Hence, this takedown measure is the tip of the iceberg that platforms are wielding leviathan power through policing freedom of expression in Africa or beyond.

¹⁵⁴ Ingabire case, *supra* note 17, para 143.

¹⁵⁵ *Republic v. Mkandawire & Another* (5 of 2010) [2010] MWHC 5 (08 October 2010) 9-10.

¹⁵⁶ See the statement of Peggy Hicks, Director of Thematic Engagement for UN Human Rights, moderating online content: fighting harm or silencing dissent? (23 July 2021), <<https://bit.ly/3J2CoW9>> accessed 24 July 2021.

¹⁵⁷ Yusuf Alli et al, *supra* note 16, at 14.

5. The Content of the Right to Freedom of Expression on the Internet under African Human Rights Law

5.1 Regional standards

The right to freedom of expression under the African Charter¹⁵⁸ can be understood as a basic right –vital to an individual's personal development, and to their participation in the conduct of public affairs.¹⁵⁹ It includes ‘the right to seek, receive and impart information and ideas of all kinds regardless of frontiers’.¹⁶⁰ The right can be exercised through several means and modes of expression.¹⁶¹ It is also described as a meta or multiplier right since it enables individuals to enjoy many other rights.¹⁶² For instance, as indicated in the democratic rationale for the right to freedom of expression in Section 2.2 (above), political participation rights would be worthless without the conversation of ideas.¹⁶³ The rights to assembly, peaceful demonstration, and association would also be superficial if they do not include an entitlement to express ideas.¹⁶⁴

The right to freedom of expression is found under civil and political rights part of the African Charter.¹⁶⁵ Article 9(1) provide that “[e]very individual shall have the right to receive information.” And according to Article 9(2), [e]very individual shall have the right to express and disseminate his opinions within the law”. Importantly, the phrase the right

¹⁵⁸ African Charter, *supra* note 58, art 9(2).

¹⁵⁹ Media Rights Agenda & Others v Nigeria (2000) AHRLR 227 (ACHPR 1999) para. 36.

¹⁶⁰ General Comment No 34, *supra* note 13, para 11.

¹⁶¹ Sarah Joseph and Melissa Castan (2013), *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press), at 594.

¹⁶² Michael O’Flaherty (2012), ‘Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No 34,’ *12 Human Rights Law Review* 631.

¹⁶³ UN Human Rights Committee (HRC), *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, para 12.

¹⁶⁴ Kevin Boyle (2010), ‘Thought, Expression, Association, and Assembly’, in Moeckli, Shah and Sivakumaran (eds), *International Human Rights Law* (Oxford University Press), at 266.

¹⁶⁵ Oji U. Umzurike (1997), *The African Charter on human and Peoples’ Rights*, (Brill: Martinus Nijhoff Publishers), at 34.

‘to express and disseminate’ under the African Charter embraces a plethora of means and forms of expression.¹⁶⁶

A comparison of the African Charter provision on freedom of expression to its articulation under other regional and international human rights instruments reveals that the right in the African Charter does not have the explicit breadth of scope, specificity and clarity¹⁶⁷ found in other instruments¹⁶⁸ such as the Universal Declaration of Human Rights (UDHR),¹⁶⁹ the International Covenant on Civil and Political Rights (ICCPR),¹⁷⁰ the European Convention of Human Rights (ECHR),¹⁷¹ and the American Convention on Human Rights (ACHR).¹⁷²

When we compare the African Charter with the European and the American Conventions, the former is quite limited in how it refers to the content of the right, by referring only to the right to ‘express and disseminate’ opinions, without references to the right to ‘seek’ them. Indeed, the African Charter mentions the right to receive information under Article 9(1), but it remains unstated as to whether this incorporates a right also to seek information. By contrast, Art. 10(1) of the ECHR states the right to freedom of expression includes freedom “to receive and impart information and ideas without interference by public authority and regardless of frontiers.” The American Convention, like the ICCPR, provides one of the broadest possible descriptions of the right to freedom of expression since it states the right to seek, receive and impart information. Moreover, Article 13(1) of American Convention broadly describes the protected means and modes of expression.

¹⁶⁶ Rachel Murray (2019), *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press), at 266.

¹⁶⁷ Adjei, *supra* note 22, at 237.

¹⁶⁸ Kolawole Olaniyan (2008), ‘Civil and Political Rights in the African Charter: Articles 8–14’ in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights the System in Practice 1986–2006* (Cambridge University Press), at 220.

¹⁶⁹ *Universal Declaration of Human Rights (UDHR)*, 10 December 1948, 217 A (III) art 19.

¹⁷⁰ UN General Assembly, *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, United Nations Treaty Series (UNTS), vol. 999, p. 171, art 19(2).

¹⁷¹ *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, art 10.

¹⁷² *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969, art 13.

However, the African Charter's failure to mention any specific medium may bring its own benefits, since it could be interpreted to embrace new and emerging mediums, including the internet. In addition, and importantly, the 2019 African Declaration clearly provides that the right to freedom of expression shall be protected both offline and online.¹⁷³ Hence, freedom of expression as formulated under the African Charter refers to conveying thoughts using any means. The 2019 African Declaration was adopted by the African Commission to complement the African Charter and seeks both to explain how the right to freedom of expression extends to its exercise on the internet and to provide deeper nuance as to the nature of that right in the digital ecosystem.¹⁷⁴ The 2019 African Declaration addresses the role of new digital technologies in the realisation of the right to freedom of expression.¹⁷⁵ It also affirms that the same rights that people have offline should be protected online in accordance with international human rights law.¹⁷⁶

Furthermore, the right to freedom of expression is confirmed within a number of specific instruments of the African Union (AU). For instance, the African Youth Charter set out that young persons have the right to seek, receive and disseminate information and ideas of all kinds, either orally, in writing, in print, in any form of art or through any media of their choice subject to the restrictions as prescribed by laws.¹⁷⁷ This means African youth are entitled to enjoy freedom of expression, subject to relevant claw-back clauses. Also, the right can be exercised through any medium, be it offline or online.¹⁷⁸ The African Charter on Democracy, Elections and Governance¹⁷⁹ also provides for freedom of expression. This Charter maps the commitment of African States in relation to constitutional democracy, elections and unconstitutional changes of government. Similarly, the African Charter on the Rights and Welfare of the Child also acknowledges that the right to freedom of expression should be extended to children in Africa.¹⁸⁰ Thus, the

¹⁷³ African Declaration, *supra* note 45, Principle 5.

¹⁷⁴ African Declaration, *supra* note 45, introduction para 1.

¹⁷⁵ *Id.*, preamble para XV.

¹⁷⁶ *Id.*, preamble para XVI, and *see* principle 5.

¹⁷⁷ African Union, *African Youth Charter*, 2 July 2006, art 4.

¹⁷⁸ *Ibid.*

¹⁷⁹ African Union, *African Charter on Democracy, Elections and Governance*, 30 January 2007, art 27(8).

¹⁸⁰ Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), art 7.

content of the right generally extends to all forms of expression thereby covering all platforms of speech, both offline and online.

5.2 Sub-regional standards

Regional economic communities (RECs) have been primarily formed to facilitate regional integration through closer economic cooperation and the harmonisation of policies rather than fostering human rights at sub-regional level.¹⁸¹ Yet, there is a strong link between the objectives of integration and human rights, such as the ways in which improving civil and political rights are often implicated within goals of economic integration. For example, when regional economic integration reaches the phase of a common market, citizens can exercise a number of civil and political rights such as free movement of persons.¹⁸²

Given their different focus, the constitutive treaties of most RECs lack express or extensive provisions on human rights, both in general and in terms of specific rights. The Treaty for the Establishment of the East African Economic Community (EAC) refers to ‘human rights’ in general terms a few times.¹⁸³ As a result, cases involving claims of human rights violations, including violations of freedom of expression, have been referred to its Tribunal citing the violations of good governance and rule of law clauses.¹⁸⁴ Similarly, the rule of law clause of the EAC Treaty dictates that Partner States must abide by the principles of rule of law, democracy, social justice and the maintenance of universally accepted standards of human rights.¹⁸⁵

In *Burundi Journalists’ Union v. The Attorney General of the Republic of Burundi*, the East African Court of Justice (EACJ), citing these provisions,

¹⁸¹ See Frans Viljoen (2012), *International Human Rights Law in Africa* (Oxford University Press), at 481; Solomon T Ebobrah (2013), ‘Human Rights Developments in African Sub-Regional Economic Communities during 2012’, 13 *African Human Rights Law Journal* 178; Frans Viljoen (1999), ‘Realisation of Human Rights in Africa through Sub-Regional Institutions,’ 7 *The African Yearbook of International Law*, 185-216, and Frans Viljoen(2011), ‘Human rights in Africa: normative, institutional and functional complementarity and distinctiveness’ 18 *South African Journal of International Affairs* 196.

¹⁸² Assembly of Heads of State and Government, *Agreement Establishing the Inter-Governmental Authority on Development (IGAD)*, IGAD/SUM-96/AGRE-Doc, Nairobi, 21 March 1996, art 13 A(o), and East African Economic Community (EAC), *Treaty for the Establishment of the East African Economic Community (EAC)*, (as amended on 14th December 2006 and 20th August 2007, art 104.

¹⁸³ EAC Treaty, Id., arts 3(3)(b), 6(d), 7(2), 27(2) and 123(3)(c).

¹⁸⁴ Id., arts 6(d) and 7(2).

¹⁸⁵ Id., art 7(2).

held that the government of Burundi's Press Law No. 1/11, mandating an arbitrary accreditation scheme that compels journalists to obtain a press card before exercising their profession, violated the right to freedom of expression.¹⁸⁶ The EACJ reasoned that "there is no doubt that freedom of the press and freedom of expression are essential components of democracy."¹⁸⁷ The Court further noted that 'under Articles 6(d) and 7(2), democracy must of necessity include adherence to press freedom'¹⁸⁸ and a 'free press goes hand in hand with the principles of accountability and transparency which are also entrenched in articles 6(d) and 7(2).'¹⁸⁹

The EACJ took a similar position in the case of *Media Council of Tanzania v. Attorney General*. In this case, it held that numerous provisions of Tanzania's Media Services Act violated the Treaty for the Establishment of the East African Community as they infringed the right to freedom of expression.¹⁹⁰ The Court found that the Tanzanian government failed to demonstrate that the limitations to the right in the law were legitimate under African human rights law, and held that the impugned provisions therefore violated the Treaty by infringing the right to freedom of expression protected by the African Charter on Human and Peoples' Rights.¹⁹¹

In Western Africa, the Revised Treaty of ECOWAS recognises the importance of the press in a drive towards a regional integration process.¹⁹² The ECOWAS Court in *Ogwuche v. Nigeria*¹⁹³ thus held that a new regulation imposed by the Nigerian Government against a human rights group was tantamount to censorship and violated the group's freedom of expression.¹⁹⁴ The National Broadcasting Commission had issued a regulation requiring Festus Ogwuche, as well as all broadcasting houses, to have any proposed live programming vetted by the Commission 48 hours

¹⁸⁶ *Burundi Journalists' Union v. The Attorney General of the Republic of Burundi*, EACJ Ref. No. 7 of 2013 (2015), para 123.

¹⁸⁷ *Id.*, para 80.

¹⁸⁸ *Id.*, para 82.

¹⁸⁹ *Id.*, para 83.

¹⁹⁰ *Media Council of Tanzania v. Attorney General*, Case No. 2 of 2017, EACJ Judgement, March 28, 2019.

¹⁹¹ *Id.*, para 118.

¹⁹² Economic Community of West African States (ECOWAS), *Revised Treaty of the Economic Community of West African States (ECOWAS)*, 24 July 1993, art 66.

¹⁹³ *Ogwuche v. Federal Republic of Nigeria*, December 11, 2018, ECW/CCJ/JUD/31/18.

¹⁹⁴ *Id.*, paras 60 and 66.

prior to airing, on the grounds that some programs were broadcasting content which threatened the peace and unity of the country.¹⁹⁵ The Court examined international and regional human rights instruments to find that the Government of Nigeria had failed to establish proof that Ogwuche's media programs constituted a sufficient threat to justify the restriction and that the restriction, as such, was an excessive burden.¹⁹⁶ Therefore, the Court ordered that the Regulation be withdrawn.¹⁹⁷

Over the years, the ECOWAS Court has reviewed complaints of human rights violations pertaining to the unlawful arrests, disappearances, and illegal killings of journalists with the view of protecting the right to freedom of expression in the cases of *Chief Ebrimah Manneh v. The Gambia*¹⁹⁸, *Musa Saidu Khan v. The Gambia*¹⁹⁹, and *Federation of African Journalists & others v. The Gambia*.²⁰⁰ Most importantly, the ECOWAS Court has set an important precedent in *Amnesty International Togo et al* case concerning freedom of expression on the internet.²⁰¹

To sum up, sub-regional courts in Africa such as the EACJ and ECOWAS Court have an enormous potential to be guardians of human rights, including freedom of expression on the internet. Moreover, their jurisprudence elaborates upon the contours of the right to freedom of expression on the internet in the African context.

6. Conclusion

This article has demonstrated how digital authoritarianism by States and the leviathan power of social media platforms continues to pose enormous threats to the enjoyment of freedom of expression in the digital environment in the African continent. States' *restrictions* on freedom of expression on the internet in Africa include internet shutdowns, internet censorship, repressive national security legislation and digital surveillance. When the States implement one of these measures, they flout a cocktail of negative and

¹⁹⁵ *Id.*, para 4.

¹⁹⁶ *Id.*, para 65.

¹⁹⁷ *Id.*, para 71.

¹⁹⁸ *Manneh v. Gambia*, Judgment, ECW/CCJ/APP/04/07 (ECOWAS, June 5, 2008), para 43.

¹⁹⁹ *Musa Saidu Khan v. The Gambia*, ECW/CCJ/JUD/08/10, (16th Dec. 2010) para 46.

²⁰⁰ *Federation of African Journalists & others v. The Gambia* (Judgment No: ECW/CCJ/JUD/04/18, March 13, 2018) p. 61.

²⁰¹ *Amnesty International Togo case*, *supra* note 68.

positive duties concerning the right to freedom of expression on the internet. Most of these measures are *incompatible* with the African human rights law.

I argue that illegitimate limitations of the right fall short of a human rights-based approach. As a result, these limitations violate freedom of expression on the internet. In light of the discussion in the preceding sections, African States must end the practice of digital authoritarianism and should robustly respect and protect the right to freedom of expression on the internet by aligning their actions with the three pillars of human rights-based approach: substantive, process and procedural touchstones.

Likewise, while proactive removal of content by social media platforms is understandable, their arbitrary, unruly decisions during content moderation equally gag the right to freedom of expression on the internet. As illustrated in this article, the removal of President Buhari's post by Twitter epitomises how platforms are policing the right to freedom of expression in Africa. Beyond their superficial human rights vocabulary, social media platforms must seriously commit to human rights law standards by incorporating them into their community standards and terms of services to fully ensure that content moderation practices are guided by human rights-based approach.

In order to whittle down the unbridled leviathan power of social media platforms, African States should consider regulating their behaviour through initiating a human rights-friendly binding instrument.²⁰² Given Africa's diverse cultural, ethnic and social contexts, social media platforms must also diversify their content and policy team in order to enable the application of local or subject-matter expertise to content issues. ■

²⁰² A similar call has been advanced in the context of the right to development in Africa. See generally, Tamo Atabongawung (2021), 'A legally binding instrument on business and human rights: Implications for the right to development in Africa', *African Human Rights Journal*, 262-289.

Cited References

- Adjei, William E. (2012). *The Protection of Freedom of Expression in Africa: Problems of Application and Interpretation of Article 9 of The African Charter on Human and Peoples' Right* (Unpublished PhD thesis, the University of Aberdeen)
- Asante, S.K.B. (1969). 'Nation Building and Human Rights in Emergent African Nations', 2 *Cornell International Law Journal* 88
- Atabongawung, Tamo (2021). 'A legally binding instrument on business and human rights: Implications for the right to development in Africa', *African Human Rights Journal*, 262-289.
- Baxi, Upendra (2008), *The Future of Human Rights* (Oxford University Press, 3rd ed)
- Benedek, Wolfgang (2013). *Freedom of Expression and the Internet (Council of Europe)*,
- Boyle, Kevin (2010), 'Thought, Expression, Association, and Assembly', in Moeckli, Shah and Sivakumaran (eds), *International Human Rights Law* (Oxford University Press)
- Brechenmacher, Saskia & Carothers, Thomas (2019). *Defending Civic Space: Is the International Community Stuck?* Carnegie Endowment for International Peace Working Paper, (October 22, 2019).
- Campell, Tom (1994). 'Rationales for Freedom of Communication', in Tom Campbell and Wojciech Sadurski (eds) *Freedom of Communication* (Aldershot)
- Caplan, Robyn (2018). 'Content or Context Moderation: Artisanal, Community-Reliant, and Industrial Approaches', *Data and Society*, 15.
- Cross, Charlotte (2021). 'Dissent as cybercrime: social media, security and development in Tanzania,' 15 *Journal of Eastern African Studies*
- Donnelly, Jack (1984). 'Cultural Relativism and Universal Human Rights', 6 *Human Rights Quarterly*, 400-419.
- Ebobrah, Solomon T (2013). 'Human Rights Developments in African Sub-Regional Economic Communities during 2012', 13 *African Human Rights Law Journal*
- Erixon, Fredrik and Lee-Makiyama, Hosuk (2011). 'Digital Authoritarianism: Human Rights, Geopolitics and Commerce', *The European Centre for International Political Economy (ECIPE)*, ECIPE Occasional Paper No. 5/2011, at 1. See also
- Fernyhough, Timothy (1993). 'Human Rights and Precolonial Africa', in Ronald Cohen, & et al (eds) *Human Rights and Governance in Africa* (University Press of Florida)
- Gillespie, Tarleton (2018), *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (Yale University Press),
- Gravett, Willem (2020). 'Digital neo-colonialism: The Chinese model of internet sovereignty in Africa', 20 *African Human Rights Law Journal*
- Hodgkin, Thomas (1957), *Nationalism in Colonial Africa*, (New York University Press)
- Ilori, Tomiwa (2021). *Life Interrupted: Centering the Social Impact of Network Shutdowns in Advocacy in Africa*, (Global Network Initiative (GNI) report)
- J. S. Mill: *On Liberty* and other Writings, Edited by Stephan Collini (Cambridge University Press, 1989), 53-115.
-

-
- Kaye, David (2019). *Speech Police: The Global Struggle to Govern the Internet* (Columbia Global Reports), 112-126.
- Laidlaw, Emily B. (2015). *Regulating Speech in Cyberspace: Gatekeepers, Human Rights and Corporate Responsibility* (Cambridge University Press)
- MacKinnon, Rebecca (2011). 'Liberation technology: China's "networked authoritarianism', 22 *Journal of Democracy*
- Mamdani, Mahmood (1996). *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press)
- Meikeljohn, Alexander (1948). *Free Speech and Its Relation to Self-Government* (Harper and Brothers Publishers)
- Mare, Admire (2020). 'State-Ordered Internet Shutdowns and Digital Authoritarianism in Zimbabwe, 14 *International Journal of Communication*, 4244–4263
- Minasse Haile (1984). 'Human Rights, Stability, and Development in Africa: Some Observations on Concept and Reality', 24 *Virginia Journal of International Law*
- Morozov, Evgeny (2011). *The Net Delusion: how not to liberate the world* (Public Affairs)
- Murray, Rachel (2019). *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press)
- Mutua, Makau (1995). 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties', 35 *Virginia Journal of International Law*
- Nyirenda-Jere, Towela & Tesfaye Biru (2015). *Internet Development and Internet Governance in Africa*, (Internet Society)
- O'Flaherty, Michael (2012). 'Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34,' 12 *Human Rights Law Review* 631.
- Olaniyan, Kolawole (2008). 'Civil and Political Rights in the African Charter: Articles 8–14' in Malcolm Evans and Rachel Murray(eds), *The African Charter on Human and Peoples' Rights the System in Practice 1986–2006* (Cambridge University Press)
- Oliva, Thiago Dias (2020), 'Content Moderation Technologies: Applying Human Rights Standards to Protect Freedom of Expression,' 20:4 *Human Rights Law Review*
- Orehek, Edward and Human, Lauren J. (2017). 'Self-Expression on Social Media: Do Tweets Present Accurate and Positive Portraits of Impulsivity, Self-Esteem, and Attachment Style?' 43(1) *Personality and Social Psychology Bulletin*
- Polyakova, Alina and Meserole, Chris (2019). 'Policy brief: Exporting digital authoritarianism: The Russian and Chinese models' (*Brookings Institution*),
- Sander, Barrie (2020). 'Freedom of Expression in the Age of Online Platforms: The Promise and Pitfalls of a Human Rights-Based Approach to Content Moderation,' 43 *Fordham International Law Journal*
- Sander, Barrie (2021). 'Democratic Disruption in the Age of Social Media: Between Marketized and Structural Conceptions of Human Rights Law,' 32 *European Journal of International Law*
-

- Schauer, Frederick (1982). *Free speech: a philosophical Enquiry* (Cambridge University Press).
- Sen, Amartya (1989). 'Food and Freedom', 17 *World Development* at
- Sen, Amartya (1999), *Development as Freedom* (Oxford University Press)
- Suzor, Nicolas P. (2019). *Lawless: The Secret Rules That Govern Our Digital Lives* (Cambridge: Cambridge University Press)
- Umzurike, Oji U. (1997). *The African Charter on human and Peoples' Rights*, (Brill: Martinus Nijhoff Publishers)
- Viljoen, Frans (2012). *International Human Rights Law in Africa* (Oxford University Press)
- Viljoen, Frans (1999). 'Realisation of Human Rights in Africa through Sub-Regional Institutions,' 7 *The African Yearbook of International Law*, 185-216
- Yohannes Eneyew Ayalew (2020). 'Assessing the limitations to freedom of expression on the internet in Ethiopia against the African Charter on Human and Peoples' Rights' 20 *African Human Rights Law Journal* , 315-345
-