

Social media and the prohibition of ‘false news’: can the free speech jurisprudence of the African Commission on Human and Peoples’ Rights provide a litmus test?

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ABSTRACT: Based on free speech theories, international human rights law, opinions of human rights mechanisms and scholars, this article argues that the African Commission on Human and Peoples’ Rights (African Commission) should expand its ‘traditional’ free speech jurisprudence to meet the exigencies of adjudicating emergent cybercrime laws in Africa that criminalise ‘fake news’ on social media. While social media’s expansion of opportunities to exercise the right to free speech and power to challenge dominant discourses deepen Africa’s democratisation, its propensity for abuse must nonetheless be addressed. Consequently, many African governments have interfered with internet access either during public protests or election periods and resorted to ill-conceived cybercrime laws that criminalise the communication of so-called ‘fake news’ on social media. Around 23 African states have cybercrime laws in place that contain provisions criminalising ‘fake news’. These states include Botswana, Burkina Faso, the Democratic Republic of Congo, Egypt, Ethiopia, Gabon, Kenya, Malawi, Nigeria, Tanzania, Togo and Uganda. Despite being unduly protective of high-ranking government officials, these criminal libel laws present many conceptual and legal difficulties. Nonetheless, the African Commission can resolve these challenges and effectively tackle disinformation on social media through a creative interpretation of article 9 of the African Charter on Human and Peoples’ Rights.

TITRE ET RÉSUMÉ EN FRANCAIS:

Interruption d’accès aux réseaux sociaux et interdiction des «fausses informations»: la jurisprudence de la Commission africaine des droits de l’homme et des peuples sur la liberté d’expression peut-elle fournir un test décisif?

RÉSUMÉ: En se fondant sur les théories relatives à la liberté d’expression, sur le droit international des droits de l’homme ainsi que sur les opinions des mécanismes des droits de l’homme et la doctrine, le présent article soutient que la Commission africaine des droits de l’homme et des peuples (Commission africaine) devrait étendre sa jurisprudence «traditionnelle» sur la liberté d’expression pour répondre aux exigences du contentieux sur les lois émergentes relatives à la cybercriminalité en Afrique qui criminalisent la publication de «fausses informations» sur les réseaux sociaux. Si l’élargissement des possibilités offertes par les médias sociaux pour exercer le droit à la liberté d’expression et le pouvoir de contester les discours dominants est une valeur ajoutée à la démocratisation en Afrique, sa propension aux abus doit néanmoins être abordée. Par conséquent, de nombreux gouvernements africains ont interféré avec l’accès à internet pendant les manifestations publiques ou les périodes

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électorales et ont recouru à des lois mal conçues sur la cybercriminalité qui criminalisent la communication des fameuses «*fake news*» sur les réseaux sociaux. Cette question concerne plus de la moitié des 23 lois africaines sur la cybercriminalité, notamment celles du Kenya, de l'Éthiopie, du Malawi, du Nigéria, de la Tanzanie, de l'Ouganda, de l'Égypte, de la Rd Congo, du Gabon, du Togo, du Botswana et du Burkina Faso. Bien qu'elles protègent indûment les hauts fonctionnaires du gouvernement, ces lois sur la diffamation comme délit présentent de nombreuses difficultés conceptuelles et juridiques. Néanmoins, la Commission africaine peut résoudre ces défis et lutter efficacement contre la désinformation sur les réseaux sociaux grâce à une interprétation innovante de l'article 9 de la Charte africaine des droits de l'homme et des peuples.

KEY WORDS: African Commission on Human and Peoples' Rights, article 9 of the African Charter, criminal defamation, 'false news', online free speech, social media

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1 INTRODUCTION

The Internet and Social Networking Sites (SNS) or social media¹ boom has revolutionised communication and provides for new opportunities to challenge dominant political narratives in the public sphere.² Social media plays vital roles as alternative news sources to official media.³ Digital technologies have also allowed the rapid creation, dissemination and findability of news and information and expanded opportunities to exercise the right to free speech.⁴ Nonetheless, social media use comes with great opportunity to share propaganda and

1 Defined as 'a group of Internet-based applications that ... allow the creation and exchange of User Generated Content', see AM Kaplan & M Haenlein 'Users of the world, unite! The challenges and opportunities of social media' (2010) 53 *Business Horizons* 59-61. As such, social media platforms include content aggregation (YouTube), social networking (Facebook), microblogging (Twitter), photo messaging services (Snapchat), and reputation systems (Yelp).

2 L Dahlberg 'Rethinking the fragmentation of the cyberpublic: from consensus to contestation' (2007) 9 *New Media & Society* 827 at 834-836.

3 B Jukwa 'Citizen journalism on Facebook and the challenges of media regulation in Zimbabwe' in NA Mhiripiri & T Chari (eds) *Media law, ethics, and policy in the digital age* (2017) chapter 7.

4 Used interchangeably in this paper with freedom of expression and freedom of speech.

disinformation to mislead audiences, defame individuals and harm vital state interests.⁵ As Tompros and others correctly observe, the anonymity of social media interactions and users' casual disregard for objectivity has bred 'a cavalier attitude to the truth'.⁶ The growth of mobile telephony, the affordable access to social media occasioned by competition among tech companies and the fact that Africa has the fastest growing mobile Internet penetration,⁷ illustrate the extent of the social media boom on the continent.⁸ As research shows, 'when Africans go online (predominantly with their mobile phones)' they spend ample time on social media platforms.⁹

Lately, social media has become susceptible to politically motivated interference during elections and political crisis, especially in Africa.¹⁰ Consequently, many African regimes have appropriated the term 'fake news' to restrict access to social media and justify wholesale Internet shutdowns. Currently, in addition to draft e-communication and cybercrimes legislation,¹¹ not less than 23 African states have adopted new cybercrime laws that criminalise the communication of false information on social media and the Internet.¹² These laws duplicate

- 5 H Allcott and others 'Trends in the diffusion of misinformation on social media' (2019) 6 *Research & Politics* 205 at 210.
- 6 LW Tompros and others 'The constitutionality of criminalizing false speech made on social networking sites in a post-Alvarez, social media-obsessed world' (2017) 31 *Harvard Journal of Law & Technology* 65 at 108.
- 7 Digital 2020 'Digital 2020 global overview report' <https://wearesocial.com/blog/2020/01/digital-2020-3-8-billion-people-use-social-media> (accessed 16 July 2020).
- 8 André-Michel Essoungou 'A social media boom begins in Africa' *Africa Renewal* December 2020 <https://www.un.org/africarenewal/magazine/december-2010/social-media-boom-begins-africa> (accessed 16 July 2020).
- 9 As above.
- 10 J Conroy-Krutz 'The squeeze on African media freedom' (2020) 31 *Journal of Democracy* 96 at 108.
- 11 Eg Nigeria – Protection from Internet Falsehood and Manipulation Bill 2019; Zimbabwe – Cybersecurity and Data Protection Bill 2019.
- 12 These include Republic of Benin – Code du Numérique (Code Act) 2017, see Committee to Protect Journalists 'Journalist Ignace Sossou convicted of false news in Benin' <https://cpj.org/2019/08/journalist-ignace-sossou-convicted-of-false-news-i.php> (accessed 15 October 2020); Cameroon – Law No 2010/012 of 21 December 2010 on Cybersecurity and Cybercrime; Mali – Law No 2019-056 on the Suppression of Cybercrime; Chad – law No 009/PR/2015 on Cybersecurity; Niger – Cybercrime Act 2019; Kenya – Information and Communication Act 2009, sec 29 (now repealed), see 'Bake condemns the arrest and intimidation of Kenyans online' <https://www.blog.bake.co.ke/2016/01/24/bake-condemns-the-arrest-and-intimidation-of-kenyans-online/> (accessed 15 October 2020) and Computer Misuse and Cybercrimes law 2018, sec 26, which criminalises abuses on social media and proposes a fine of \$50,000 (£37,000) and/or two years in prison for publishing false information, but suspended by the High Court in Petition 206 <http://kenyalaw.org/caselaw/cases/view/159286> (accessed 23 July 2020); Malawi – Malawi Electronic Transactions and Cyber Security Act <http://www.macra.org.mw/wp-content/uploads/2014/07/E-Transactions-Act-2016.pdf> (accessed 15 October 2020); Rwanda's ICT Law No 24/2016 of 18/06/2016; Tanzania – Cybercrime Act 2015, sec 16 (prohibition of false information or data with intent to defame), see 'Tanzania's Cybercrime Act Makes It Dangerous to "Insult" the President on Facebook' <https://advox.globalvoices.org/2016/04/18/tanzanias-cybercrime-act-makes-it-dangerous-to-insult-the-president-on-facebook/> (accessed 15 October 2020); Uganda – Computer Misuse Act 2011, sec 25

existing criminal and penal code sanctions for defamation.¹³ African governments' claim to tackle disinformation and protect national interest is ostensibly aimed at online content regulation.¹⁴ This proves difficult as state or private regulation of media content carries significant risks as it may incentivise over removal or over retention of disputed content or give undue weight to vested interests in restricting comment and encourage censorship.¹⁵ Moreover, the nascent nature of African democracies raises the spectre of a slide to authoritarianism and unconscionable restraints on free speech,¹⁶ particularly through criminal libel laws. While freedom of expression is enshrined in international and regional human rights instruments and national constitutions divergent national laws on online 'fake news' regulation hold sway. Efforts internationally to tackle disinformation and other cyber interference in elections and online political discourse are still emergent. Fortunately, free speech jurisprudence of the African Commission on Human and Peoples' Rights' (African Commission) provides a sound analysis of the impermissibility of the criminalisation of 'false news' as applied to print and broadcast media. A permissible limitation must (a) be prescribed by law, (b) achieve a legitimate aim, and (c) be reasonably necessary and proportionate in a democratic society. Interestingly, most African regional courts and human rights bodies have shown a proclivity to follow suit.

However, libel laws that criminalise 'false news' or information on social media present some conceptual and legal difficulties. For instance, can 'false news' be acceptably defined? Are digital intermediaries liable for the publication of defamatory user-generated content? What constitutes 'publication' online? Would the criminalisation of false news on social media be a permissible limitation of free speech? The emergent international and African regional norms on online content regulation therefore requires elaboration. Using free speech theories, analysis of evolving international standards, commentaries of human rights mechanisms, and scholarly works, this paper explicates how the African Commission could expand its 'traditional' free speech jurisprudence to adjudicate

(offensive communication); Egypt – Supreme Media Regulatory Council's Directive of March 2019 allows it to block websites and accounts for 'fake news' and impose fines up to \$14,400 without prior court order; DRC (Telecoms Law); Ethiopia – Computer Crime Proclamation 2016; Botswana – Cybercrime and Related Crimes Act, sec 16 (on defamation); Mauritius – Information and Communication Technologies Act 2001, sec 46.

- 13 See, for instance, Zimbabwe's Criminal Law (Codification and Reform) Act of 2004; section 132 of the Kenyan Penal Code declared a vague and unconstitutional limitation of free speech by the Kenyan High Court, see *Robert Alai v The Hon Attorney General & Another* [2017] eKLR <http://kenyalaw.org/caselaw/cases/view/135467/> para 56 (accessed 15 October 2020).
- 14 YE Ayalew 'The Internet shutdown muzzle(s) freedom of expression in Ethiopia: competing narratives' (2019) *Information & Communications Technology Law* 1 at 2.
- 15 K Jones 'Online disinformation and political discourse: applying a human rights framework' (2019) 1 at 19 (footnotes omitted).
- 16 Technological University Singapore 'Online disinformation and the African firm' (2020) 17 *African Current Issues* 1 at 3.

the permissibility of social media-related criminal libel laws. Consequently, aside this introduction, part two of this paper draws from free speech theories as conceptual framework. Part three analyses emerging ‘false news’ ‘cyberlaws’ from Nigeria’s Protection from Internet Falsehood and Manipulations Bill 2019 (PIFM Bill 2019) to Ethiopia’s Computer Crime Proclamation 2016 (CCP 2016) as problematic to free speech. Part four attempts a synthesis of evolving international standards on ‘false news’ restrictions to free speech on social media and related traditional jurisprudence and soft laws of the African Commission as curative solutions to challenges encountered in part three. Part five concludes that the African Commission can effectively tackle false news in the digital era through a creative and purposeful interpretation of the African Charter’s article 9.

2 FREE SPEECH, ‘FALSE NEWS’ AND SOCIAL MEDIA: A CONCEPTUAL FRAMEWORK

This part draws from free speech theories developed by scholars and judicial authorities as a framework to conceptualise the connection between free speech, ‘false news’ and social media as part of the dynamics of a democratic society. It appraises the justifications for free speech, the limitations thereto, particularly the political speech versus ‘fake’ speech conundrum, and then critiques criminal defamation from offline and online perspectives including the peculiar challenges of regulating online free speech in Africa.

2.1 Dynamics of free speech justifications in a digital age

Wide-ranging philosophical and empirical inquiries have been conducted on the constitutional value of free speech in a democratic society.¹⁷ As Barendt argues in his seminal work, *Freedom of speech*,¹⁸ free speech merits special protection on four basic rationales: truth-seeking; self-governance; the functioning of democracy; and its checking value.¹⁹ Other authors generally agree, subtract from or make some additions to these rationales,²⁰ which are overlapping and cross-

17 E Barendt *Freedom of speech* (2007) 1 18-21; V Zeno-Zencovich *Freedom of expression: a critical and comparative analysis* (2008).

18 Barendt (n 17).

19 Barendt (n 17) 9-23.

20 V Blasi ‘Holmes and the marketplace of ideas’ (2004) 2004 *The Supreme Court Review* 1 (substitutes ‘functioning of democracy’ with ‘the promotion of good character’).

cutting.²¹ Overall, leading scholars agree on the values of free speech in a democracy.²²

First, the truth-seeking rationale, derived from JS Mill,²³ but popularised by Holmes,²⁴ is essentially that, save for threat of harm, countering speech in an atmosphere of open discussions will engender truth, better deliberation or political legitimacy²⁵ or that 'it is only by the free flow of ideas and discussion that error is exposed, truth vindicated and liberty preserved'.²⁶ Consequently, government may not be the arbiter of truth while statutes that criminalise 'false' speech, regardless of harm, face the presumption of unconstitutionality.²⁷ A similar view was expressed in *Obbo and Another v Attorney General*.²⁸ However, the pseudonymous characteristics that facilitate disinformation, 'clickbait' and echo chambers on social media and the use of algorithms for 'crowd-sourcing' have radically altered the conditions for free speech in the digital era. In addition, digital intermediaries exercise governance, surveillance and co-opted private power as 'they can block, censor, or take down content from their end users unilaterally or under pressure from governments'.²⁹

Second, the belief in mature individuals as equal, rational moral agents capable of independent action, choice or thought underlies the argument from self-government. This function of free speech makes for the proper exercise of individual agency and autonomy and hence the full development of the individual through the ability to make meaningful life choices. Currie and De Waal argue that the right to speak irrespective of speech content is a 'constitutive feature of a just political society' in which a government treats 'all its members ... as responsible moral agents'.³⁰ Indeed, the 'prospect for relatively private

- 21 SJ Brison 'The autonomy defense of free speech' (1998) 108 *Ethics* 312 321; RC Post 'Managing deliberation: the quandary of democratic dialogue' (1993) 103 *Ethics* 654 at 666.
- 22 See A Meiklejohn *Free speech and its relation to self-government* (1948) (the public's interests in receiving information needed for informed opinion on public policy is a core norm of First Amendment); CR Sunstein *Democracy and the problem of free speech* (1993); O Fiss 'Free speech and social structure' (1986) 71 *Iowa Law Review* 1405 1420; TI Emerson 'Toward a general theory of the First Amendment' (1963) 72 *Yale Law Journal* 877 at 879-886.
- 23 JS Mill *On liberty* (1859) <http://www.utilitarianism.com/ol/one.html> (accessed 22 May 2020).
- 24 See *Abrams v United States* 250 US 616 (1920) 630 ('[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market'.) (Holmes J).
- 25 TD Jones 'Human rights: freedom of expression and group defamation under British, Canadian, Indian, Nigerian and United States law – a comparative analysis' (1995) 18 *Suffolk Transnational Law Review* 427 at 585.
- 26 *NPP v GBC* (2000) 20 WRN 163 181 (Anua-Sekyi JSC) (Ghana).
- 27 *New York Times Co v Sullivan* 376 US 254 (1964) 280.
- 28 Petition 15 of 1997 [2000] UGCC 4 (21 July 2000) (Constitutional Court, Uganda) (*Obbo* case).
- 29 JM Balkin 'Free speech is a triangle' (2018) 118 *Columbia Law Review* 2011 2044. See also Manila Principles on Intermediary Liability <https://www.manilaprinciples.org/> (accessed 15 October 2020).
- 30 I Currie & J De Waal *Bill of rights handbook* (2013) 339.

and anonymous communication', which social media creates, has been considered a hallmark of democratic expression and deliberation.³¹ Social media platforms now mediate democratic participation. For instance, Facebook's 'Statement of Rights and Responsibilities' provides that its users cannot post content that amounts to 'hate speech, threatening, or pornographic; incites violence' or 'do anything unlawful, misleading, malicious, or discriminatory'.³² These rules sound innocuous but Facebook uses its discretion to remove content which in its opinion violates its policy.

Third, the functioning of democracy argument posits that free speech sustains uninhibited public discourse, which is required for the formation of public opinion. The opportunity to peacefully ventilate public grievances against the state and hold authorities accountable thus constitutes a mechanism for orderly change in society without resort to violence. This rationale is demonstrated in the judgments from two African courts, which quoted extensively from European Court of Human Rights (European Court), as follows:³³

Because the freedom of expression is one of the fundamental pillars of any democracy, by allowing the public to share information and to engage in public discourse helps to expose misdemeanors and malpractices by public officials. By virtue of the fact that there is an inherent value to the individual and society as a whole when there is diversity of ideas and opinions, freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society..."

The United States (US) Supreme Court uphold similar views on the First Amendment to the US Constitution,³⁴ which embodies a

commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open', which 'may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials'.³⁵

The implication then is that 'erroneous statements' are 'inevitable in free debate' and must be protected so as to allow freedom of speech and of the press to have the 'breathing space' they need to survive.³⁶ This does however not allow *carte blanche* posting of disinformation or propaganda on social media.

31 JM Balkin 'The future of free expression in a digital age' (2009) 36 *Pepperdine Law Review* 427-444.

32 https://web.facebook.com/legal/terms/previous?_rdc=1&_rdr (accessed 16 October 2020); for Twitter, see 'The Twitter Rules' Twitter <http://support.twitter.com/groups/33-report-a-violation/topics/121-guidelines-best-practices/articles/18311-the-twitter-rules> (accessed 15 October 2020).

33 *Peta v Minister of Law, Constitutional Affairs and Human Rights* (CC 11/2016) [2018] LSHC 3 (18 May 2018) <https://lesotholii.org/ls/judgment/high-court-constitutional-division/2018/3-0> para 8 (accessed 15 October 2020) (*Peta* case); *Mokone v Attorney General* 2018 All Bots 186 (CA).

34 Providing that 'Congress shall make no law ... abridging the freedom of speech'.

35 *New York Times v Sullivan* (n 27) (Brennan J).

36 *Hustler Magazine and Larry C Flynt v Falwell* 485 US 46 (1988) 51 52 (Rehnquist CJ).

Lastly, free speech informs public opinion and empowers the public to rein in and check the excesses of government.³⁷ This rationale underlines the link between free speech and political accountability, because citizens' engagement with information exchange and participation in public debate helps to expose misdeeds and misconduct by public officials. Nowadays, the mobile Internet, social media and digitisation of news sources have redefined news by enabling citizen journalism with attendant online dissemination of falsehood, rumours, and hateful speech which obfuscate public debate.

However, freedom of expression is neither absolute nor open to prior censorship but may be restricted as appropriate. Hence, democracies do balance the exercise of free speech against other societal interests.³⁸ In the United States, some forms of harmful speech are protected.³⁹ Concerning criminalisation of 'false' speech, the US Supreme Court has said repeatedly:⁴⁰

The First Amendment recognizes no such thing as a 'false idea', but 'they are nevertheless inevitable in free debate and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted 'chilling' effect on speech relating to public figures that does have constitutional value.

According to American 'special protection' exponents then, speech, even when 'offensive or morally repugnant', is immune from government restrictions.⁴¹ While social media has opened new avenues for the evolution of democratic culture it affords new vista for the regulation of harmful content.⁴² Accordingly, the criminalisation of 'false' speech or 'fake news' on social media calls for interrogation considering the importance of public discourse. Generally, public discourse, 'speech on matters of public concern' or expressions in democratic self-governance 'settings' such as social media, receives a high level of protection.⁴³ The European Court confirms the foregoing in a long line of cases that it is incumbent on the mass media 'to impart information and ideas concerning matters ... of public interest. ...

37 Application 4/2013, *Lohé Issa Konaté v Burkina Faso* (5 December 2014) (holding that 'criticism of public officials enjoys protection under the right to freedom of expression'); *Peta* (n 33 above); Petition 397 of 2016, *Okuta and Another v Attorney General and Others* EkLR (6 February 2017) (Kenyan High Court).

38 RE Howard-Hassmann 'Canadians discuss freedom of speech: individual rights versus group protection' (2000) 7 *International Journal on Minority and Group Rights* 109 at 110-113.

39 RC Post 'Participatory democracy and free speech' (2011) 97 *Vanderbilt Law Review* 477 at 478; Brison (n 21).

40 *Hustler Magazine and Larry C Flynt v Falwell* (n 36 above); *Schenck v United States* 249 US 47 (1919) 52 (But the State may proscribe speech which present a 'clear and present danger that they will bring about the substantive evils that Congress has a right to prevent'.) (Holmes J).

41 F Schauer *Free speech: a philosophical enquiry* (1984) 7-8; K Greenawalt 'Free speech justifications' (1989) 89 *Columbia Law Review* 119 at 120.

42 J Thomas 'Free speech in the digital age' in Australian Human Rights Commission *Free speech symposium papers* (2014) 25; JM Balkin 'Digital speech and democratic culture: a theory of freedom of expression for the information society' (2004) 79 *New York University Law Review* 1.

43 RC Post 'Recuperating First Amendment doctrine' (1995) 47 *Stanford Law Review* 1249 at 1276.

[which] the public also has a right to receive ...'.⁴⁴ This also affords one of the best means of forming opinion on the attitudes of political leaders.⁴⁵ Accordingly, scholars and human rights mechanisms have confirmed the utility of Internet-based communication.⁴⁶ Moreover, free speech is not about factual information alone; it covers sarcasm, satire, exaggeration and similar genres which media freedom accords a wide margin,⁴⁷ and it protects opinions, commentaries and value judgments the truth of which is not demonstrable.⁴⁸ From the foregoing perspective, it is crucial to analyse the 'fake news' contextualisation in Africa, the legal responses thereto and how these impinge on free speech protection.

2.2 Criminalising online 'false news': African context and international perspectives

'Fake news' as a term of art in the field of 'political manipulation' only gained global prominence in 2017.⁴⁹ In a widely-influential article, Allcott and Gentzkow define 'fake news' broadly as 'news articles that are intentionally and verifiably false, and could mislead readers'.⁵⁰ Also, 'fake news' or its various synonyms (post-truth, alternative news, etc) is just one aspect of a growing ecosystem of information disorder which consists of propaganda, disinformation (false information shared intentionally to harm), misinformation (false information shared without harm), malinformation (true information shared to cause harm).⁵¹ Western narratives have however been remarkably predominant, particularly after the 2016 US presidential elections. False news reporting is a widespread problem across Africa, and predates the advent of digital technologies; historically, it has manifested itself through state propaganda and information

44 See eg, *Sunday Times v United Kingdom* (1979) 2 EHRR 245 [65]; *Ligens v Austria* (1986) 6 EHRR 407 para 38.

45 *Sunday Times* case (n 44).

46 Tompros (n 6) 94-95; J Rowbottom 'To rant, vent and converse: protecting low level digital speech' (2012) 71 *Cambridge Law Journal* 355 383; General Comment 34, Article 19: Freedoms of Opinion and Expression (CCPR/C/GC/34) 12 September 2011 para 15.

47 *Nlkowitz and Verlagsgruppe News GmbH v Austria* European Court Application 5266/03 paras 25-26.

48 See MA Einhorn 'Miss Scarlett's license done gone!: parody, satire, and markets' (2002) 20 *Cardozo Arts & Entertainment Law Journal* 589 603.

49 AP News "'Fake news' is Collins Dictionary's word of the year 2017" <https://apnews.com/article/47466c5e260149b1a23641b9e319fda6> (accessed 12 July 2020).

50 H Allcott & M Gentzkow 'Social media and fake news in the 2016 election' (2017) 31 *Journal of Economic Perspectives* 211 at 236.

51 C Wardle & H Derakhshan 'Information disorder: toward an interdisciplinary framework for research and policy making' Council of Europe Report (2017) 1 20.

manipulation by ruling elites.⁵² Theoretically grounded empirical research suggests a complexity of reasons why 'fake news' and 'cyber-propaganda' cannot be divorced from Africa's peculiar socio-political and economic conditions. First, in 'closed' African societies, individuals and communities lacking 'the requisite access to verifiable information' or skills, ability and means of accessing news sources resort to rumours and half-truths.⁵³ Even where there is relatively good access to digital news sources, limited digital literacy, sheer ignorance and lackadaisical attitude to verification of information allow for the sharing of false and unverifiable information. Second, the digitisation of news sources encouraged the commercialisation of news and gave rise to the mushrooming of online news organisations which circulate sensational news to gain attention. Third, 'fake news' has been weaponised in African elections particularly through Facebook, Twitter, WhatsApp, etc., by cyber-troops of politicians and easily feeds into political partisanship underscored by ethnic and sectional rivalries.⁵⁴ Fourth, state monopolies over information services which enables divergent levels of censorship coupled with resource constraints by journalists drive fake news across Africa.⁵⁵

'Fake news' is 'fabricated' information published as factual news ostensibly to harm.⁵⁶ However, this understanding is problematic since 'false news' also covers a broad spectrum of false but non-injurious hoaxes, lies, fiction, satire, and parody.⁵⁷ Combating disinformation can also be daunting; it often spreads uncontrollably and is easily exploited for ideological gains.⁵⁸ Hence, African governments reflexively resort to ill-conceived legal mechanisms like criminal defamation and Internet clampdown, purportedly to prevent breaches of the peace or public order or preserve state security,⁵⁹ albeit contrary to international treaties which guarantee free speech.⁶⁰

52 B Mutsvairo & S Bebawi 'Journalism educators, regulatory realities, and pedagogical predicaments of the "fake news" era: a comparative perspective on the Middle East and Africa' (2019) 74 *Journalism & Mass Communication Educator* 143 at 148.

53 A Mare, HM Mabweazara & D Moyo "'Fake news" and cyber-propaganda in Sub-Saharan Africa: recentring the research agenda' (2019) 40 *African Journalism Studies* 1 1-12.

54 A Mare & T Matsilele 'Hybrid media system and the July 2018 elections in "post-Mugabe" Zimbabwe' in MN Ndlela & W Mano *Social Media and Elections in Africa* Volume 1 (2020) 147-176.

55 Mare, Mabweazara & Moyo (n 53).

56 DO Klein & JR Wueller 'Fake news: a legal perspective' (2017) 20 *Journal of Internet Law* 1 at 6.

57 See Allcott & Gentzkow (n 50) 214.

58 C Nwaodike 'False information and free speech' *Atlas Corps* <https://atlas Corps.org/false-information-and-free-speech/> (accessed 11 October 2020).

59 H Matfess 'More African countries are blocking internet access during elections' *Ouartz Africa* 1 June 2016 <https://qz.com/africa/696552/more-african-countries-are-blocking-internet-access-during-elections/> (accessed 16 October 2020).

60 Nwaodike (n 58).

Criminal libel law, abolished in England in 2009, and under article 36 of the related French Law on Freedom of the Press 1881, has been rightly described as ‘arcane’ and a vestige of European colonialism,⁶¹ hence unjustifiable in a democratic setting.⁶² In classical terms, ‘defamation’ is the ‘publication’ of a statement that tends to lower a person’s reputation in the opinion of right-thinking members of the community or to make them shun or avoid him.⁶³ ‘Publication’ means bringing the defamatory matter to the notice of a third person other than the plaintiff.⁶⁴ So, aside the author and publisher, printers, distributors and sellers of offline publications are not liable for defamation if unaware of a publication’s libellous content. Under the common law, ‘libel’ is defamation involving written or printed statements while ‘slander’ involves oral statements⁶⁵ but ‘substantially true’ statements if published for public benefit, and those made in privileged circumstances, are not actionable. Historically, state prosecution was considered vital to prevent anarchy should citizens resort to self-help to avenge themselves of reputational damage.⁶⁶ As several African courts found: criminal defamation inhibits critical speech through fear of threatened or actual prosecution, conviction, prison sentence and fines; it occasions self-censorship for fear of these penalties;⁶⁷ and chills free speech.⁶⁸ The civil remedies of damages, injunction, retraction and apology should therefore prove adequate to assuage reputational injury.⁶⁹ Defamation on social media can occur through users’ posts, tweets, uploads, comments, etc.,⁷⁰ but what constitutes ‘publication’ online requires some refinements considering the dilemma it poses concerning criminal responsibility.⁷¹ Some jurisdictions have developed ‘a single publication rule’, which ‘provides that a cause of action accrues when material is first published not when it is read or subsequently accessed online, sold, or a copy otherwise provided to a reader’.⁷² Generally, digital intermediaries are recognised

61 L Eko ‘Globalization and the diffusion of media policy in Africa: the case of defamation of public officials’ (2016-2017) 22 *Africa Policy Journal* 1 17 19.

62 *Peta* (n 33) paras 14-24.

63 *Black Law’s Dictionary* (1990).

64 J Burchell & J Milton Burchell *JM Principles of criminal law* (2005) 774.

65 *American Restatement (Second) of Torts* (1977) para 568.

66 D Pember & C Calvert *Mass media law* (2005).

67 ‘The case against criminal defamation’ *Mail & Guardian Online* 23 September 2015 <https://mg.co.za/article/2015-09-23-the-case-against-criminal-defamation/> (accessed 17 July 2020); PEN International Report ‘Stifling dissent, impeding accountability: criminal defamation laws in Africa’ 47 www.peninternational.org (accessed 12 July 2020).

68 *Okuta* (n 37); *Peta* (n 33).

69 As above.

70 See J Elkin ‘Cybersmears: dealing with defamation on the Net’ (2000) 9 *Business Law Today* 22.

71 R Spano ‘Intermediary liability for online user comments under the European Convention on Human Rights’ (2017) 17 *Human Rights Law Review* 665.

72 B Jordan ‘The modernization of English libel laws and online publication’ (2011) 14 *Journal of Internet Law* 3 at 6.

as 'mere conduits'⁷³ or non-publishers,⁷⁴ hence they do not bear criminal liability if they perform no editorial role on online content. However, at the international level, there is no gainsaying the fact that, until very recently, human rights law has struggled to mediate the altered conditions and new challenges posed to freedom of expression by misinformation on social media. The UN Human Rights Committee (UNHRC) has observed as follows:⁷⁵

The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.

The UN Special Rapporteur on Freedom of Expression has also stated that criminal sanctions for offline defamation are unnecessary and disproportionate.⁷⁶ The UN Human Rights Council has expressed concerns about online misinformation and propaganda and has consistently affirmed that 'the same rights that people have offline must also be protected online'.⁷⁷ The Human Rights Committee has also stated: 'Regulatory systems should take into account the differences between the print and broadcast sectors ... while also noting the manner in which various media converge'.⁷⁸

Nonetheless, digital platforms do have extensive control over user-generated content based on the algorithms used, hence the need for more transparency in their operations. Consequently, several pronouncements of various special rapporteurs on freedom of expression address the issues surrounding intermediary liability for 'fake news' and propaganda online.⁷⁹ Regarding the Joint Declaration on 'fake news' 2017, Principle 1 thereof reiterates the three-part test of limitation of free speech. Principle 2(a) and (b) affirm that criminal defamation and '[g]eneral prohibitions on the dissemination of information based on vague and ambiguous ideas, including "false news" ... are incompatible with free speech standards and 'should be

73 Directive No 2000/31/EC of the European Parliament and of the Council of 8 June 2000 (EU e-commerce directive 2000); Manila Principles on Intermediary Liability 2014 <https://www.manilaprinciples.org/> (assessed 27 July 2020); Act to Improve Enforcement of the Law in Social Networks 2017 (Network Enforcement Act or *NetzDG*) (company obligation to remove 'illegal' content without prior judicial review).

74 See Joint Declaration 2011, para 2(a); Spano (n 71).

75 General Comment 34 para 13.

76 Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression A/HRC/17/27/Add.1 (16 May 2011); Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression A/66/290 (10 August 2011) para 28.

77 UN Human Rights Council Resolutions (2012-2018), The promotion, protection and enjoyment of human rights on the Internet, UN Doc A/HRC/RES/38/7 (5 July 2018), A/HRC/RES/32/13 (1 July 2016), A/HRC/RES/26/13 (26 June 2014), A/HRC/RES/20/8 (5 July 2012).

78 General Comment 34 para 39.

79 See eg, Joint Declaration on media independence and diversity in the digital Age 2018 para 7; Joint declaration on 'freedom of expression and 'fake news', disinformation and propaganda' in March 2017 FOM.GAL/3/17 3 March 2017 (Joint declaration on 'fake news') paras 5-6; Joint declaration on the right to freedom of expression and universality 2014, para 2(c).

abolished'. Under Principle 1, intermediaries must follow due process before engaging in content deletion or moderation while liability for inappropriate online content is determined by editorial functions and non-compliance with a duly made content removal order. ARTICLE 19 and other international non-governmental organisations (NGOs) have also denounced criminal defamation and concur that content regulation must respect free speech principles.⁸⁰ Despite this rising international condemnation of the use of criminal defamation to suppress freedom of expression,⁸¹ Nyane observes that it is still retained in the statute books of many African countries.⁸² In this regard, some jurists argue that there can be no justification for the publication of untruths, hence, members of the press should not be left with the impression that they have a licence to do so. More so, the press occupies a powerful position and large sections of the community tend to accept what they read in the newspapers as true.⁸³ Nevertheless, some courts in Africa have developed transformative jurisprudence in line with national constitutions and the African Charter to declare criminal defamation and false news publishing as unjustifiable free speech limitations.⁸⁴

2.3 Criminal defamation in Africa: emerging national jurisprudence

In *Madanhire and Another v Attorney General*,⁸⁵ decided by the Zimbabwean Constitutional Court, a newspaper editor and reporter were alleged to have knowingly published false statements with

- 80 See Written comments of Open Society Justice Initiative and Article 19 (December 2008) paras 22 and 39 in *Kasabova v Bulgaria* App no 22385/03 (European Court 19 April 2011); ARTICLE 19, 'Regulating social media: we need a new model that protects free expression' <https://www.article19.org/resources/regulating-social-media-need-new-model-protects-free-expression/> (accessed 12 July 2020) (arguing that an independent Social Media Council offers the best regulatory approach); *Da Cunha v Yahoo de Argentina* SRL, March 2014 paras 48 & 68 (SC, Argentina) (Amicus curiae submission of the Open Society Justice Initiative).
- 81 JM Pasqualucci 'Criminal defamation and the evolution of the doctrine of freedom of expression in international law: comparative jurisprudence of the InterAmerican Court of Human Rights' (2006) 39 *Vanderbilt Journal of Transnational Law* 379 394; Declaration of Principles on Freedom of Expression, Inter-Am. Comm. Human Rights. Res., 108th Sess., Principle 11 (2000) <http://www.cidh.oas.org/Relatoria/showarticle.asp?artID=26&1ID=1> (accessed 12 July 2020).
- 82 H 'Nyane 'Abolition of criminal defamation and retention of scandalum magnatum in Lesotho' (2019) 19 *African Human Rights Law Journal* 743-62. See also O Anku-Tsede 'The media and the offence of criminal libel in Ghana' (2013) 9 *Journal of Law, Policy and Globalisation* 26 (criminal defamation statutory abolished).
- 83 *Mokone* (n 33) para 55.
- 84 A Meerkotter 'Judicial independence is critical to protecting press freedom in Africa' *SALC* 29 May 2018 <https://southernafricalitigationcentre.org> (accessed 15 October 2020).
- 85 Judgment No CCZ 2/14 (12 June 2014), and the follow-up case of CCZ/07/15 *Misa Zimbabwe-and others v Minister of Justice and others* (6 February 2016).

intention to defame under section 96 of Zimbabwe's Criminal Code. The Court found as follows:⁸⁶

The fact that investigative journalism may on occasion involve the publication of erroneous or inaccurate information does not detract from the reciprocal rights to receive and impart information and ideas without interference.

Following *Madanhire*, the Lesotho Constitutional Court in *Peta v Minister of Law, Constitutional Affairs and Human Rights*⁸⁷ dealt with the vagueness of section 104 of the Lesotho Penal Code on which hinged prosecution for criminal defamation for a satirical article posted on social media concerning the Lesotho Defence Force's former Commander. While stating that '[p]ublic figures ... should display a high degree of tolerance to criticism', the Court confirmed satire to be a protected form of expression:

[Criminalising satire] seems to be premised on the idea that deliberate lies, exaggeration and distortion of reality cannot serve any usefulness connected to the purposes of freedom of expression. Because satire by its nature distorts and exaggerates reality Satirical expression, notwithstanding the fact that it distorts and exaggerates reality, assists individuals in attaining self-fulfilment and fostering political participation.

The Court held that the defence of truth and publication for 'public benefit' available in a defamation charge was vague, liable to abuse by political powers to silence legitimate criticism 'and chilling of truth-searching and the concomitant undermining of the purposes of guaranteeing freedom of expression'.

Madanhire was similarly followed by the Kenya High Court in *Okuta & Another v Attorney General & 2 Others*,⁸⁸ where a charge of criminal defamation based on a Facebook comment under section 194 of the Kenyan Penal Code was held to be a proportionate punishment to restrict freedom of expression in a democratic society. Similar results were achieved in *Chipenzi and Others v The People*.⁸⁹ In *Obbo and Another v Attorney General*,⁹⁰ which dealt with publishing false information 'likely to cause fear and alarm to the public' under section 50(1) of the Ugandan Penal Code, the Ugandan Constitutional Court stated:

Exaggeration – even clear falsification – may arguably serve a useful social purpose linked to values underlying freedom of expression. ... All of this expression arguably has intrinsic value in fostering political participation and individual self-fulfilment.

However, in *GPU and Others v Attorney General*,⁹¹ the Gambia's Supreme Court refused to follow the ECOWAS Court decision in *Federation of African Journalists & Others v The Republic of the Gambia* (2019) (describing the legislative definitions of 'false news' and criminal defamation in sections 59 & 181A(1) of the Gambia Criminal Code as 'expressions of inexactitude' and 'so broad as to be capable of

86 Judgment No CCZ 2/14, 11.

87 *Peta* case (n 33).

88 Petition 397 of 2016 (n 37).

89 HPR/03/2014 [2014] ZMHC 112 (3 December 2014) (setting aside Zambian Penal Code, sec 67).

90 *Obbo* case (n 28).

91 Suit 1/2014 (9 May 2018).

diverse subjective interpretations'.⁹² In a recent judgment, *The Incorporated Trustees of Laws and Rights Awareness Initiative v Nigeria*,⁹³ the ECOWAS Community Court held that section 24 of the Nigerian Cybercrime Act 2015 contains vague concepts that allow for arbitrary interpretation in violation of the right to freedom of expression protected under article 9 of the African Charter.⁹⁴

Considering the foregoing, criminal defamation provisions in emergent 'cyberlaws' in Africa constitute a 'step backward in the evolution of human rights in Africa'⁹⁵ as they are often vague and overbroad. Case studies from Ethiopia and Nigeria, two troubling African legal landscapes, justify the foregoing assertion.

3 EMERGING AFRICAN CYBERLAWS, AND 'FALSE NEWS' CRIMINALISATION: AN ANALYSIS

Viral misinformation is becoming ever more sophisticated, hence, governments are increasingly turning to legislation without necessary safeguards.⁹⁶ False news statutes evince a tension 'between a government's desire to control access to public information and the media's right to inform citizens of matters vital to the public interest'.⁹⁷ Consequently, this part, using Nigeria and Ethiopia's cybercrime laws as case studies, highlight problems associated with the criminalisation of 'fake news' on social media under emergent African cybercrimes laws.

92 See Criminal Code of The Gambia's, The Federal High Court, Lagos, in Suit No FHC/L/CS/937/2017 *Solomon Okedara v Attorney-General of the Federation* (7 December 2017) also refused to declare that the Nigerian Cybercrimes Act 2015, s 24 infringed freedom of expression. Cf. *Geoffrey Andare v Attorney-General*, where identical provision, section 29 of Kenya's Information and Communications Act 2018, was set aside by Kenya High Court.

93 ECW/CCJ/APP/53/18, 10 July 2020.

94 See Ecowas Community Court of Justice Blog 'Nigerian government ordered to repeal or amend its law on cybercrime' prod.courtcecowas.org/2020/07/10/nigerian-government-ordered-to-repeal-or-amend-its-law-on-cybercrime/ (accessed 17 July 2020). See also Reference No 7 of 2013 East African Court of Justice: *Burundi Journalists Union v Attorney General of Burundi* (2015) paras 82-88.

95 Application 4/2013, *Konaté* (n 37) (Elsie Thompson, Sophia Akuffo, Bernard Ngoepe, and Duncan Tambala JJ, separate minority opinion) paras 4-5.

96 *The Guardian* 'Global crackdown on fake news raises censorship concerns' <https://www.theguardian.com/media/2018/apr/24/global-crackdown-on-fake-news-raises-censorship-concerns> (accessed 17 July 2020).

97 A Mason 'Violence, criminal defamation, and censorship laws: threatening freedom of expression in Chile and Ecuador' (2012) 18 *Law & Business Review of the Americas* 369 at 369.

3.1 Nigeria's PIFM Bill 2019

Nigerian law favours state regulation of online free speech,⁹⁸ hence a potpourri of colonial style Criminal and Penal Codes first enacted respectively in 1902 and 1960⁹⁹ and new cybercrimes laws police online activities. Section 373 of the Criminal Code Act,¹⁰⁰ which defines a 'defamatory matter' as a 'published' matter (expression) injurious to the reputation of any person whether 'living or dead', can arguably be used to criminalise social media content. Additionally, section 24(1)(b) of the Cybercrime (Prevention) Act 2015, which criminalises the intentional sending of false, intimidating or hateful messages via computer networks, is already being used to arrest journalists who criticise officials on social media.¹⁰¹ Against this background, the PIFM Bill 2019, which aims to suppress Internet falsehoods on social media platforms, was introduced in the National Assembly on 5 November 2019. This six-part 36-section Bill, dubbed the 'anti-social Media Bill' by media organisations, but its sponsor, Senator Mohammad Musa, says it is intended to 'mitigate the propaganda or 'fake news' that travels at the 'speed of light.'¹⁰² Part 2 thereof creates the offences of Internet and malicious falsehood and re-enacts common law requirements therefor. It criminalises the transmission of 'false statements of fact', making or altering bots or providing services for such transmission within or outside Nigeria 'knowingly' and 'likely to' have caused financial loss or personal injury to a person.¹⁰³ Individual offenders face up to N300 000.00K (\$787 USD) fine or two years' jail term or both while corporate offenders face fines up to N10 million fine (\$26 323 USD). This applies to the use of an 'inauthentic account' or bot and to statements even when 'untrue and not defamatory'.¹⁰⁴ False statements likely to influence an election or referendum are also criminalised.¹⁰⁵ By a circular definition, a statement is false 'if it is false or misleading, whether wholly or in part, and whether on its own or in the context in which it appears'.¹⁰⁶ Other objectionable portions of the

98 T Ilori 'A socio-legal analysis of Nigeria's protection from internet falsehoods, manipulations and other related matters bill' *AfricLaw* 5 December 2019 <https://africlaw.com/2019/12/05/asocio-legal-analysis-of-nigerias-protection-from-internet-falsehoods-manipulations-and-other-related-matters-bill/> (accessed 24 July 2020).

99 'Nigeria: why Nigeria needs to review its criminal, penal codes' <https://allafrica.com/stories/201911200525.html> *allAfrica* 20 November 2019 (accessed 16 October 2020).

100 Cap. C38 Laws of the Federation of Nigeria (LFN) 2004.

101 J Rozen 'An attempt to gag the media': Journalists on Nigeria's proposed social media bill *Committee to Protect Journalists* 1 April 2020 <https://cpj.org/2020/04/an-attempt-to-gag-the-media-journalists-on-nigeria/> (22 July 2020).

102 T Fadare 'Why I sponsored bill to stop the spread of fake news – Sen. Musa' Order Paper 6 November 2019 <https://www.orderpaper.ng/why-i-sponsored-bill-to-stop-spread-of-fake-news-sen-musa/> (accessed 25 July 2020).

103 PIFM Bill 2019, secs 3(1)(3) & (4), 4(1)(2) & (3)(f), 5(1)(2) & (3)(f) and 6B(4).

104 PIFM Bill 2019, sec 6B(1)(i).

105 PIFM Bill 2019, sec 3(1)(b).

106 PIFM Bill 2019, sec 35(2)(b).

Bill include: hefty fines and/or imprisonment against tech companies for non-compliance with orders to disable access to online content;¹⁰⁷ powers of law enforcement agencies to regulate tech intermediaries;¹⁰⁸ and the online transmission of false statements – to order Internet intermediaries to disclose the source or retract or correct false information,¹⁰⁹ and designate online platform/accounts as ‘fake’;¹¹⁰ the extraterritorial application of the law,¹¹¹ etc., all which are likely to put pressure on media platforms to police content. The Bill’s vague definition of ‘false statement’ and the provisions of sections 3-6B pose risks of prior restraint and self-censorship concerning the exercise of online speech. Interestingly, media organisations have termed it ‘plagiarised’ because ‘Musa only changed some terms from that of Singapore [Protection from Online Falsehoods And Manipulation Act (POFMA) 2019] to give his bill a feel of originality’ considering several striking resemblances between the Bill and the Act.¹¹² Moreover, section 39 of the amended Constitution of the Federal Republic of Nigeria 1999 (CFRN 1999)¹¹³ guarantees freedom of expression and press freedom. Nigeria also ratified the International Covenant on Civil and Political Rights (ICCPR) and domesticated the African Charter.¹¹⁴ Consequently, content regulation based on the Bill must satisfy the three-part test under international standards.

3.2 Ethiopia’s CCP 2016

Similar to Nigeria, the Constitution of the Federal Democratic Republic of Ethiopia 1995¹¹⁵ provides for freedom of expression and the press and access to information, and though it prohibits censorship, the right is not absolute as provided for under article 29(6).¹¹⁶ The Freedom of the Mass Media and Access to Information Proclamation No 590/2008 also affirms such constitutional safeguards. Nevertheless, the latter has provisions problematic to free expression such as complex registration processes for media outlets and high fines for defamation. The Criminal Code Proclamation No 414/2004 also penalises defamation with a fine

107 PIFM Bill 2019, sec 32.

108 PIFM Bill 2019, secs 17 (Targeted Correction Regulation – e.g. to publish online location of false statement), 18 (Disabling Regulation – to disable users’ access to false content) & 19 (General Correction Regulation).

109 PIFM Bill 2019, secs 7 & 8.

110 PIFM Bill 2019, sec 27.

111 PIFM Bill 2019, sec 9.

112 *TheCable* ‘From title to content, Nigeria’s “social media bill” is a “replica” of Singapore’s act’ <https://www.thecable.ng/fact-check-is-nigerias-social-media-bill-truly-a-replica-of-singapores-act> (accessed 22 July 2020).

113 (Promulgation) Act 24 of 1999 Cap C23 Vol 3 LFN 2004.

114 1966, 999 UNTS 171 (entered into force 23 March 1976); African Charter on Human and Peoples’ Rights (Enforcement and Ratification) Act of 1999, Cap A9 LFN 2004.

115 Federal Negarit Gazette, Addis Ababa, 21 August 1995, art 29.

116 DY Messele ‘Rethinking Ethiopia’s Computer Crime Proclamation’ *International Youth Journal* <https://youth-journal.org/rethinking-ethiopiarsquos-computer-crime-proclamation-scr> (accessed 24 July 2020).

or up to one-year imprisonment. As regards government disruption to the Internet in Africa 'Ethiopia isn't an anomaly'.¹¹⁷ Censorship is rife, particularly since the aftermath of violence attendant upon the controversial May 2005 general elections.¹¹⁸ Moreover, government often blames Facebook and Twitter for fake news used to incite 'ethically tinged violence leading to deaths and displacements'.¹¹⁹ Consequently, Ethiopia's new Hate Speech and Disinformation Prevention and Suppression Proclamation 2020¹²⁰ targets 'false and misleading information'.¹²¹ Under article 8, government reserves the right to order providers to remove disinformation on social media accounts with more than 5,000 followers within 24 hours of notification or face harsh penalties. The CCP 2016 also reinforces this hostile regulatory ambience; it extends the reach of criminal defamation and gives government regulatory powers that will impact heavily on the right to online free speech in Ethiopia.¹²² The Proclamation consists of six parts and 46 articles towards the control and prosecution of computer crimes including online criminal defamation. Article 13 punishes defamatory speech as 'illegal content' disseminated through a computer system with 3 years' jail term or Birr 30,000 fine or both.¹²³ Relatedly, it legalises content policing – a Service Provider shall be criminally liable for illegal content disseminated through its computer systems by third parties by being directly involved in its dissemination and failure to remove or disable access after actual knowledge or administrative notice.¹²⁴ Furthermore, it permits the concurrent application of any special law or criminal code.¹²⁵

117 AL Dahir 'Ethiopia's tech startups are ready to run the world, but the internet keeps getting blocked' (*Quartz Africa* 18 June 2019) <https://qz.com/africa/1646789/ethiopia-tech-startups-hurt-by-social-media-block-internet-shutdown/> (accessed 23 July 2020).

118 CIPESA 'State of internet freedom in Africa 2019: mapping trends in government internet controls, 1999-2019' (2019) 22.

119 S Ebatamehi 'Ethiopian council of ministers approve computer crime proclamation bill' *The African Exponent* 11 November 2019 <https://www.africanexponent.com/post/4474-ethiopia-approves-bill-against-fake-news-and-hate-speech> (accessed 20 July 2020).

120 Federal Negarit Gazette of The Federal Democratic Republic of Ethiopia No 83 of 7 July 2016, 9104-9131.

121 E Wanyama 'Ethiopia's new hate speech and disinformation law weighs heavily on social media users and internet intermediaries' *CIPESA* 21 July 2020 <https://cipesa.org/2020/07/ethiopias-new-hate-speech-and-disinformation-law-weighs-heavily-on-social-media-users-and-internet-intermediaries/> (accessed 16 October 2020).

122 ARTICLE 19 'Ethiopia: computer crime proclamation' (2016) 12.

123 CCP 2016, art 13(3).

124 CCP 2016, art 16(1)(2)(3).

125 CCP 2016, art 19.

4 'FALSE NEWS' RESTRICTION ON SOCIAL MEDIA: THE AFRICAN COMMISSION'S FREE SPEECH JURISPRUDENCE AS LITMUS TEST?

This part assesses how the African Commission could expand its traditional jurisprudential analysis of criminal defamation to adjudicate the reasonableness of emergent cyberlaws that criminalise 'false news' on social media Africa-wide. It highlights the free speech principles, explores the scope of available safeguards against criminal defamation in relevant cases, and ultimately synthesises evolving human rights-centred international, comparative and African regulatory standards.

4.1 The African Commission's 'traditional' free speech jurisprudence

Freedom of expression is a fundamental right protected by international and regional human rights instruments,¹²⁶ including article 9 of the African Charter on Human and Peoples' Rights (African Charter),¹²⁷ which provides as follows:

- (1) Every individual shall have the right to receive information.
- (2) Every individual shall have the right to express and disseminate his opinions within the law.

The African Commission¹²⁸ has interpreted the African Charter holistically, contextually,¹²⁹ consonant with its object and purpose¹³⁰ and international human rights standards, and through doctrinal innovations, has developed a free speech jurisprudence including a 'limitation analysis' using comparative international and regional jurisprudence as interpretive aids. The African Commission has connected article 9 with the underlying values of free speech. In *Constitutional Rights Project and Others v Nigeria*,¹³¹ the African

126 Universal Declaration of Human Rights, GA Res 217 (III) UN Doc A/810 (1948) art 19; ICCPR, art 19(2); European Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR) art 10(1); American Convention on Human Rights (opened for signature 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143 (American Convention) art 13.

127 Adopted 27 June 1981, entered into force 21 October 1986; 21 ILM 59 (1981).

128 Established under African Charter, art 30, with a mandate 'to promote human and peoples' rights and ensure their protection in Africa'.

129 *Umuhoza v Rwanda* (merits) (2017) 2 AfCLR 165 paras 143-158.

130 JC Nwobike 'The African Commission on Human and Peoples' Rights and the demystification of second and third generation rights under the African Charter: *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria*' (2005) 1 *African Journal of Legal Studies* 129.

131 (2000) AHRLR 227 (ACHPR 1999).

Commission held that 'freedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and participation in the conduct of the public affairs of his country'.¹³² The African Commission also underscored the importance of media freedom to greater public accountability and the strengthening of democracy since 'it is the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole, that ensures public order'.¹³³ The Commission found that political speech deserves special protection and a higher degree of tolerance especially when directed towards the government or persons acting in public capacity.¹³⁴ Moreover, the importance of freedom of expression as 'a means of ensuring respect for all human rights and freedoms' is also recognised by the Commission.¹³⁵ However, the significance of permissible limits to free speech are also well articulated.

4.2 The African Commission's free speech 'limitation analysis'

The Commission draws inspiration from international human rights law under articles 60 and 61 of the African Charter 'as benchmarks for the application and interpretation of the African Charter'.¹³⁶ The Commission also relies on Resolutions and elaborations on the provisions of article 9 in individual communications¹³⁷ and deploys its Special Rapporteur on Freedom of Expression and Access to Information for on-the-field enforcement and supervisory activities. In this regard, the African Commission is considered more progressive than other international and regional bodies.¹³⁸ When read together with the African Court on Human and Peoples' Rights' landmark *Lohé Issa Konaté v The Republic of Burkina Faso* decision,¹³⁹ the recent

132 para 36; see also *Amnesty International Others v Sudan* (2000) AHRLR 297 (ACHPR 1999) para 46.

133 *Scanlen and Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR 2009), followed in Case Reference 7 of 2013, *Burundian Journalists' Union v Attorney General* (15 May 2015) para 95; *Law Office of Ghazi Suleiman v Sudan (I)* (2003) AHRLR 134 (ACHPR 2003).

134 *Kenneth Good v Botswana* (2010) AHRLR 43 (ACHPR 2010) para 198; *Law Office of Ghazi Suleiman* (n 133); See also *Umuhoza* (n 128) para 141.

135 *Good case* (n 134).

136 *Open Society Justice Initiative (on behalf of Pius Njawe Noumeni) v Cameroon* para 138.

137 S Gumedze 'Bringing communications before the Commission' (2003) 3 *African Human Rights Law Journal* 118 124-125.

138 See T Mendel 'The UN Special Rapporteur on freedom of opinion and expression: progressive development of international standards relating to freedom of expression' in T McGonagle & Y Donders (eds) *The United Nations and freedom of expression and information* (2015) 265.

139 The majority (7 judges) found criminal defamation not necessarily bad in principle, but held custodial sentences, banning of newspapers, disproportionate fines and damages as inappropriate. The separate minority opinion that the crime be abolished is preferable (n 66).

judgment of the Economic Community of West African States' Community Court (ECOWAS Court) on Nigeria¹⁴⁰ and East African Court of Justice's (EACJ) jurisprudence,¹⁴¹ the African criminal defamation analysis constitutes a corpus of law developed against the background of the enduring legacy of colonial penal codes in Africa.¹⁴²

In determining whether criminal defamation is a justifiable interference with freedom of expression secured in article 9, the Commission proceeds with an assessment of whether there has indeed been an 'interference', and if so, whether such fulfils a cumulative three-part test of legality, legitimacy, and necessity and proportionality.¹⁴³ First, the interference (criminal defamation) must not only be provided for in domestic law which conforms with the state's international human rights obligations.¹⁴⁴ Furthermore, the law providing for the restriction must have foreseeable effects, limit discretion and be amenable to judicial review. Hence, states cannot rely on article 9(2) to pass national law or impose prior restraints (like censorship)¹⁴⁵ to override international free speech standards.¹⁴⁶

Second, the criminal defamation restriction (imprisonment, fine, etc) must also serve a legitimate aim (protection of reputation) corresponding to one of the aims in the Charter's article 27(2). Third, the restriction must be necessary in a democratic society, which requires that the right to free speech be proportionate to (balanced against) the legitimate aim pursued¹⁴⁷ (honour and reputation).¹⁴⁸ This is achieved when a direct/rational relation exists between the impugned expression and protected interest; there are sufficient reasons to justify the restriction, no less intrusive solution to achieve the same result exists, and the restriction does not render the right

140 *Federation of African Journalists and Others v Republic of Gambia* (13 February 2018) (criminalised libel and publication of false news are 'inacceptable instances of gross violation of free speech' and emphasising that 'wide or vague speech-restricting provisions forces self-censorship').

141 Case 2 of 2017 *Media Council of Tanzania v. Attorney General* (28 March 2019); Case No 7 of 2016 *Mseto v Attorney General* (21 June 2018); *Burundi Journalists Union* (n 100) paras 82 - 88.

142 A Meerkotter 'Judicial Independence is Critical to Protecting Press Freedom in Africa' (2018) <https://www.southernafricalitigationcentre.org/2018/05/29/judicial-independence-is-critical-to-protecting-press-freedom-in-africa/> (accessed 16 July 2020).

143 *Open Society* (n 136) paras 138-139.

144 See, eg, *Amnesty International* (n 131 above) para 79; *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 188 (ACHPR 1995) para 15.

145 *Open Society* (n 136) para 167-170 (differentiating the standard of acceptable prior restraint in print media from radio broadcasting).

146 *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR) 1998.

147 *Media Rights Agenda* (n 146) para 69; *Zimbabwe Lawyers for Human Rights & Another (on behalf of Meldrum) v Zimbabwe* (2009) AHRLR 235 (ACHPR 2009) paras 176-78 (closure of newspaper held a disproportionate violation of free speech).

148 *Open Society Justice* (n 136) para 137; *Good* (n 133) paras 219 224 ('if the aim sought cannot be identified and justified ... then it means that the means employed was not proportional').

illusory.¹⁴⁹ Consequently, the Commission has not found it difficult to hold that harsh penalties (interferences) imposed through criminal libel such as imprisonment, heavy fines, proscriptions, etc., are disproportionate. Moreover, vague and overly broad restrictions based on illegitimate grounds and disproportionate restrictions that hollow out free speech are impermissible.¹⁵⁰ Hence, the African Commission has pronounced that stakes are higher within the context of public debate and criticisms of public figures in a democratic society.¹⁵¹ Concerning the important role of the media in sustaining public debate, the African Commission has repeatedly stated: '[P]olitical expression demands special attention and legal protection'.¹⁵² In *Media Rights Agenda and Others v Nigeria*,¹⁵³ *TELL*, a weekly magazine of Nigeria reported a story seen as insulting to the then President Abacha entitled: 'The return of tyranny – Abacha bares his fangs'. The Commission drew a distinction between criticism of a public official and private citizen and condemned punitive action for criticisms against government as a violation of article 9(2).¹⁵⁴ In *Scanlen and Holderness*,¹⁵⁵ the Commission attached great importance to the 'public watchdog' role of the press to ensuring the proper functioning of a democracy as counterbalanced by the press' duty to act responsibly. It admitted that occasions will arise when journalists might 'publish or disseminate information, opinion or ideas, which will contravene other persons' reputation or interests', but in such circumstances, 'it is sufficient if journalists have made a reasonable effort to be accurate and have not acted in bad faith'.¹⁵⁶ The foregoing legal exposition accords with efforts to decriminalise defamation by UN treaty bodies,¹⁵⁷ special mechanisms,¹⁵⁸ and regional bodies.¹⁵⁹

149 *Zimbabwe Lawyers* (n 146) para 176.

150 In *Zimbabwe Lawyers* (n 146) (holding section 80(1)(b) of the Access to Information and Protection of Privacy Act (AIPPA) which criminalises the reckless publication of falsehoods to be overbroad).

151 *Konaté* case (n 37) para 155.

152 See *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007); *Media Rights Agenda* (n 146); *Ouko v Kenya* (2000) AHRLR 135 (ACHPR 2000) paras 27-28; *Amnesty International* (n 131) paras 77-80.

153 *Media Rights Agenda* (n 146).

154 *Media Rights Agenda* (n 146) paras 73-75.

155 *Scanlen* case (n 133).

156 *Scanlen* case (n 133) para 120.

157 General Comment 34 para 47.

158 The United Nations Special Rapporteur on Freedom of Opinion and Expression 'Promotion and Protection of the Right to Freedom of Opinion and Expression UN Doc E/CN 4/2001/64 (26 January 2001); Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc E/CN 4/2000/63 (18 January 2000) para 52 (calling on States to repeal criminal defamation laws in favour of the use of civil remedies); Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression (10 December 2002).

159 M Pasqualucci 'Criminal defamation and the evolution of the doctrine of freedom of expression in international law: comparative jurisprudence of the InterAmerican Court of Human Rights' (2006) 39 *Vanderbilt Journal of Transnational Law* 379.

Moreover, the (Revised) FoE Declaration 2019¹⁶⁰ and several resolutions are clear on this issue. A 2010 resolution urged member states to repeal criminal defamation laws.¹⁶¹ Moreover, the FoE Declaration recalls that freedom of expression is an indispensable component of democracy while stating that no one should 'be found liable for true statements, expressions of opinion, or statements which are reasonable to make in the circumstances'.¹⁶² Accordingly, as the FoE Declaration 2019 affirms, states shall require Internet intermediaries to enable equal access to the Internet and shall not interfere with the free flow of information.¹⁶³ Again, '[s]tates shall not require Internet intermediaries to proactively monitor content',¹⁶⁴ but shall require Internet intermediaries to incorporate human rights standards, transparency and effective remedies into content removal processes though such removals shall not be required without due process and safeguards against unjustifiable restrictions on free speech online.¹⁶⁵ This soft-law guidance is crucial to mediate intermediary liability in a state-dominated regulatory environment as demonstrated by the case studies in part 3.

4.3 Adjudicating the reasonableness of social media-related criminal libel laws

The African Internet governance landscape is yet to acquire the sophistication of government-private sector regulation similar to Western nations. The African Commission would, sooner or later, have to adjudicate the problem of content regulation on social media. Its free speech jurisprudence would be of considerable assistance. First, such laws meet the necessity test only when 'drafted with sufficient clarity to enable an individual to adapt his behaviour' accordingly, and 'cannot give persons who are in charge of its application unlimited powers of decision'.¹⁶⁶ Second, to achieve legitimate purpose and be proportionate to and absolutely necessary for its benefits call for answers to the following: Are there sufficient reasons to justify the action? Is there a less restrictive solution? Does the action destroy the essence of the rights guaranteed by the Charter?¹⁶⁷ Since the African Commission is duty bound to adapt the Charter's provisions, as a living instrument, to new media or digital media, the answers must accord with free speech standards suited to article 9 purposes.

160 Adopted by the African Commission at its 65th Ordinary Session, 21 October to 10 November 2019, Banjul, The Gambia.

161 African Commission 'Resolution ACHPR/Res.174 (XLV111)10: Repealing Criminal Defamation Laws in Africa' 48th Ordinary Session, Banjul, The Gambia, 10-24 November 2010; 'Decriminalization of Expression (DOX) Campaign 2012'.

162 Principle 21(1)(a).

163 Principle 39(1).

164 Principle 39(2).

165 Principles 39(3) & (4).

166 *Malawi African Association v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

167 *Zimbabwe Lawyers* (n 147 above) paras 176 & 178; *Constitutional Rights Project* (n 130) para 44 69; FoE 2019, Principle 21(1)(a) - (c) ('Protecting reputations').

The FoE Declaration 2019 also comes in handy. The FoE Declaration 2019 enjoins states to 'repeal laws that criminalise sedition, insult and publication of false news', and 'amend criminal laws on defamation and libel in favour of civil sanctions' while noting that custodial sentences for criminal defamation violate the right to freedom of expression.¹⁶⁸ Based on these principles, the Commission should not find it difficult to identify vague and overbroad provisions in Ethiopia's CCP 2016 and Nigeria's PIFM Bill 2019 (if passed as it is) and pronounce their harsh penalties for criminal libel as disproportionate restrictions on free speech.

5 CONCLUSION AND RECOMMENDATIONS

This article analyses the criminalisation of defamatory misinformation on social media and its chilling effects on freedom of expression, particularly the imperative of an Africa-wide adjudicatory safeguard. Criminal defamation is a serious interference with freedom of expression and impedes the media's watchdog role. Consequently, a free, independent and diverse communications environment, including media diversity, which states have a positive obligation to promote, are key means of addressing falsehoods and misinformation online. While journalistic freedom allows for exaggeration and provocation it ought not to be at the expense of responsible reporting, good faith, and journalistic ethics. It is hereby recommended that instead of recourse to retrogressive laws, African governments must, through rigorous engagement with tech companies, endeavour to influence SNS' content policies within the context of public debate. Government-backed news organisations should endeavour to counter false news through fact-based reporting and release accurate and timely information. Cybercrime legislation must be diligently drafted in compliance with international free speech standards on proportionality and not used to silence legitimate speech while criminal and penal codes and cybercrimes laws on defamation must be repealed. States have a duty to develop rules on digital intermediaries' liability which must conform with freedom of expression principles. Content regulation must, as much as reasonable, be made amenable under a system of independent regulatory, administrative or judicial review.

168 Principles 22(2)(3) & (4).