

THE RIGHT TO DEMOCRATIC PARTICIPATION IN AFRICA IN THE ERA OF DEEFAKE

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Abstract

In theory, the right to democratic participation in Africa is safeguarded by an array of international and regional human rights instruments, such as article 13 of the African Charter on Human and Peoples' Rights. In essence, the right entails the genuine freedom of people to participate in government and to vote freely, without coercion, intimidation, or deception. In recent times, there has been a growing concern about the impact of artificial intelligence (AI) on the enjoyment of human rights. Deepfake, a relatively new concept, is one of such AI-controversy. Recently, scholars have considered the impacts of deepfakes on different areas of law, such as intellectual property, torts and evidence. In human rights discourse, discussions on deepfake have focused particularly on the right to dignity and privacy. But in fact, the right to information is probably the human right most endangered by deepfake. This article seeks to underscore that there is a concerning impact on the right to democratic participation. First, the article shows the interdependence and interrelation between the right to democratic participation and the right information. Thereafter, it argues that the right to information makes sense only when seen as 'the right to truth'. Further, it argues that deepfake interferes with the 'freely' component of the right to democratic participation in that it disturbs and distorts information necessary for the electorates to freely participate in government. The article notes the little response from

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African states despite the call from the African Commission to establish a framework for human rights in the use of AI and emphasises the importance of partnership with technology companies in addressing the problem. Other recommendations made include the need to educate the electorates on deepfakes and the formulation of law and policy compatible with the African Charter in addressing the problem.

1 Overview of the legal framework of the right to democratic participation in Africa

Eighteen African countries will have elections between August 2023 and November 2024.¹ One potential problem that has emerged in the electoral process across the world, which African countries will have to pay particular attention to, is deepfake.² This is because deepfakes have the potential of being used ‘to fool the voter into believing that they are themselves seeing a person say or do something they didn’t say’.³ They may be used to portray political opponents doing abhorrent things to sway the minds of the electorates against the opponents.⁴ The proliferation of deepfakes and their potential impacts on democratic participation, thus, call for urgent action.⁵

Before the turn of the century – and beyond – one of the recurrent themes about African human rights system, is the ‘egregious’ violations of human rights by African governments.⁶ The right to democratic participation has not been spared – despite the settled principle that the right is an international human right⁷ – several scholars, especially in the late twentieth century, have proliferated on the violation of this right by African states, most

- 1 J Wan ‘Africa elections 2023: All the upcoming votes’ 1 August 2023 <https://africanarguments.org/2023/08/africa-elections-all-upcoming-votes/> (accessed 24 August 2023).
- 2 Simonite ‘What happened to deepfake threat to the election’ 16 November 2020 <https://www.wired.com/story/what-happened-deepfake-threat-election/> (accessed 24 August 2023).
- 3 A Swenson ‘FEC moves toward potentially regulating AI deepfakes in campaign ads’ <https://apnews.com/article/fec-artificial-intelligence-deepfakes-election-2024-95399e640bd1e41182f6c631717cc826> (accessed 24 August 2023).
- 4 H Hall ‘Deepfake videos: When seeing isn’t believing’ (2018) 27(1) *Catholic University Journal of Law and Technology* at 51.
- 5 The United States Federal Election Commission, for instance, recently moved to regulate deepfake in campaign ads. See Swenson (n 3).
- 6 M Mutua ‘The African Human Rights Court: A two-legged stool?’ (1999) 21 *Human Rights Quarterly* at 342; J Akokpari ‘Policing and preventing human rights abuses in Africa: The OAU, the AU and the NEPAD peer review’ (2004) 32(2) *International Journal of Legal Information* at 461; M Ssenyonjo ‘Responding to human rights violations in Africa: Assessing the role of the African Commission and Court on Human and Peoples’ Rights (1987-2018)’ (2018) 7 *International Human Rights Review* at 1.
- 7 GH Fox ‘The right to political participation in international law’ (1992) 17(2) *Yale Journal of International Law* at 541.

notably, through the practice of a one-party system.⁸ The violations of this right have occurred through unlawful arrests and detention of opposition party members; and detention of journalists to suppress valuable information to the electorates. Even academics and activists are not immune: they are threatened for their writings and activism.⁹ It is noteworthy, that the problem with attaining and enjoying the right is neither the absence of a framework nor legislation. But the framework – particularly the role the African Union can play – has often been criticised as ‘tepid’, preferring stability rather than addressing the problem.¹⁰

As for the legislation, under the African human rights system, there are various instruments – both ‘hard’ and ‘soft’ – that safeguard the right to democratic participation. The African Charter on Human and Peoples’ Rights (African Charter), the main African human rights instrument,¹¹ guarantees the right of every citizen ‘to participate freely in the government’ of their country.¹² Both the African Commission on Human and Peoples’ Rights (African Commission)¹³ and the African Court on Human and Peoples’ Rights

- 8 See U Kumar ‘Justice in a one-party African state: The Tanzanian experience’ (1986) 19(3) *Law and Politics in Africa, Asia and Latin America* at 255-274; C Baylies & M Szeftel ‘The fall and rise of multi-party politics in Zambia’ (1992) 54 *Review of African Political Economy* at 75-91; J Quigley ‘Perestroika African style: One-party government and human rights in Tanzania’ (1992) 13 *Michigan Journal of International Law* at 611.
- 9 MK Mbondenyei ‘Entrenching the right to participate in government in Kenya’s constitutional order: Some viable lessons from the African Charter on Human and Peoples’ Rights’ (2011) 55(1) *Journal of African Law* 30-58; NJ Udombana ‘Articulating the right to democratic governance in Africa’ (2003) 24(4) *Michigan Journal of International Law* at 1274.
- 10 See D Wipman ‘Pro-democratic intervention in Africa’ (2002) 96 *American Society of International Law Proceedings* at 143-145: stating that ‘African states have been slow to condemn President Mugabe’s use of intimidation, ballot box stuffing, and related tactics to ensure a favourable electoral outcome despite an apparent opposition victory. As of March 2002, the OAU Central Organ had not initiated the responses called for in its Lomé Declaration. The tepid response suggests that for most African states, the commitment to promotion of democracy is primarily about regional stability’. For a recent critique, see CA Odinkalu ‘Neither African nor a union’ 7 May 2023 <https://www.premiumtime.ng.com/opinion/597192-neither-african-nor-a-union-by-chidi-anselem-odinkalu.html> (accessed 11 May 2023).
- 11 C Heyns ‘The African regional human rights system: In need of reform?’ (2001) 2 *African Human Rights Law Journal* at 155 at 156; S Gumedze ‘Bringing communications before the African Commission on Human and Peoples’ Rights’ (2003) 3(1) *African Human Rights Law Journal* at 118-119.
- 12 Organization of African Unity (OAU) African Charter on Human and Peoples’ Rights June 1981 CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (African Charter) Art 13(1).
- 13 The African Commission was established by the African Charter Art 30. See M Jimoh ‘A critique of the seizure criteria of the African Commission on Human and Peoples’ Rights’ (2022) 22 *African Human Rights Law Journal* at 365; E Bello ‘The mandate of the African Commission on Human and Peoples’ Rights’ (1988) 1 *African Journal of International Law* at 55; CA Odinkalu & C Christensen, ‘The African Commission on Human and Peoples’ Rights: The development of its non-state communication procedures’ (1998) 20(2) *Human Rights Quarterly* at 235.

(African Court)¹⁴ have had to consider communications and applications alleging violations of this right and have upheld the right.¹⁵ In addition to the African Charter, the Universal Declaration of Human Rights (UDHR) – some provisions of which are now considered to be part of customary international law¹⁶ – provides that ‘everyone has the right to take part in the government of his country, directly or through freely chosen representatives’.¹⁷ The International Covenant on Civil and Political Rights (ICCPR) also provides that every citizen shall have the right and opportunity to (a) take part in the conduct of public affairs, directly or indirectly through freely chosen representatives; and (b) vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.¹⁸

This right is also contained in other international human rights instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination;¹⁹ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);²⁰ the European Convention on Human Rights (ECHR);²¹ and the American Convention on Human Rights (AmCHR).²² The foregoing human rights instruments’ provisions and the jurisprudence from the UN Human Rights Committee and other regional human rights bodies, by the ‘decompartmentalization’ articles of the African Charter – that is, articles 60 and 61²³ – serve as a source of guarantee for this

14 The African Court was established by the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples’ Rights.

15 For some of these, see Section 2 and Section 3 below.

16 J Humphrey ‘The Universal Declaration of Human Rights: Its history, impact and judicial character’ in BG Ramcharan (ed) *Human rights: Thirty years after the Universal Declaration* (1979) at 29; D Forsythe ‘1949 and 1999: Making the Geneva Conventions relevant after the cold war’ (1999) 81 *International Review of the Red Cross* at 266.

17 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (UDHR) Art 21(1).

18 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966 (ICCPR) Art 25.

19 UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965 Art 5(c).

20 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979 (CEDAW) Art 7.

21 European Convention on Human Rights, 15 December 2011 (ECHR) Art 3.

22 American Convention on Human Rights, 22 November 1969 (AmCHR) Art 23.

23 ‘Decompartmentalization is a process allowing the use of various external sources to interpret the rights enshrined in the African, Inter-American, and European human rights instruments and allowing pursuit of the greatest possible protections for the human being.’ Articles 60 and 61 of the African Charter allow decompartmentalization. See L Burgorgue-Larsen ‘“Decompartmentalization”: The key technique for interpreting regional human rights treaties’ (2018) 16(1) *International Journal of Constitutional Law* at 187; M Jimoh ‘The evolutive interpretation of the African Charter on Human and Peoples’ Rights’ (2023) 10(1) *Indonesian Journal of International and Comparative Law* at 43.

right and are useful in understanding the scope of this right within the African human rights system.²⁴

Apart from the above-stated human rights instruments, the African Charter on Democracy, Election and Governance²⁵ – which is considered a human rights instrument²⁶ – also contains provisions safeguarding the rights of Africans to democratic participation. There are also numerous soft laws – resolutions, Declarations, Principles and General Comments – on the right in Africa.²⁷ Thus, it may fairly be argued that the African human rights system has a robust framework protecting the right to democratic participation.

1.1 The problem

There are presently debates about the effects of the misuse of modern technology on human rights.²⁸ The concern about the impacts of modern technology on human rights has been raised by states and international organisations since, at least, 1968.²⁹ One of the recent

24 In the past, the African commission and the African court have been inspired by these instruments. See M Killander 'Interpreting regional human rights treaties' (2010) 7 *International Journal of Human Rights* at 145.

25 For discussion, see S Elvy 'Towards a new democratic Africa: The African Charter on Democracy, Elections and Governance' (2013) 27 *Emory International Law Review* at 41.

26 For discussion on it being a human rights instrument, see G Niyungeko 'The African Charter on Democracy, Elections and Governance as a human rights instrument' (2019) 63(1) *Journal of Africa Law* at 63.

27 These soft laws include (1) African Commission's Resolution on Electoral Process and Participatory Governance, see 'Resolution on Electoral Process and Participatory Governance ACHPR/Res.23(XIX)96' in *Recommendations and Resolutions Adopted by the African Commission on Human and Peoples' Rights (1988-2017)* (2017) at 59; (2) African's Commission Resolution on Elections in Africa, see 'Resolution on Electoral Process and Participatory Governance ACHPR/Res.23(XIX)96' in *Recommendations and Resolutions Adopted by the African Commission on Human and Peoples' Rights (1988-2017)* (2017) at 307; (3) General Comment 25 of the UN Human Rights Committee on political participation, see UN Human Rights Committee, General Comment 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; (4) The Addis Ababa Declaration, see 'Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World AHG/Decl.1 (XXVI) 1990' 11 July 1990; (5) The Algiers Declaration, see 'Algiers Declaration AHG/Dec.1(XXXV) 1999' 14 July 1999 https://archives.au.int/bitstream/handle/123456789/569/AHG%20Decl%201%20%28XXV%29%20_E.pdf (accessed 12 May 2023); (6) The Lomé Declaration, see 'Lomé Declaration AHG/Decl.2 (XXXVI)' 12 July 2000 <https://www.peaceau.org/uploads/ahg-decl-2-xxxvi-e.pdf> (accessed 12 May 2023); (7) Declaration on the Principles Governing Democratic Elections in Africa, see 'OAU/AU Declaration on the Principles Governing Democratic Elections in Africa AHG/Decl. 1 (XXXVIII)' 8 July 2002 https://archives.au.int/bitstream/handle/123456789/572/AHG%20Decl%201%20%28XXXVIII%29%20_E.pdf (accessed 12 May 2023).

28 See P Nagaraj 'Human rights in the WSIS process: The notion of interdependence and indivisibility as a way forward' (2016) 9 *NALSAR Student Law Review* at 125.

29 JM Myers 'Human rights and development: Using advanced technology to promote human rights in sub-Saharan Africa' (1998) 30(2) *Case Western Reserve Journal of International Law* at 343.

concepts that has emerged is ‘deepfake’ and its attendant implications for human rights.³⁰ Deepfakes are synthetic³¹ and hyper-realistic³² videos, audios or images created through deep learning, where new contents, which never occurred, are created, either from a true occurrence or from a non-existent occurrence. Caldera puts it simpler: ‘a deepfake is a forged video; it depicts something that has never happened by manipulating previously existing video footage or pictures’.³³ Deepfakes have been deployed to manipulate the information received by people. In the United States, for instance, deepfakes were said to have manipulated its recent election³⁴s. Indeed, the potential manipulation of audios, images and videos is not new.³⁵ Described as a ‘400-year problem’,³⁶ sub-Saharan Africa is said to have a ‘long history of fake news’.³⁷ With deepfakes, three new issues compound the manipulations: first, the advancement in technology making it very difficult to detect the deepfake manipulation;³⁸ second, the surge of deepfakes ‘producers’;³⁹ and third, the ease with which the deepfakes could be disseminated via social media.

As an instance, in January 2019, the Gabonese military attempted an unsuccessful *coup d’état*. The move was reportedly triggered by a deepfake video of Gabon’s unseen president, Ali Bongo.⁴⁰ The President had been out of the country since October 2018, with little information about his whereabouts. As the speculations about his death grew, the President’s advisors promised to release a New Year’s

- 30 See MB Dobrobaba ‘Deepfakes as a threat to human rights’ (2022) 75(11) *Lex Russica* at 112.
- 31 T Hwang ‘Deepfakes: A grounded threat Assessment’ 2020 <https://cset.georgetown.edu/wp-content/uploads/CSET-Deepfakes-Report.pdf> (accessed 12 2023).
- 32 M Westerlund ‘The emergence of deepfake technology’ (2019) 9(11) *Technology Innovation Management Review* at 39.
- 33 E Caldera ‘Reject the evidence of your eyes and ears: Deepfakes and the law of virtual replicants’ (2019) 50 *Seton Hall Law Review* at 179.
- 34 M Appel & F Prielzel ‘The detection of political deepfakes’ (2022) 27(4) *Journal of Computer-Mediated Communication* at 1.
- 35 JP LaMonaga ‘A break from reality: Modernizing authentication standards for digital video evidence in the era of deepfakes’ (2020) 69(6) *American University Law Review* at 1952; J Langguth et al ‘Don’t trust your eyes: Image manipulation in the age of deepfakes’ (2021) 6 *Frontiers in Communication* at 1.
- 36 L Floridi ‘Fake news and a 400-year-old problem: We need to resolve the “post-truth” crisis’ 29 November 2016 <https://www.theguardian.com/technology/2016/nov/29/fake-news-echo-chamber-ethics-infosphere-internet-digital> (accessed 12 May 2023).
- 37 See A Mare et al ‘“Fake news” and cyber-propaganda in sub-Saharan Africa: Recentring the research agenda’ (2019) 40(4) *African Journalism Studies* at 2.
- 38 R Pfefferkorn ‘Deepfakes in the courtrooms’ (2019) 29 *Public Interest Law Journal* at 271.
- 39 The term denotes the fact that those who were formerly mere users of information technology now take part in the production of the contents. The term signifies ‘the blurring of production and consumption’. See Mare et al (n 37) 1.
- 40 A Breland ‘The bizarre and the terrifying case of the “deepfake” video that helped bring an African nation to the brink’ 15 March 2019 <https://www.motherjones.com/politics/2019/03/deepfake-gabon-ali-bongo/> (accessed 12 May 2023).

address video by the President. However, when the video was released, the Gabonese military believed that it was a deepfake, confirming that something had happened to the President and saw it as an opportunity to seize power. But there were also reports that the video was real.⁴¹ Thus, even though any claim that the dissemination of fake content in Africa started with the emergence of emerging technologies will fall into an ‘ahistorical complacency’,⁴² it is not in doubt that emerging technologies through deepfake has, and will, further augment the fakery.⁴³

1.2 Scope of the article

Noting that currently, the African continent lacks a framework for addressing human rights issues in the use of AI, robotics, and emerging technologies,⁴⁴ the main question to be addressed by this article is: What is the relationship between the right to democratic participation and deepfake? While clearly, deepfake has implications for the right to freedom of information in the African Charter⁴⁵ and may impact the right to freedom of expression⁴⁶ – for instance, where an attempt to criminalise deepfake leads to censorship and suppression⁴⁷ – this article will argue that: (i) the jurisprudence of the African Commission and African Court shows that the right to democratic participation is interdependent and interrelated to those rights impacted by deepfake; and (ii) deepfake has effects on the right to democratic participation in Africa.

The article is divided into five sections. After this introduction, paragraph 2 discusses the jurisprudence on the right to democratic participation in Africa. It considers the provisions in the African Charter and its criticisms; and the meaning of the right as espoused by the African Commission and the African Court. Paragraph 3 discusses the relationship between the right to democratic participation and other rights in the African Charter. The other rights to be considered are the right to information, the right to freedom of

41 B Okunoye ‘Elections in Africa: AI generated deepfakes could be the greatest digital threat in 2020’ 6 January 2020 <https://paradigmhq.org/deepfakes/> (accessed 12 May 2023).

42 Mare et al (n 37) 4.

43 J Langa ‘Deepfakes, real consequences: Crafting legislation to combat threats posed by deepfakes’ (2021) *Boston University Law Review* at 767.

44 See ‘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’ <https://achpr.au.int/en/adopted-resolutions/473-resolution-need-undertake-study-human-and-peoples-rights-and-art> (accessed 12 May 2023) (Resolution 473).

45 African Charter (n 12) Art 9(1).

46 As above Art 9(2).

47 H Latham ‘Fake news and its implications for human rights’ 14 December 2020 <https://www.humanrightspulse.com/mastercontentblog/fake-news-and-its-implications-for-human-rights> (accessed 12 May 2023).

association, and the right to self-determination. Paragraph 4 wages into the deepfake in human rights discourse. This paragraph considers deepfake and human rights and the effects deepfake has on the right to democratic participation. Finally, paragraph 5 concludes the article.

2 The jurisprudence on the right to democratic participation in Africa⁴⁸

2.1 The Provisions of the African Charter

Article 13 of the African Charter provides that:

- (1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
- (2) Every citizen shall have the right of equal access to the public service of his country.
- (3) Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

It should be noted that the lack of sufficient *travaux préparatoires* of the African Charter has not prevented scholars from engaging in an impassioned critique of this provision.⁴⁹ Given the poor democratic system in most African states, one of the main criticisms levelled at this provision as defying ‘logic’ is that the right is not ‘full’ or at least, not ‘on par’ with the provisions of other international human rights instruments.⁵⁰ Most commentators posit that in comparison with other instruments, the right as provided in the African Charter is

48 For jurisprudential analysis, see C Heyns et al ‘The right to political participation in sub-Saharan Africa’ (2019) 8(2) *Global Journal of Comparative Law* at 128.

49 For discussion on the scarcity of the *travaux préparatoires* of the African Charter, see MA Plagis & L Riemer ‘From context to content of human rights: The drafting history of the African Charter on Human and Peoples’ Rights and the enigma of Article 7’ (2021) 25 *Journal of History of International Law* at 563. See also Fox (n 7) 558: stating that ‘lack of background materials makes investigation of rights articulated in the African Charter difficult. Transcripts of a crucial drafting meeting have yet to be released to the public, and the decisions of the African Commission on Human Rights are kept confidential to protect the safety of the petitioners’.

50 MK Mbondenyei ‘The right to participate in the government of one’s country: An analysis of Article 13 of the African Charter on Human and Peoples’ Rights in the light of Kenya’s 2007 political crisis’ (2009) 9 *African Human Rights Law Journal* at 186-187.

narrower.⁵¹ Perhaps, the harshest critique of the provision is that given by Gregory Fox:

Article 13 also lacks provisions on discrimination, universal suffrage, and a secret ballot. Finally, the reservation that all rights need only be ‘in accordance with the provisions of the law’ suggests that article 13 requires nothing more of states than what is already required by their national constitutions. If so, then article 13 is almost entirely useless as an international standard of conduct by which each state is to measure the legality of its actions.⁵²

The criticism places emphasis on the ‘claw back’ clause contained in article 13(1) as limiting the enjoyment of the right to ‘the provisions of the law’.⁵³ ‘If caution is not taken’, states Mbondenyi, ‘such a law could at best be too restrictive or, at worst, discriminatory’.⁵⁴ However, it has been submitted that considering the robust jurisprudence of the African Commission on claw-back clauses – particularly the interpretation of ‘law’ as ‘international law’,⁵⁵ – the criticism on the claw-back clauses should be foreclosed.⁵⁶ Hence, the criticism on the provisions of article 13 as permitting a claw-back, is now superfluous. Moreover, as a general principle of international law, a state cannot use its national law to evade international obligations.⁵⁷

In *Constitutional Rights Project and Another v Nigeria*,⁵⁸ the African Commission held that what constitutes free and fair elections has international standards and that it ‘would be contrary to the logic of international law’ if a national government were granted unlimited

51 Fox (n 7) 558: stating that ‘the text of the Charter alone, however, suggests that it provides guarantees substantially narrower in scope than those found in the American and European Conventions or the Political Covenant’. See also C Heyns ‘The African regional human rights system: The African Charter’ (2004) 108 *Dickson Law Review* at 687: stating that ‘[...] the right of political participation [is] given scant protection in comparison with international standards’.

52 Fox (n 7) 558.

53 For discussion on claw-back clauses, see R Gittleman ‘The African Charter on Human and Peoples’ Rights: A legal analysis (1982) 22(4) *Virginia Journal of International Law* at 691-709; S Sibanda ‘Beneath it all lies the principle of subsidiarity: The principle of subsidiarity in the African and European regional human rights systems’ (2007) 40 *Comparative & International Law Journal of Southern Africa* at 443.

54 Mbondenyi (n 50) 34.

55 See *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) (*Article 19*).

56 See M Jimoh, ‘Investigating the responses of the African Commission on Human and Peoples’ Rights to the criticisms of the African Charter’ (2024) 4 *Rutgers International Law and Human Rights Journal* (forthcoming): stating that ‘as may be gleaned from some of the recent decisions of the Commission, it seems that African States have heeded this warning as they rarely rely on these clauses. Indeed, though some leading scholars believe that ‘the Commission has clearly been designed to accomplish very little,’ this radical approach by the Commission with respect to claw-back clauses is one of the significant contributions of the Commission in the protection of human rights on the continent. The Commission has, thus, responded adequately’.

57 United Nations, Vienna Convention on the Law of Treaties, 23 May 1969 Art 27.

58 *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998) (*Constitutional Rights Project*).

latitude to determine this standard.⁵⁹ Thus, in *Legal Resources Foundation v Zambia*,⁶⁰ the African Commission ‘argued forcefully’ while discussing the right to democratic participation, that a state party cannot avoid responsibilities by ‘recourse to the limitations and “claw-back” clauses in the Charter’.⁶¹ The African Commission pointed out that ‘the purpose of the expression “in accordance with the provisions of the law” is surely intended to regulate how the right is to be exercised rather than that the law should be used to take away the right’.⁶²

Further, another criticism levelled against the provisions of article 13 is that it is susceptible to discrimination.⁶³ The jurisprudence of the African Commission, however, suggests otherwise. In practice, the African Charter has been interpreted holistically,⁶⁴ with all clauses ‘reinforc[ing] each other’.⁶⁵ In *Legal Resources*, the African Commission found allegations of violation of article 13 by examining ‘closely the nature and content’ of the right to non-discrimination in article 2 of the African Charter.⁶⁶ The African Commission concluded that the limitation on the right to democratic participation ‘cannot be used to subvert rights already enjoyed’.⁶⁷ Also, in *Purohit & Moore v The Gambia*⁶⁸ – communication bordering on automatic institutionalisation of people with psychosocial disabilities under the Gambian Lunatics Detention Act, 1917 – the African Commission held that the right to political participation is extended to every person under the African Charter, without any distinction. In addition, part of the criticisms contained in Fox’s work is also that:

Article 13 of the African Charter guarantees participatory rights, but because the provision lacks enforceable standards its utility remains limited... However, unlike the Political Covenant or the European Convention, the African Charter fails to stipulate that an electoral choice must reflect the free expression of the electors’ will or the opinion of the people. The absence of such a provision suggests the African Charter permits one-party elections.⁶⁹

Like the other criticisms, little support can be found for this criticism from the jurisprudence of the African Commission and the African

59 As above para 48.

60 *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) (*Legal Resources*).

61 As above para 70.

62 As above para 72.

63 Fox (n 7) 558.

64 A Amin ‘A teleological approach to interpreting socio-economic rights in the African Charter: Appropriateness and methodology’ (2021) 21 *African Human Rights Law Journal* at 204.

65 *Legal Resources* (n 60) para 70.

66 As above para 71.

67 As above para 70.

68 *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

69 Fox (n 7) 558.

Court. For instance, in *Constitutional Rights Project*, the African Commission found that to participate freely in government includes the right to vote for the representative of one's choice.⁷⁰ Clearly, a one-party election mandated on the electorates, without a choice of other candidates, would be a violation of this right. Thus, in *Lawyers for Human Rights v Swaziland*,⁷¹ the Swazi King's Proclamation which repealed the 1968 Constitution and Bill of Rights, and outlawed the formation of political parties, was held by the African Commission to 'seriously undermine the ability of the Swaziland people to participate in the government of their country and thus violated article 13 of the African Charter'.⁷²

2.2 The meaning of the right to democratic participation

The right to democratic participation simply means the enjoyment of the freedom to engage in electoral processes through voting – either by voting or being voted for.⁷³ Also included in the right is the freedom to join and form political parties, and to participate in the formulation of policies.⁷⁴ Within the African context, the rationale for including the right in the African Charter was a result of the despotic regimes which plagued Africa in the 1960s and 1970s and the 'desire to wrest political power and governmental authority from the hands of the emerging post-colonial despots and vest it in citizens'.⁷⁵ To fully enjoy the democratic system in Africa, it was understood that the right of people to freely participate in governance is a prerequisite.⁷⁶

In many communications and applications which have been considered by the African Commission and the African Court, the scope and limitation of the right have been duly considered.⁷⁷ Part of the principles which have been espoused on the nature of the right is that requiring a candidate to belong to a political party before they are able to participate in governance violates article 13 of the African Charter.⁷⁸ Also, the prohibition of electoral alliances with a view to

70 *Constitutional Rights Project* (n 58) para 50.

71 *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005) (*Lawyers for Human Rights*)

72 As above para 63.

73 WA Oluchina 'The right to political participation for people with disabilities in Africa' (2015) 3 *African Disability Rights Yearbook* at 312.

74 As above 312.

75 Mbondenyi (n 50) 187. See also MK Mbondenyi 'Improving the substance and content of civil and political rights under the African human rights system' (2008) 17(2) *Lesotho Law Journal* at 39.

76 See Udombana (n 9) 1254.

77 In fact, the first merit judgment of the African Court mainly discussed the right to democratic participation. See *Mtikila v Tanzania* (14 June 2013) 1 AfCLR 34 (*Mtikila*).

78 As above para 99.

running a candidacy for election would violate the tenets of this right.⁷⁹

Importantly, the right is not absolute. But any such restriction must be necessary in a democratic society; and be reasonably proportionate to the legitimate aim pursued.⁸⁰ In addition, the State Party should be able to prove that the restriction serves one of the purposes set out in article 27(2) of the African Charter.⁸¹ Thereafter, a proportionality test is applied to weigh the impact, nature and extent of the limitation against the legitimate state interest serving a particular goal.⁸² So far, the African Commission and the African Court have found some restrictions as failing the proportionality test, while some have passed the proportionality test.

For instance, in *Ajavon v Benin*,⁸³ the African Court held that it was not 'convinced that the requirement relating to the number of founding members to constitute a political party, corroborated by the social necessities invoked by the Respondent State, is contrary to the requirements of articles 27(2) ... of the Charter'.⁸⁴ The African Commission too found that a requirement to provide an address and identification when casting a vote was not unreasonable.⁸⁵ But a requirement that a person can only exercise the right to be voted for if both their parents were born in Côte d'Ivoire, was held to be unreasonable.⁸⁶

3 Interdependence and interrelation of human rights: The right to democratic participation and other rights

The purpose of this paragraph is to discuss, very briefly, the relationship – that is, the interdependence and the interrelation – between the right to democratic participation and the right to information, the right to association and the right to self-determination under the African human rights system. The debate on whether the notion of indivisibility and independence of rights means

79 *Ajavon v Benin* (Judgment) (2020) 4 AfCLR 133 (*Ajavon*) para 206.

80 *Mtikila* (n 77) para 106.1.

81 The purposes are the rights of others, collective security, morality and common interest. These are the only limitations permitted. See In communications 105/93, 128/94, 130/94, 152/96, *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

82 *Mtikila* (n 77) para 106.1

83 *Ajavon* (n 79).

84 *Ajavon* (n 79) para 185.

85 *Peoples' Democratic Organisation for Independence and Socialism v The Gambia* (2000) AHRLR 104 (ACHPR 1996).

86 *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire* (2008) AHRLR 75 (ACHPR 2008).

the same is outside the scope of this paragraph.⁸⁷ For the purposes of this article, the relationship between the right to democratic participation and the right to information, the right to association, and the right to self-determination under the African human rights system is treated as a *related independence*. In this sense, rights are considered to be ‘mutually reinforcing or mutually dependent, but distinct’.⁸⁸ Thus, the rights are complementary, yet autonomous.⁸⁹

3.1 The right to democratic participation and the right to freedom of information

There is an obvious relationship between the right to democratic participation and the right to information in the African Charter because information is necessary to participate in government fully and freely.⁹⁰ Article 9 of the African Charter provides:

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

It should be noted that article 9 contains two stand-out and stand-alone rights – the right to information and the right to freedom of expression – which are not necessarily coefficients.⁹¹ The tenets of the right to democratic participation demand that people should have access to information ‘so that they can make [...] decisions intelligently’.⁹² In part, the restriction on the right to information has contributed to dictatorship in Africa, which in turn, affects the right of the people to democratic participation.⁹³ In the fragile societies we have in Africa, effective access to information ‘is critical for full and effective participation in governance’.⁹⁴

87 For full consideration, see and compare JW Nickel ‘Rethinking indivisibility: Towards a theory of supporting relations between human rights (2008) 30 *Human Rights Quarterly* at 984 and C Scott ‘Interdependence and permeability of human rights norms: Towards a partial fusion of the international covenants on human rights (1989) 27(3) *Osgoode Hall Law Journal* at 769. See also G Gadzhiev ‘The interdependence of economic and social rights’ (1998) 39(3) *Acta Juridica Hungarica* at 213.

88 Scott (n 87) 782.

89 As above 783.

90 See Heyns et al (n 51) 131: stating that ‘the right to equal participation in political and public affairs can be realised only in conjunction with a range of other rights, including that to freedom of expression and information, peaceful assembly, association, equality, non-discrimination, and access to justice and socio-economic rights. In some instances, there may also be a right not to participate, or to disengage, for example on the basis of freedom of religion’.

91 M McDonagh ‘The right to information in International human rights law’ (2013) 13 *Human Rights Law Review* at 29.

92 Udombana (n 9) 1230.

93 FD Ifeanyi & VO Odoh ‘Mass media and challenges of Africa’s development: An analysis of press freedom and access to information in Africa’ (2014) 32 *Journal of Law, Policy and Globalization* at 153.

94 JM Mbaku ‘Corruption and democratic Institutions in Africa’ (2018) 27(2) *Transnational Law and Contemporary Problems* at 333.

While the jurisprudence of the African Commission and the African Court has not fully revealed the relationship between the right to democratic participation and the right to information, scholars have conducted studies showing their relationship.⁹⁵ One of these is the work of Shyamal Chowdhury which considers the impact of information on democratic participation and corruption.⁹⁶ Mbaku states that:

Shyamal Chowdhury has empirically investigated the impact of democracy and freedom of the press on corruption. He argues that freedom of the press serves as a mechanism through which cases of corruption can be brought to the attention of voters. In other words, an independent press can effectively investigate corruption and make the information available to voters. The voters can then utilize that information to make decisions about who to vote for. Politicians whose corrupt activities are exposed by the press can be punished at the polls by voters. Elected officials and candidates are then forced to avoid engaging in corrupt activities because of the risk of being punished by the voters.⁹⁷

When journalists are illegally arrested and detained, the right of the people to receive information is affected. There are numerous decisions of the African Commission and the African Court where violations of the right to information have been found due to the arrest of journalists.⁹⁸ In *Article 19 v Eritrea*,⁹⁹ for instance, the African Commission observed that the imprisonment of journalists deprives not only the journalists of their rights to freely express and disseminate their opinions but also the public, of the right to information.¹⁰⁰ A public deprived of information cannot enjoy the right to democratic participation to its fullest extent. In addition, undue restriction on (social) media restricts the maximum enjoyment of the right to democratic participation.

95 Udombana (n 9) 1274; Heyns et al (n 51) 131; Mbondenyei (n 50) 35.

96 SK Chowdhury 'The effect of democracy and press freedom on corruption: An empirical test' (2004) 85 *Economic Letters* at 93.

97 Mbaku (n 94) 337.

98 See for instance, *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995); *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) (*Jawara*); *Zimbabwe Lawyers for Human Rights and Another (on behalf of Meldrum) v Zimbabwe* (2009) AHRLR 268 (ACHPR 2009).

99 *Article 19* (n 55).

100 As above para 106.

3.2 The right to democratic participation and the right to freedom of association

Also closely related to the right to democratic participation, is the right to freedom of association.¹⁰¹ One of the key components of the right to democratic participation is the freedom to join any political party of one's choice. A person has a right choose to join a political party.¹⁰² In *Jawara*,¹⁰³ the African Commission explained the relationship between the right to democratic participation and the right to freedom of association. The African Commission noted that the banning of political parties is a violation of the right to freedom of association, which affects the right to democratic participation.¹⁰⁴ The rationale is that when there is a ban, individuals are denied or compelled to join or form an association before seeking elective positions.¹⁰⁵ States Parties are thus under obligation to ensure that the activities of its ruling party do not prevent the forming of opposition parties.¹⁰⁶

3.3 The right to democratic participation and the right to self-determination

Article 20 of the African Charter guarantees the right of a people to self-determination. The relevance of the right to democratic participation in determining the right of the people to self-determination has been canvassed in the jurisprudence of the African Commission. The relationship between the two exists because the right to self-determination cannot be exercised in the absence of proof of massive violations of human rights, that is, oppression and domination.¹⁰⁷ Thus, where it is found that people have a representation in government with the enjoyment of the right to democratic participation, the right to self-determination cannot be exercised.¹⁰⁸

101 The right to freedom of association is contained in the African Charter Art 10. See *Mbondenyi* (n 50) 35: stating that 'indeed, even the jurisprudence of the African Commission confirms the foregoing observation. For instance, the Commission has emphasised the connectivity between this right and, among others, the rights to nationality, freedom of assembly and expression and self-determination'.

102 *Tanganyika Law Society & The Legal and Human Rights Centre v The United Republic of Tanzania* Application 011/2011 (*Tanganyika*) para 107.1.

103 *Jawara* (n 98)

104 As above para 59.

105 *Mtikila* (n 77) para 114.

106 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006).

107 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009).

108 See *Front for the Liberation of the State of Cabinda v Republic of Angola* (Communication 328/06, 54th Ordinary Session).

In *Katangese Peoples' Congress v Zaire*,¹⁰⁹ the African Commission concluded that in the absence of evidence that the people of Katanga were denied the right to participate in government as guaranteed by article 13(1) of the African Charter, they could not exercise their right to self-determination in a way incompatible with the sovereignty and territorial integrity of Zaire.¹¹⁰

4 Deepfake and the human right discourse

4.1 Deepfake and human rights

One of the main advancements in technology since the turn of the century is AI. There are numerous definitions and descriptions of what AI is.¹¹¹ A symmetrical theme that runs through these numerous descriptions is that it is a problem-solving tool. There are numerous reports on how AI is being used to meet many of the world's most urgent challenges, such as humanitarian crises and climate change.¹¹² Similarly, in Africa, AI is increasingly being utilised. There are reports that AI is steadily covering fields such as finance, education, and transportation, especially in Nigeria, Ghana, Kenya, and South Africa.¹¹³ AI is equally being used to improve food security and healthcare in Africa.¹¹⁴

109 *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) (*Katangese*).

110 As above para 6.

111 Marvin Minsky, defines it as 'the science of making machines do things that would require intelligence if done by men'. John McCarthy defines it as 'the science and engineering of making intelligent machines. Stuart Russell and Peter Norving suggest that AI can be broken down into the following categories: 1) systems that think like humans; 2) systems that act like humans; 3) systems that think rationally; and 4) systems that act rationally'. Mathias Risse sees AI as the 'ability demonstrated by machines, in smart phones, tablets, laptops, drones, self-operating vehicles or robots that might take on tasks ranging from household support, companionship of sorts, even sexual companionship, to policing and warfare'. See M Risse 'Human rights and artificial intelligence – An urgently needed agenda' 2018 https://carrcenter.hks.harvard.edu/files/cchr/files/humanrightssai_designed.pdf (accessed 12 May 2023).

112 'United Nations activities on artificial intelligence (AI) 2019' 2019 https://www.itu.int/dms_pub/itu-s/opb/gen/S-GEN-UNACT-2019-1-PDF-E.pdf (accessed 12 May 2023).

113 C Besaw & J Filitz 'Artificial intelligence in Africa is a double-edge sword' 16 January 2019 <https://ourworld.unu.edu/en/ai-in-africa-is-a-double-edged-sword> (accessed 12 May 2023).

114 A Moyo 'Africa: Google using artificial intelligence to improve health care and food security' 26 April 2019 <https://www.business-humanrights.org/en/latest-news/africa-google-using-artificial-intelligence-to-improve-healthcare-food-security/> (accessed 12 May 2023).

However, despite the expediency of AI to human lives, there is a growing concern that it constitutes a threat to human rights,¹¹⁵ such as the right to privacy, human dignity, equality and non-discrimination, freedom of expression and information, freedom of movement, and freedom of assembly. In fact, AI is said to affect all internationally recognised human rights because human rights ‘are interdependent and interrelated’.¹¹⁶ Deepfake utilises AI technology.¹¹⁷

The origin of deepfake is usually traced to a Reddit – a social website – user with the handle ‘u/deepfakers’ who created a series of videos utilising new AI techniques that superimposed the faces of several prominent actresses into pornographic videos in 2017.¹¹⁸ Since then, deepfake technology has continued to advance, making it more difficult to distinguish between real and fake content. The proliferation of deepfake software apps has compounded the problem.¹¹⁹ Just like in the rest of the world, the concern of deepfake has been raised by commentators in Africa.¹²⁰ But the peculiarity of the problem with Africa is that a lot of Africans are ignorant of what deepfake content is,¹²¹ and there is a lack of framework for its use and regulation.

The internet, specifically, social media, is the platform where most deepfake content is disseminated.¹²² In recent times, Africa’s internet and social media users have risen significantly. In 2010, there were about 100 million African internet users.¹²³ By December 2021,

115 ‘Unboxing Artificial Intelligence: 10 Steps to Protect Human Rights’ May 2019 <https://rm.coe.int/unboxing-artificial-intelligence-10-steps-to-protect-human-rights-reco/1680946e64> (accessed 12 May 2023); S Baweja & S Singh ‘Beginning of artificial intelligence, end of human rights’ 16 July 2020 <https://blogs.lse.ac.uk/humanrights/2020/07/16/beginning-of-artificial-intelligence-end-of-human-rights> (accessed 12 May 2023).

116 ‘Human rights in the age of artificial intelligence’ November 2018 <https://www.accessnow.org/cms/assets/uploads/2018/11/AI-and-Human-Rights.pdf> (accessed 12 May 2023).

117 C Kocsis ‘Deepfakes, shallowfakes, and the need for a private right of action’ (2022) 126 *Dickinson Law Review* at 623.

118 For discussion, see LaMonaga (n 35) 1948.

119 T Cline ‘When seeing is no longer believing: An African take on the cost of deepfake’ 16 January 2023 <https://www.forbesafrica.com/technology/2023/01/16/when-seeing-is-no-longer-believing-an-african-take-on-the-cost-of-deepfakes/> (accessed 12 May 2023).

120 A Mascellino ‘Deepfake problem studied in Europe; Africa no immune’ 20 January 2023 <https://www.biometricupdate.com/202301/deepfake-problem-studied-in-eu-africa-not-immune> (accessed 12 May 2023).

121 L Ndebele ‘Deepfakes worrying threat to democracy, says report’ 23 February 2024 <https://www.news24.com/news24/africa/news/deepfakes-worrying-threat-to-democracy-in-africa-says-report-20230223> (accessed 12 May 2023).

122 Mbaku (n 94) 364: arguing that the internet has become the main conduit for communicating and disseminating information.

123 A Essoungou ‘A social media boom begins in Africa’ December 2010 <https://www.un.org/africarenewal/magazine/december-2010/social-media-boom-begins-africa> (accessed 12 May 2023).

this number had increased to more than 590 million.¹²⁴ Thus, many African users may encounter deepfakes, without necessarily realising it. Recently, there were perturbations in Mali over the exponentiality of deepfakes.¹²⁵

Arguably, part of the most obvious human rights implicated by the dissemination of deepfakes are the rights to human dignity and the right to privacy. The superimposition of the faces of female celebrities, such as Scarlet Johansson, into pornographic videos, demeans the character of Scarlet Johansson.¹²⁶ When the faces of people are superimposed on the body of another without their consent when creating deepfakes, the right to privacy is implicated.¹²⁷ Beyond dignity and privacy, however, deepfake affects the right to democratic participation guaranteed under the African Charter. Thus, the relationship between the right to democratic participation and deepfake is not at arm's length. These implications are discussed below.

4.2 The effects of deepfake on the right to democratic participation in Africa

The greatest effect of deepfake on human rights is the distortion of information, and, in the long run, the creation of a situation termed 'information apocalypse'.¹²⁸ It may be argued that the right to information makes sense only when seen as 'the right to truth'.¹²⁹ Otherwise, there would be no point enshrining this right in international human rights instruments,¹³⁰ because no one would

124 'Internet Penetration in Africa – 2020 – Q1 – March' 25 May 2022) <https://www.internetworldstats.com/stats1.htm> (accessed 12 May 2023).

125 The reason for the perturbations was because of the sensitivity and content of the deepfakes. For instance, one 'video claims that the French intellectual Bernard-Henri Lévy is a spy selling information about the Malian army's position and forces to jihadists in Mali, based on a photo of him taken when he was in Sudan in 2007 and taken out of context'. C Bennett 'Fake videos using robotic voices and deepfakes circulate in Mali' 10 January 2022 <https://observers.france24.com/en/tv-shows/truth-or-fake/20220110-truth-or-fake-debunked-mali-robot-voices-deepfakes> (accessed 12 May 2023).

126 See P Hayward & A Rahn 'Opening pandora's box: Pleasure, consent and consequence in the production and circulation of celebrity sex videos' (2015) 2(1) *Porn Studies* at 49.

127 S Maddocks 'A deepfake porn plot intended to silence me: Exploring continuities between pornographic and "political" deep fakes' (2020) 7(4) *Porn Studies* at 415.

128 Westerlund (n 32) 43: stating that '...the most damaging aspect of deepfakes may not be disinformation *per se*, but rather how constant contact with misinformation leads people to feel that much information, including video, simply cannot be trusted, thereby resulting in a phenomenon termed as "information apocalypse" or "reality apathy"'.
129 As above.

130 See UDHR Art 19; ICCPR Art 19. In Africa, the right to information is guaranteed under African Charter Art 9 and many other instruments.

clamour for a right to be lied to.¹³¹ As argued above, the right to democratic participation is interrelated with the right to information. With this, it is not difficult to see how deepfake creates a web of impacts on the right to democratic participation. Mainly, deepfake interferes with the ‘freely’ component of the right to democratic participation. It disturbs and distorts information necessary for the electorates to freely participate in government through the decisions made during election.

In recent years, technology has played an important role in elections in Africa.¹³² Africans have shown interest in politics through their activities on social media. For instance, according to Portland, 1.6 billion geolocated posts on X (formerly Twitter) originated from Africa in 2015 and almost 1 in 10 of the most popular hashtags in 2015 related to political issues and politicians.¹³³ This connotes a rise in political posts from Africa. Noteworthy, in the exercise of the right to participation, the ‘will of the people must be expressed in elections, which must be “periodic” and must be “genuine”’.¹³⁴ The ‘freely chosen’ requirement of the right to democratic participation denotes that the people’s right to vote is not undermined by coercion, intimidation, or deception.¹³⁵

But deepfake does exactly the opposite. The underlying aim of deepfake is deception. As it relates to democratic participation, the objective of deepfake could be political manipulation. Political opponents could superimpose the faces of their main opponents, saying and doing things never said or done.¹³⁶ ‘A well-timed deepfake’, states Langa, ‘distributed when there is enough window for the fake to circulate but not enough window for the victim to debunk it effectively’, could influence the outcome of an election by creating a ‘decisional chokepoint: [a] narrow window of time during which irrevocable decisions are made, and during which the circulation of false information, therefore, may have irremediable effects’.¹³⁷ While in developed societies, there is doubt on the exact impact of deepfakes on election and democratic process,¹³⁸ the peculiarity of the situation in Africa — illiteracy, the lack of a

131 See *Gomez Lund v. Brazil* 24/2010 IACtHR Series C 219 (2010); McDonagh (n 91).

132 A Erlich et al ‘Using communications technology to promote democratic participation: Experimental evidence from South Africa’ 2022 https://gps.ucsd.edu/_files/faculty/mcintosh/mcintosh_SA_ICT_EDCC_Resubmit_220920.pdf (accessed 12 May 2023).

133 ‘How Africa Tweets’ <https://portland-communications.com/publications/how-africa-tweets-2016/> (accessed 12 May 2023).

134 Udombana (n 9) 1250.

135 Fox (n 7) 570.

136 Hall (n 4) 51.

137 Langa (n 43) 773.

138 As above 772.

framework, and military rule and unconstitutional changes¹³⁹ – calls for particular attention.

In recent months, there have been reports of deepfakes threatening the democratic landscape in the Gambia,¹⁴⁰ Mali,¹⁴¹ and South Africa.¹⁴² Deepfake has also been used as a ‘defence-to-truth strategy’ in Nigeria, thereby undermining the right to democratic participation. For instance, in 2018, a video emerged online of a Nigerian Governor stuffing his Babaringa¹⁴³ with bundles of US Dollars.¹⁴⁴ Though many critics believed that the video was real, the Governor has consistently maintained that the video was ‘cloned’.¹⁴⁵ The proliferation of deepfake software apps provided the opportunity to deny the authenticity of the video. The ‘defence-to-truth strategy’ adopted by the Governor might have neutralised the impacts the video could have had on the Governor’s election bid in 2019. Thus, as the proliferation of deepfake software apps continues, it is imperative to design a framework to address their human rights concerns. Because most African States – with the increase in *coup d’états* in recent years – have weak democratic institutions. Human rights stakeholders on the continent need to pay particular attention to deepfake and its negative effects on the right of African people to participate freely in government.

5 Recommendations and conclusion

This article argues that the relationship between the right to democratic participation and deepfake is not at arm’s length. Though the most obvious human rights implicated by deepfake are the right to information, the right to dignity, and the right to privacy, the interdependence and the interrelation between the right to democratic participation and the right to information means that the former is affected by the proliferation of deepfake software apps. In developed countries, the first effort shown in addressing the deepfake problem is by identifying its potential impact. Also, governments have partnered with private companies to find a solution to the problem.¹⁴⁶ Whereas in Africa, since the call by the African Commission to African states in 2021 to ‘work towards a

139 Mbondenyi (n 50) 187.

140 Okunoye (n 41).

141 Bennett (n 125).

142 L Nweti ‘Deepfakes go South African – Ramaphosa in video of plan to tear down Voortrekker monument and Loftus’ 15 April 2023 <https://mybroadband.co.za/news/internet/487811-deepfakes-go-south-african-ramaphosa-in-video-of-plan-to-tear-down-voortrekker-monument-and-loftus.html> (accessed 12 May 2023).

143 *Babaringa* is a big traditional dress worn by the Hausa tribe in Nigeria.

144 ‘Ganduje in the eye of the storm’ 10 October 2021 <https://www.thisdaylive.com/index.php/2021/10/10/ganduje-in-the-eye-of-the-storm/> (accessed 12 May 2023).

145 As above.

comprehensive legal and ethical governance framework for AI technologies, robotics and other new and emerging technologies to ensure compliance with the African Charter and other regional treaties'.¹⁴⁷ There is little evidence that African states have responded to this clarion call. Of course, the starting point in addressing the problem is as stated by the African Commission: a policy design approach where extensive research precedes the formulation of a framework. A point not canvassed, however, by the African Commission, and which is important in addressing the problem, is the necessity of African states partnering with technology companies in addressing this problem.

It is also recommended that human rights stakeholders in Africa, including civil organisations and NGOs, should increase their efforts in educating Africans about the negative impact of deepfakes and their effects on human rights, particularly on the right to democratic participation. One way this may be achieved is through conferences, seminars, publications in media, and reports by organisations and law enforcement agencies. In Africa, the African Commission, under its promotional role needs to take the lead in this quest. Lastly, African states should formulate laws and policies to address the impact of deepfakes. Such laws should, however, comply with human rights standards and may not be so stringent that they violate the right of Africans to freely express themselves.

146 For instance, 'Voight-Kampff' tests are being used by the United States government in partnership with technology companies to determine if content is a deepfake. see Caldera (n 33) 181.

147 Resolution 473 (n 44) para 4.