

REGULATION OF FREE SPEECH AND THE ABUSE OF SOCIAL MEDIA IN AFRICA: LESSONS FROM THE UNITED STATES OF AMERICA

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ABSTRACT

Information communications technology through social media has brought very good innovations. There is an upsurge in cases of hate speech and fake news. To check this, states adopt different approaches. While some states prefer statutory responses, others prefer non-statutory. However, in Africa, largely penal government responses are perceived as infringements on the constitutionally guaranteed rights to freedom of expression and violations of international standards. The objective of this paper is to examine how freedom of speech can be enjoyed while still minimizing fake news. This paper doctrinally evaluates the inappropriate use of social media in Africa and the criminalisation of certain speeches in Africa using statutes, constitution, law reports, and conventions., The paper finds that freedom of speech has been suppressed by state apparatus and legislation and recommends legislative control of social media, drawing from the lessons of the experiences of the USA.

Keywords: Freedom of Expression; hate speech, fake news, social media, Africa.

1. Introduction

Information and Communications Technology (ICT) has altered how people live their lives, do business, and interact. One area it has had a tremendous impact is the area of dissemination of information and mass communication. Particularly, it has taken freedom of expression (FE) to a level where free speech (FS) is almost devoid of state control and censorship. The increasing usage of the internet and social media (SM) has broken down traditional walls on the dissemination of information¹ and has provided a fast and affordable platform for people to express themselves unimpeded. For Bande, ICTs are a critical feature and the very symbol of the modern 'information and knowledge society, connecting people and places worldwide in ways previously unimaginable.'² Regrettably, despite the promotion of FS, ICTs bring the gains are often diminished by the actions of those who use them negatively. Although SM provides a unique platform that augments FE, it is a source of concern as it has given rise to new challenges in information communication management. This is because it has become a tool for the proliferation of hate speeches (HS) and fake news (FN), which are often intended to victimize people or organizations for latent or manifest intentions, which could be for political, economic, or ethnic reasons, amongst others. This is more so as, unlike traditional media, it is difficult to check facts and filter content before they are published, as every SM handler has complete control over what they post, especially as there are no gatekeepers like editors of traditional media outlets.³

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¹ Isaac Rutenberg and Abdulmalik Sugow, 'Regulation of the Social Media in Electoral Democracies: A Case of Kenya' *SOAS Law Journal* (2020) 7(1), 302.

² Lewis Chezan Bande, "A Case for Cybercrime Legislation in Malawi," *Malawi Law Journal* 5, no. 2 (2011): 93.

³ Isaac Rutenberg and Abdulmalik Sugow, 'Regulation of the Social Media in Electoral Democracies: A Case of Kenya' (n 2) 308.

In several countries, including Germany, the USA, India, Myanmar, Sri Lanka, Kenya, and Nigeria,⁴ social media has been used to influence elections, promote ethnic and religious differences, and incite violence and hatred. For instance, it is believed that social media had a heavy impact on the 2016 and 2020 United States of America Elections, as there were several fake stories peddled about, just to discredit some candidates.⁵ This was also seen in the 2017 elections and elections in several African countries.⁶ In Nigeria, it is believed in some quarters that SM influenced the outcome of the 2015 Presidential elections.⁷

Consequently, many countries, including Germany, Italy, France, Spain, and the US, have introduced or are considering the introduction of legislation to check fake news and hate speech.⁸ However, the regulation of social media could impede free speech depending on how the regulations are conceptualised and implemented. For instance, for those who perceive FS from a libertarian perspective, free speech cannot be limited because it is an unqualified right.⁹ For instance, the US First Amendment protects some offensive speech to sustain the pursuit of truth and allow citizens to express themselves freely.¹⁰ This thinking, Workneh concludes, is based on the need for free speech to be devoid of state interference or censorship, as worthy speech shall triumph in the end. This is because state interference may compromise freedom of speech as political dissents will be classified as hate speech.¹¹ However, there are arguments against the idea of free speech absolutism. Sivanandan opines that membership of a state implies that individuals have ceded part of their rights to the state for the mutual benefit of citizens. Thus, in modern societies, freedom of expression would admit of some exceptions to sustain peace and harmonious co-existence of all members of the society.¹² It is against this background of divergent perspectives that this paper examines the existing and proposed legislative measures to control the use of SM in some African countries.

This paper seeks to address the following questions: Firstly, are there adequate domestic and international legal instruments to regulate abuse of freedom of expression online, secondly, should HS and FN be curtailed through criminal sanctions and restricting of internet access, thirdly, can the SM be regulated without curtailing the FE and free speech? Fourthly, are there lessons the experience of the United States presents to Africa in its quest to check the spread of HS and FN through the SM? This paper will proceed by evaluating the international standards for FE. The next part of the paper will evaluate existing local and international laws in Africa that regulate freedom of expression to see if they are adequate. It will conclude by examining the experience of the USA and recommend the control of SM drawing from the experiences of the USA.

2. International standards for freedom of expression.

⁴ Ibid 322.

⁵ University of Maryland, Division of Research, 'Social Media's Impact on the 2020 Presidential Election: The Good, the Bad and the Ugly' available at < <https://research.umd.edu/articles/social-medias-impact-2020-presidential-election-good-bad-and-ugly> > Accessed 26 June 2022.

⁶ Martin N. Ndlela and Winston Mano, 'The Changing Face of Election Campaigning in Africa' in Martin N. Ndlela and Winston Mano (eds), *Social Media and Elections in Africa*, Volume 1, 2020, Palgrave Macmillan, 1-12.

⁷ Raymond Adibe, Cyril Chinedu Ike and Celestine Uchechukwu Udeogu, 'Press Freedom and Nigeria's Cybercrime Act of 2015: An Assessment,' *Africa Spectrum*, (2017) 52, 2, 125.

⁸ Abdulmalik Sugow, 'The Right to Be Wrong: Examining the (Im) Possibilities of Regulating Fake News While Preserving the Freedom of Expression in Kenya' *Strathmore Law Review* 4 (2019), 22.

⁹ Téwodros W. Workneh, 'Ethiopia's Hate Speech Predicament: Seeking Antidotes Beyond a Legislative Response' *African Journalism Studies*, (2019) 40:3, 124

¹⁰ Ibid 124

¹¹ Ibid 124-125

¹² Cited in Téwodros W. Workneh Ethiopia's Hate Speech Predicament: Seeking Antidotes Beyond a Legislative Response, (n 9) 125.

Freedom of expression is one of the fundamental human rights guaranteed by Article 19 of the Universal Declaration of Human Rights (UDHR).¹³ Although UDHR does not have legal force, it is the foundation for the introduction of other relevant binding instruments. The International Covenant on Civil and Political Rights (ICCPR)¹⁴ is the main instrument at the UN level that regulates FE. In particular, article 19 of the ICCPR guarantees the rights of people to express themselves freely and have personal opinions unfettered, including the right to seek, receive, and impart information in any form and through any media.¹⁵ Notwithstanding the foregoing, the rights are subject to necessary restrictions by law, such as the need to protect national security of public health, morals, and the rights and reputation of others.¹⁶ Also, the rights can be restricted by law if it is used to promote war, racial, national, or religious hatred that could incite discrimination, hostility, or violence.¹⁷ Freedom of expression is not an absolute human right like the right to life, as it can be derogated from under certain conditions in the public interest.¹⁸

The Human Rights Committee (HRC), which has the mandate to oversee all human rights issues at the United Nations (UN), issued General Comment 34 in 2011 to determine when and how the right to FE can be restricted. Accordingly, paragraphs 21, 22, 23, 24, 25, and 52 provide that it is only in regard to Art 20 ICCPR that states can justifiably impose legal restrictions on FE. Additionally, paragraph 26 provides that such laws restricting the right to FE must not be discriminatory and comply with article 19(3) ICCPR. Paragraphs 9 and 49 of the comment protect all forms of public opinion and bar any general restriction on the holding of opinion, whether the opinion is erroneous or not. In Paragraph 47, the comment provides that defamation laws must be couched in a way that does not gag the right to FE. Paragraph 7 provides that all organs of a state party have a binding obligation to respect the right to freedom of opinion and expression and to give effect to the rights provided in article 19 of the ICCPR in their domestic laws in line with general comment No. 31. Paragraph 11 guarantees freedom of expression in all its ramifications while paragraph 12 protects all forms of expression irrespective of the mode of expression including oral, written, sign language and such non-verbal expression such as images and art works. Paragraphs 13 -17 require that for the sustenance of democracy, the right to freedom of opinion and expression must be guaranteed by the existence of a free and uncensored press. Paragraphs 33 and 34 demand that all restrictions must be necessary and not overboard. Paragraph 35 mandates that states show the specific nature of the perceived danger and the link between the expression and the threat. Paragraphs 39 and 40 expect that the regulation of the media conforms to article 19(3), and new media should not be controlled in such a way that would affect the right of people to express themselves freely. Paragraph 42 specifically provides that the punishment of media organisations, publishers or journalists because of their criticism of the government or the political system cannot fall under any of the grounds for justifiable restrictions. While Paragraph 43 provides that ‘any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3.’

Generally, under the ICCPR, infringements can only be justified if they are provided by law, meet one of the legitimate aims enumerated in Articles 19(3) and 20, and are necessary and proportionate to the legitimate aims in Article 19(3).¹⁹ In practice, relying on the ICCPR and the

¹³ 1948.

¹⁴ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49

¹⁵ Art 19(2) ICCPR

¹⁶ Art 19 (3) IVVPR

¹⁷ Art 20(1-2)

¹⁸ See art. 7 and 12 of the International Covenant on Civil and Political Rights (ICCPR)

¹⁹ Article 19 of the International Covenant on Civil and Political Rights (ICCPR)

General Comments, justification of human rights infringements is evaluated through five elements: it must be provided by law, for a legitimate aim, be suitable to achieving the legitimate aim, necessary and proportionate (reasonable) in light of all relevant interests. It therefore follows that apart from the fact that an infringement is provided by law, it must be in furtherance of a legitimate aim provided in Article 19(3) and 20 of ICCPR and must be suitable and necessary to achieve the legitimate aim. Also, it will meet the necessity test, which means it must be clear that the legitimate aim cannot be achieved without limiting the right to FE. Lastly, the restriction should be reasonably proportionate considering the competing interests and the legitimate aim. It is argued that the use of criminal sanctions to curtail the right to FE and the blocking of internet access may, in many cases, be disproportionate and may be inconsistent with the provisions of Article 19(3) and 20. This is more so as the HRC expects states to decriminalise defamation and apply criminal laws only in very serious cases, and not as a tool to protect public officers from criticism, as public officers are expected to tolerate more criticisms and opposition.

No doubt, digitalisation has brought new challenges to the rights of people to express themselves freely. To reiterate, the increasing dependence on online media platforms for the dissemination of information has introduced a new dimension to the management of information communication. Dealing with these new challenges has elicited different responses across the globe, including criminalising offensive speeches, shutting down internet access, blocking or filtering websites, and restriction SM handles. The issue is whether criminalising some forms of expression and restriction of internet is justifiable on any grounds. The joint declaration by the UN Special Rapporteur on the promotion and protection of the right to Freedom of Opinion and Expression, the Special Rapporteur for Freedom of Expression of the Inter-American Commission, the Organization for Security and Cooperation in Europe (OSCE) Representative, and the African Commission on Human and Peoples Rights (AfComHR) issued in 2011 emphasised that ‘cutting off access to the Internet, or parts of the Internet, for whole populations or segments of the public...can never be justified, including on public order or national security grounds.’ Also, in 2017, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression reiterated that a total shutdown of the network cannot in any way conform to the necessary standards stipulated in Article 19(3) ICCPR.²⁰ It is argued that blocking of internet access is justifiable only if they meet the conditions provided in Article 19(3) of the ICCPR.²¹ This is because protection of FE could extend to offensive expressions like fake news.²² Also, blocking websites and the internet invariably shifts liability to intermediaries²³ like the host of SM platforms for the actions of their users. International standards for FE expect that intermediaries should not be compelled to interfere with the content or with the digital traffic on their platforms and are not held accountable for content posted by users or be mandated to monitor content, unless in obedience to an order of court that requires the deletion of the content. The UN basically believes that freedom of expression is crucial to sustainable development and the

²⁰ UN Human Rights Council, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’ Available at < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/077/46/PDF/G1707746.pdf?OpenElement> > Accessed 22 June 2022.

²¹ *Bhasin v Union of India* petition(civil) No. 1031/2010 where the Indian Supreme Court held that indefinite suspension of internet services and orders for internet shutdown would be unjustifiable unless they meet the tests of necessity and proportionality including on grounds of national security. Available at < <https://globalfreedomofexpression/cases/bhasin-v-Union-of-India/> > Accessed 22 June 2022.

²² ‘The Joint Declaration on Freedom of Expression and Fake News, Disinformation and Propaganda, 2017’ < <https://www.osce.org/fom/302796> > Accessed 22 June 2022.

²³ An intermediary is any organization which provides services that gives people access to internet enabled services.

enjoyment of other human rights,²⁴ and therefore, States facilitate the enjoyment of this right and the means to enjoy this right, including internet access.²⁵

Apart from international legal frameworks, there are also relevant regional and sub-regional instruments in Africa. Africa has legal instruments, institutions and courts that protect FE, like the African Charter on Human and Peoples Rights (ACHPR),²⁶ which were introduced before the advent of the internet. In addition to protecting free speech, the AfComHR adopted the Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019(DPFEAI).²⁷ DPFEAI affirms the right to receive, express and disseminate information as provided in Article 9 of the ACHPR.²⁸ Before then, the AfComHR in 2002 issued a Declaration of Principles on Freedom of Expression in Africa, which among other things declared the right to impart and receive information as a fundamental human right and an indispensable component of democracy and that legal restrictions on FE must be for a legitimate purpose and necessary. In addition, the dissemination of information of public interest should not be limited by privacy laws.²⁹

On the other hand, the African Court on Human and Peoples Rights (AfCtHR), which is responsible for the adjudication of violations of Human Rights, has, through its decisions, provided some protection for freedom of expression. For instance, in *Lohe Issa Konatte v The Republic of Burkina Faso*,³⁰ the Court upturned the conviction of a journalist for making a defamatory newspaper publication alleging that a state prosecutor is corrupt on the grounds that it was a disproportionate interference with the applicant's right to FE. Interestingly, courts in some African countries have followed this decision. For instance, the High Court of Kenya in *Jacqueline Okuta & Attorney General & 2 Others*,³¹ the Constitutional court of Lesotho in *Peta v Minister of Law, Constitutional Affairs and Human Rights*³² and the Zimbabwean case of *MISA Zimbabwe, v Minister of Justice*³³ held that criminal sanctions for defamation was an infringement on the right to expression and therefore unconstitutional. Also, the Economic Community of West African States (ECOWAS) Court of Justice (ECOWAS Court), in *Federation of African Journalist and others v The Gambia*³⁴ held that based on article 66.2 of the Ecowas treaty, the Gambia must amend its laws relating to criminal libel, sedition and fake news to remove criminal sanctions as it unduly restricts the right to FE. Similarly, the East African Court of Justice (EACJ) in *Mseto v Attorney General*³⁵ held that banning a Tanzanian newspaper from publishing for three years violates the right to FE. Notwithstanding the foregoing, the AfCtHR in *Lohe Issa Konatte v The Republic of Burkina Faso* seems to have suggested that restriction of freedom of expression with

²⁴ Yohannes Eneyew Ayalew, 'The Internet shutdown muzzle(s) freedom of expression in Ethiopia: competing narratives' *Information & Communications Technology Law*, (2019) 28:2, 209.

²⁵ Ibid 210.

²⁶ Article 9.

²⁷ Adopted at the at its 65th Ordinary Session which was held from 21 October to 10 November 2019 in Banjul, The Gambia to replace the Declaration of Principles on Freedom of Expression in Africa adopted in 2002 < [African Commission on Human and Peoples' Rights Legal Instruments \(achpr.org\)](#) > Accessed 17 March 2020.

²⁸ Ibid.

²⁹ Principle 1, 2 and 12.

³⁰ *Konaté v Burkina Faso* (Application No. 004/2013) [2013] AfCHPR 39.

³¹ [2017] eKLR.

³² *Peta v Minister of Law, Constitutional Affairs and Human Rights* < <https://globalfreedomofexpression/cases/peta-v-minister-of-law-constitutional-affairs-human-rights> > Accessed 21 June 2022.

³³ *MISA Zimbabwe, v Minister of Justice* < <https://globalfreedomofexpression/cases/misa-zimbabwe-et-al-minister-of-Justice-et-al> > Accessed 21 June 2022.

³⁴ *Federation of African Journalist and others v The Gambia* < <https://globalfreedomofexpression/cases/federation-of-african-Journalist-and-there-v-the-gambia> > Accessed 21 June 2022.

³⁵ EACJ Consolidated Application nos. 3 and 4 of 2019. t < <https://www.eacj.org/?cases> > Accessed 26 June 2022.

criminal sanctions could be permissible in serious and exceptional circumstances such as violence or threats against a person.

The internet, including social media, has provided the fastest, easiest, and cheapest means of disseminating information. Nevertheless, because social media is largely uncontrolled and uncensored, abuse is inevitable, hence, it has aided the spread of HS and FN. This situation has impelled governments globally to introduce legislations that curtail the right to FE.³⁶ In Africa, the popular responses to online misuse are the regulation approach, but in doing so that extreme measures have been adopted in most of the African countries reviewed in this paper as opposed to the minimalist approach adopted by countries like the US.³⁷ In some African countries, there is a growing tendency to introduce criminal sanctions and/or restrict internet access and SM sites as measures to check the increase of HS and FN. No doubt FE admits of some exceptions necessary to check offensive speeches and speeches that could incite hatred, ethnic rivalry, and wars. However, it is expected that criminal sanctions should be used only for very serious cases like incitement to war or ethnic rivalry, and to maintain peace in society. In most other cases, offensive speech can be handled civilly by encouraging further dialogue or by pursuing civil claims in court.³⁸ The right to FE is not absolute, hence, laws could be introduced to check inappropriate use of social media and proliferation of hate speech and fake news online. Parekh opines that freedom of speech is essential in sustaining a democratic society and should be protected, but a balanced approach that promotes social harmony and mutual³⁹ benefits should be adopted. He noted that hate speech is unacceptable as it could erode democratic values and limit involvement of some groups in public affairs which makes it imperative for it to be prohibited by law.⁴⁰ Historically, the need to regulate HS and FN has always been a major policy thrust by many governments, as several European countries had long ago introduced laws to discourage anti-Semitism and inciting speeches like the one that led to the holocaust after the Second World War.⁴¹

In Africa, there appears to be a preference for the criminalisation of offensive online speeches and the restriction of internet and social media access, which raises some fundamental questions. Whether it conforms to any of the grounds allowed by international standards for interference with the right to FE, that is, is it legitimate, necessary, and proportionate to the legitimate aim. In answering these questions, there is a need to look at how some African countries have responded to online fake news and hate speech through criminal legislation and arbitrary blocking of access to the internet to ascertain their conformity to international standards.

3. Criminalisation of Online Fake News and Hate Speech in Africa.

In response to harsh opposition and criticism of government officials and their policies, which are often classified as hate speech and fake news, many countries in Africa have either introduced new laws or amended existing laws to impose harsh criminal sanctions for offensive expressions online. The criminalisation of some of these expressions is done without regard to international standards of FE and the obligations of states to protect FE under international law. In some jurisdictions, the courts have invalidated the provisions of laws that seek to criminalise fake news. For instance, the Zimbabwean Supreme Court in *Chavunduka v Minister for Home Affairs*,⁴²

³⁶ Fernando Nuñez, *Disinformation Legislation and Freedom of Expression*, 10 *U.C. Irvine L. Rev.* 783 (2020), 783.

³⁷ Haraszti (2012) 'identifies two approaches to handling hate speech by states, namely "minimalist" and "regulationist."' Cited in Téwodros W. Workneh 'Ethiopia's Hate Speech Predicament: Seeking Antidotes Beyond a Legislative Response' (n 9), 127.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Téwodros W. Workneh, 'Ethiopia's Hate Speech Predicament: Seeking Antidotes Beyond a Legislative Response' (n 9) 136.

⁴² Case No. SC36/2000. Reported in 2000 (1) SLR 552.

invalidated a law criminalising false publication because it is a violation of the right to FE. This decision is consistent with the joint declaration of the United Nations (UN) Special Rapporteur on Freedom of Opinion that the right to freedom of expression is not limited to 'correct statements'.⁴³ Commenting on the introduction of laws to criminalise certain expressions online, Sugow notes that: such regulation amounts to an undue limitation on the right to FE and irrespective of whether liability is on the offenders directly as in done in Kenya or the intermediary as adopted in some other jurisdictions, the difficulties of guaranteeing that the right to FE is not curtailed persist.⁴⁴

In Nigeria, ICT has expanded the scope of free speech beyond the contemplation of existing laws, and this has made legislative response imperative to the stern rising tide of hate speech and false news online. The main law enacted to deal with ICT-related crimes is the Cybercrimes (Prohibitions, Preventions, etc) Act, 2015 (Cybercrimes Act). This law is purely criminal in its conceptualisation and therefore all its provisions relating to freedom of expression are with criminal sanctions. For instance, section 24 (1) provides to the effect that any person who intentionally post any information online that is grossly offensive or false, to annoy, 'inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred' commits an offence punishable with three years' imprisonment or a fine of ₦7,000,000.00 or both. Also, Any person who intentional transmits or causes the transmission of any communication online intended to bully, threaten, harass, or cause the fear of death, violence or bodily harm, threat to kidnap, harm a person or demand for ransom,⁴⁵ threat to harm to property, reputation, false criminal accusation and extortion⁴⁶ commits an offence punishable with 10 or 5 years imprisonment or in the alternative a fine of minimum of ₦25,000,000.00 or ₦15,000,000.00 as the case may be.⁴⁷ In addition, any publication online with internet to distribute xenophobic, racial or incite genocide is an offence punishable with 5 years' imprisonment or a fine of ₦10,000,000.00.⁴⁸ While the offences in section 24(2) are serious offences that may warrant criminal sanctions, it is contended that the offences in section 24(1) are milder and there is no justification to criminalise them. It is therefore necessary to decriminalise abusive speeches, speeches meant to injure reputation, and annoying speeches under section 24, as they can conveniently be dealt with by civil remedies. This is because, this provision could be manipulated by state actors to clamp down on citizens critical of government officials and their policies.

Nigeria has had a long history of criminalising expressions it considers offensive. For instance, although civil defamation, which encompasses libel and slander, has been incorporated into the Nigerian legal system for a long time,⁴⁹ Nigeria has also adopted criminal sanctions for defamation. Interestingly, section 375 of the Criminal Code Act⁵⁰ provides to the effect that anyone who publishes any defamatory matter shall be liable to imprisonment for a year, and if he knows that the defamatory matter is false, he shall be liable to imprisonment for two years. This provision shows the propensity to impose criminal sanctions as restrictions on freedom of expression and the treatment of the abuse of free speech as criminal offences. In addition, there are several other provisions of the law criminalising some expressions. For instance, publication of false news with the intent to cause fear and alarm to the public is punishable with three years'

⁴³ Abdulmalik Sugow, 'The Right to Be Wrong: Examining the (Im) Possibilities of Regulating Fake News While Preserving the Freedom of Expression in Kenya' (n 8) 32.

⁴⁴ Ibid 19-46.

⁴⁵ Section 24 of the **Cybercrimes (Prohibition, Prevention, etc.) Act 2015**

⁴⁶ Ibid, S 24(2) (c)

⁴⁷ Ibid, s 24(2) (i) (ii)

⁴⁸ Ibid s 26(1).

⁴⁹ *Ajakaiye v. Okandeji* [1972] 1SC 92).

⁵⁰ Cap 77, LFN 2004.

imprisonment,⁵¹ and defamation of a foreign state or its sovereign is punishable with two years' imprisonment.⁵² Also, the importation, publication, or distribution of seditious materials is punishable with at least two years imprisonment or an option of a fine.⁵³ Notwithstanding the existence of these laws, there have been two futile attempts to introduce special laws to regulate social media and check the proliferation of hate speech and fake news in Nigeria. Firstly was the proposed Frivolous Petition Bill 2015,⁵⁴ which provides for two years imprisonment or a fine of ₦2,000,000.00 for anyone or group of persons who circulates false messages or abusive statements to other persons or government institutions on social media.⁵⁵ The bill was abandoned by the senate because of strong opposition by civil society groups who argued that the bill is intended to gag online media practice and activism in Nigeria.⁵⁶ Similarly, the Hate Speech Bill was introduced in 2018 but was withdrawn and reintroduced in 2019. The bill imposes a life sentence and, where there is a loss of life, a death sentence on anyone who publishes or distributes any material that is threatening, abusive, insulting, or capable of stirring ethnic hatred.⁵⁷ While the Protection from Internet falsehood and Manipulation Bill 2019 seeks to criminalise any statement likely to prejudice national security or diminish public confidence in the government. It imposes three years imprisonment or an option of a fine or both.⁵⁸ This bill, it is argued, is an attempt to criminalise criticisms of government officials and policies.⁵⁹ These bills suffered heavy criticisms and were seen as an attempt to overregulate the media and limit the right to freedom of expression.⁶⁰

In Kenya, HS and FN have been known to influence elections, particularly the 2017, and instigate ethnic rivalry. While the extent of the impact of HS and FN on SM may not be easily ascertainable, there are concerns about the spread of false information online, especially during elections in Kenya.⁶¹ This has provoked government reactions in some cases and prompted the introduction of more stringent regulations. Although section 96 of the Kenyan Penal Code bars incitement to violence and section 132 of the Penal Code protects public officers against some expressions, the limitations of relying on general laws to address issues of HS and FN led to the enactment of the Computer Misuse and Cybercrimes Act (Kenya Cybercrimes Act).⁶² Section 22(1) of the Kenya Cybercrimes Act criminalises the publication of false, misleading, or fictitious data online. The constitutionality of this Act was unsuccessfully challenged in *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others*.⁶³ Also, the Kenya Information and Communication Act was amended to regulate the use of social media and specifically, provides for licensing of social media platforms and bloggers and control of user behaviour, which are considered threats to the

⁵¹ S 59 Criminal Code.

⁵² S 60 Criminal Code.

⁵³ S 51 Criminal Code

⁵⁴ Senate Bill 143.

⁵⁵ S 4.

⁵⁶ Ujunwa Ochulo, 'Senate Throws Out Social Media Bill' (*The Guardian*, 17 May 2016)

<<https://guardian.ng/news/senate-throws-out-social-media-bill/>> accessed 29 March 2022..

⁵⁷ Queen Esther Iroanusi, 'Important Things to Know About Nigeria's Hate Speech Bill' (Premium Times, 17 May 2016) <<https://www.premiumtimesng.com/news/headlines/362633-explainer-important-things-to-know-about-nigerias-hate-speech-bill.html>> accessed 29 March 2022.

⁵⁸ S 3.

⁵⁹ Aniete Ewang, 'Nigerians Should Say No to Social Media Bill' (Human Rights Watch, 26 November 2019)

<<https://www.hrw.org/news/2019/11/26/nigerians-should-say-no-social-media-bill>> accessed 29 March 2022.

⁶⁰ Tonnie Iredia, 'Social Media and Guerilla Legislation in Nigeria' (*The Vanguard*, 27 June 2021)

<<https://www.vanguardngr.com/2021/06/social-media-and-guerilla-legislation-in-nigeria/>> accessed 29 March 2022..

⁶¹ Isaac Rutenberg and Abdulmalik Sugow, 'Regulation of the Social Media in Electoral Democracies: A Case of Kenya' (n 2) 303–304

⁶² No 5 of 2018

⁶³ Petition 206 of 2018

privacy of users.⁶⁴ However, some of its provisions stifle FE. The criminalisation of fake news in Kenya has been resisted severally by the courts in Kenya. For instance, the High Court in *Jacqueline Okuta & another v Attorney General and 2 others*⁶⁵ held that the offence of criminal defamation is unconstitutional and could stifle free speech, as civil remedies are sufficient in regulating defamation. Similarly, in *Geoffrey Andare v Attorney General & 2 others*,⁶⁶ the court declared section 29 of the Kenya Information and Communication Act unconstitutional.⁶⁷ Furthermore, in *Robert Alai v AG & DPP*, the appellant was charged with undermining the authority of a public official under section 132 of the Kenyan Penal Code over a tweet about the President of Kenya. The court, in declaring section 132 unconstitutional, relied on Article 33 of the Kenyan Constitution, which guarantees freedom of expression, and held that people cannot be said to have the right to freely express themselves if they cannot disapprove or comment on the conduct and activities of officials of the state.

In the Gambia, the criminal Code has provisions that criminalise certain expressions considered offensive, such as libel⁶⁸ sedition⁶⁹ and false news.⁷⁰ In addition, specific laws have also been introduced to deal with expressions considered offensive in the digital space. For illustration, the Gambian Information and Communication Act (ICA) was enacted in 2009 and amended in 2013. The ICA criminalises false publication on the internet⁷¹ online dissent, criticism, or spreading of false information online, which is punishable with fines of up to Gambian Dalasi (GMD) 3 million and/or 15 years' imprisonment. This last limb was introduced by the 2013 amendments to tame online activism, especially from the diaspora, and the increasing impact of online media.⁷² However, in the Gambia, there has been some judicial intervention both at the domestic and regional levels to protect freedom of expression, which in many cases has led to the invalidation of the provisions of some laws. For instance, in 2018, the ECOWAS Court held that Gambian authorities should review and repeal sections of the Criminal Code relating to false news, sedition, and libel in its entirety.⁷³ Also in 2018, the Gambian Supreme Court declared unconstitutional section 173 of the ICA and criminal defamation. Also, the definition of sedition was restricted by the court to expressions relating to the administration of justice and the president and instead of its expanded definition which included government of the Gambia.⁷⁴

In Ethiopia, the state's monopolisation of channels of communication inadvertently limits the chances of hate speech and fake news in Ethiopia.⁷⁵ Specifically, article 9(1) of the Telecom Fraud Proclamation⁷⁶ creates a telecommunication infrastructure monopoly for the state-owned telecom industry and criminalises any attempt to provide local or international telecom service by anybody,

⁶⁴ S 29.

⁶⁵ (2017) eKLR.

⁶⁶ (2016) eKLR.

⁶⁷ Abdulmalik Sugow, 'The Right to Be Wrong: Examining the (Im) Possibilities of Regulating Fake News While Preserving the Freedom of Expression in Kenya' (n 8), 33 and 36.

⁶⁸ S 178 & 179

⁶⁹ S 51 & 52

⁷⁰ S 59 & 181

⁷¹ S 173.

⁷² CIPESA, 'Digital Rights in The Gambia' (3) <https://cipesa.org/?dl_name=briefs/Digital-Rights-in-The-Gambia-UPR-Submission-2019.pdf> accessed 26 June 2022.

⁷³ Ibid 1-2.

⁷⁴ Ibid 2

⁷⁵ Halefom H. Abraha, 'Examining approaches to internet regulation in Ethiopia', Information & Communications Technology Law (2017), 2.

⁷⁶ No. 761/2012

with between 10-20 years' imprisonment.⁷⁷ However, this is a major inhibition to the right of Ethiopians to express themselves freely. Nevertheless, SM provides a forum where people can express themselves outside the state-sponsored channels of communication. Hence, in recent times, cases of HS and FN are on the increase. However, in a bid to mitigate the hatred and ethnic tensions generated by hate speeches, the government is impelled to introduce new laws to curb hate speech and hold people accountable for public speeches. The need for regulation is propelled by the perception that there is justification to restrict speeches that demean and dehumanize others.⁷⁸ For instance, the Ethiopian Freedom of Information and Mass Media Law of 2008 regulates the mass media. Although it is doubtful if it can effectively regulate online activities, considering that it limits the concept of mass media to only the print and broadcast outlets.⁷⁹

In Malawi, the Electronic Transactions and Cybersecurity Act, 2016 (ETCA) regulates digital activities. Article 24 of the Act inhibits online communications and Article 87 criminalises offensive communications with 12 months imprisonment or an option of a fine. Article 24 of the ETCA enables the state authorities to limit or technically restrict online

Make sure to include full citation details when referencing sources in footnotes and provide a bibliography if needed. If you need adjustments or additional details, let me know! Communication to protect national security and public order.⁸⁰ However, there are concerns that the ETCA inhibits human rights and could limit FE in the digital world, especially as the objective of the law is to censor online content. For instance, in 2016, some members of opposition political parties were charged with treason on allegations of planning a coup on WhatsApp; they were, however, discharged by the Court in 2017 for want of evidence.⁸¹ The ETCA has, in some instances, been deployed to unjustifiably limit FE in Malawi. In 2019, a bank clerk was charged with offensive communication for likening the then-Malawi first lady to a cartoon character, 'Rango', on Facebook. He was granted bail pending trial, and one of the conditions for his bail is a total ban from making any statement on SM about the former President's wife.⁸² Also, an activist, Manes Hale, was arrested in 2018 by the Malawian police and charged with abusing the President on Facebook under Section 4 of the Protected Flag, Emblems and Names Act.⁸³

Botswana generally recognises the right to FE; notwithstanding this, over the years, some policies and laws have restricted the right to FE, especially on the internet. For instance, sections 192-199 of the Botswana Penal Code criminalise some categories of expressions, including defamation, and section 93 of the Penal Code prohibits abusive, obscene, or insulting language against state officials. section 95 and 96 of the Penal Code prohibit any speech that could incite breach of peace or violence.⁸⁴ Although these provisions do not expressly mention online activities, they have often been deployed to prosecute online offenders, especially those people who are critical of the

⁷⁷ Temesgen Aschenek Zeleke, 'The Quandary of Cyber Governance in Ethiopia', *Journal of Public Policy and Administration* (2019); 3(1), 4-5.

⁷⁸ Téwodros W Workneh, 'Ethiopia's Hate Speech Predicament: Seeking Antidotes Beyond a Legislative Response' (n 9) 127

⁷⁹ Kinfe Micheal Yilma and Halefom Hailu Abraha, 'The Internet and Regulatory Responses in Ethiopia: Telecoms, Cybercrimes, Privacy, E-Commerce, and the New Media' (2015) 9(1) *Mizan Law Review* 151-152.

⁸⁰ Michael Kaiyatsa, 'Digital rights remain under threat in Malawi despite historic win for democracy' Available at < <https://advox.globalvoices.org/2020/08/05/digital-rights-remain-under-threat-in-malawi-despite-historic-win-for-democracy/> > Accessed 26 June 2022.

⁸¹ Ibid.

⁸² Ibid

⁸³ Wongani Chiuta, 'I want a better Malawi: Manice Hale accused of Insulting President returns to US after State drops case' *Nyasa Times*, 28 August 2018. Available at < <https://www.nyasatimes.com/i-want-a-better-malawi/> > Assessed 20 April 2023.

⁸⁴ State of Internet Freedom in Botswana 2019 Mapping Trends in Government Internet Controls, 1999-2019. January 2020 CIPESA, 4.

activities of the government. For example, in 2015, a journalist who made a SM post relating to the sex scandal of a government minister was charged with defamation and unlawful circulation of indecent material contrary to section 16 of the 2018 Cybercrime and Related Crimes Act.⁸⁵

Similarly, freedom of expression is generally threatened in Uganda, and this transcends beyond traditional media and has been extended to online media. Uganda enacted the Computer Misuse Act (CMA) to criminalise online content in Uganda. sections 24 and 25 of the CMA criminalise cyber harassment and offensive communication. This law has been relied on to stifle free speech, harass journalists, human rights advocates, and critics of government officials and policies.⁸⁶ For instance, in 2017, a human rights activist was charged with offensive communication and cyber harassment contrary to sections 24 and 25 of the CMA, simply because he described the head of state as ‘a pair of buttocks’ on Facebook.⁸⁷

In Cameroon, the government, in a bid to repress dissenting voices, limits the enjoyment of free speech on the pretext of fighting terrorism. For instance, the Anti-terrorism law introduced in 2017 has provisions criminalising some expressions. Since the introduction of the law, several people have been arrested and detained without trial, including a serving Supreme Court justice for expressing critical views about government policies, activities, and officials.⁸⁸ This is irrespective of the fact that the Cameroon constitution guarantees human rights and Cameroon has ratified several international human rights instruments, including the ICCPR and the African Charter. Also, by article 45 of the Cameroon Constitution, all ratified treaties and international agreements take precedence over national laws. This implies the Anti-Terrorism Law ought to apply subject to international laws on FE.⁸⁹

Notwithstanding the foregoing, international standards permit the criminalisation of certain expressions. For instance, the United Nations Convention on the Elimination of All Forms of Racial Discrimination allows states to criminalise expressions, acts of violence or incitement that promote racism, ethnicity or hatred against any race or group of persons. However, the approach by the African countries reviewed above shows a tendency to criminalise all expressions that are critical of government actions and officials. This is unacceptable as free speech is critical to the sustenance of democracy and allows truth to thrive in society.⁹⁰ Hence, laws that limit free speech can only be justifiable and permissible when they are reasonable and intended to protect the reputation and rights of others.⁹¹

4. Restriction of Internet Access and Banning of Social Media Platforms

Communication rights are significant because they help to accentuate the right to FE and by extension, the realisation of other human rights.⁹² However, they could be curtailed to promote public safety, peace, and to guard the reputation of other people. In curtailing these rights, it is

⁸⁵ State of Internet Freedom in Botswana 2019 Mapping Trends in Government Internet Controls, 1999-2019. January 2020 CIPESA, 11.

⁸⁶ Solomon Rukundo, ‘My President is a Pair of Buttocks: the limits of online freedom of expression in Uganda’ *International Journal of Law and Information Technology*, (2018), 26, 252.

⁸⁷ Ibid 252.

⁸⁸ Jean-Claude N. Ashukem, ‘To give a dog a bad name to kill it – Cameroon’s anti-terrorism law as a strategic framework for Human Rights’ Violations, *Journal of Contemporary African Studies*, (2021) 39 (1), 125-128.

⁸⁹ Ibid 125.

⁹⁰ Ammar Oozeer, ‘Internet and social networks: freedom of expression in the digital age, *Commonwealth Law Bulletin*, (2014) 40:2, 344

⁹¹ Emily Howie (2018) Protecting the human right to freedom of expression in international law, *International Journal of Speech-Language Pathology*, 20:1, 12.

⁹² Sharynne McLeod (2018) Communication rights: Fundamental human rights for all, *International Journal of Speech-Language Pathology*, 20:1, 4.

important not to use measures that may completely erode the right to FE. Some countries have, in addition to using criminal sanctions to address issues of HS and FN, resorted to restricting websites and internet access. Also, because some state actors are involved in the peddling of FN, often as a propaganda tool to control public opinion,⁹³ platforms have sometimes been blocked for taking off offensive posts by powerful politicians, especially in Africa, where freedom of expression is constantly threatened. A recent report by the UN special Rapporteur indicates that there have been cases of mass surveillance, censoring of social media, and extended Internet shutdowns in several countries in Africa.⁹⁴ Sometime ago, the Nigerian government banned Twitter for seven months, for allegedly violating Nigerian laws, after it deleted a tweet by the President of Nigeria.⁹⁵ This was done under some existing laws that regulate cyberspace, like the Nigerian Communications Act 2003, which, among other things, gives the Nigerian Communications Commission powers to direct telecommunication infrastructure providers and internet service providers to block any network based on national security.⁹⁶ Also, the Nigerian Broadcasting Commission Act (NBC ACT) is another Act that could impact freedom of expression online. The NBC gives the Nigerian Broadcasting Commission powers to regulate and license broadcasting on radio, television, cable television services, direct satellite broadcast, and any medium of broadcast,⁹⁷ which certainly will include online streaming and online broadcasting. This power certainly includes the power to withdraw or ban any of these media outlets.

Apart from Nigeria, other countries have also adopted this method to deal with offensive expressions. For instance, the Gambia under the Yaya Jammeh regime blocked over 20 websites belonging to the opposition and independent media outfits critical of the government.⁹⁸ More worrisome is the fact that the only telecommunication company permitted in the Gambia is the government-owned Gambia Telecommunication Company,⁹⁹ which makes it very easy to restrict internet access in Gambia. Arguably, the monopolisation of ICT infrastructure by a state infringes on the right to FE as it limits the options for people to communicate in a forum of their choice. It also exposes the citizens to extreme censorship, considering that a state media is not likely to allow any material critical of the state and its officials. Similarly, Kenya, in response to harsh criticisms against the government, had on some occasions shut down the internet based on the provisions of the Kenyan Computer Misuse and Cybercrimes Act.¹⁰⁰

Likewise, in Ethiopia, there are indications that freedom to communicate online is threatened due to the frequent restrictions on connectivity and internet shutdowns.¹⁰¹ The authority's based on National security and prevention of exam malpractice, have shut down the

⁹³ Samantha Bradshaw and Philip N. Howard, *Challenging Truth and Trust: A Global Inventory of Organized Social Media Manipulation*, University of Oxford Computational Propaganda Research 1-4.

⁹⁴ A/HRC/41/41, 2019; Enrico Calandro, 'Unpacking Cyber-Capacity Building in Shaping Cyberspace Governance: the SADC case' 10.

⁹⁵ Emmanuel Akinwotu, 'Nigeria Lifts Twitter Ban Seven Months after site deleted President's post; The Guardian. Available at < <https://www.theguardian.com/world/2022/jan/13/nigeria> > accessed 28 March 2022.

⁹⁶ Adeyemi Adepotun, 'NCC, telcos block access to Twitter in Nigeria' *The Guardian* Available at < <https://editor.guardian.ng/news/ncc-telcos> > accessed 28 March 2022.

⁹⁷ S 2(1).

⁹⁸ Adam Withnail, 'Gambia election: Government shuts down internet as President Yahya Jammeh faces threat to 22-year rule' *Independent* Available at < <https://www.independent.co.uk/news/world/africa/gambia-election> > Accessed 26 June 2022.

⁹⁹ CIPESA, 'Digital Rights in The Gambia', (n 78) 4.

¹⁰⁰ Ibid; Isaac Rutenberg and Abdulmalik Sugow, 'Regulation of the Social Media in Electoral Democracies: A Case of Kenya' (n 1) 303-304.

¹⁰¹ Temesgen Aschenek Zeleke, 'The Quandary of Cyber Governance in Ethiopia Journal of Public Policy and Administration' (n 81) 834-5.

internet severally times since 2016.¹⁰² Also, a State of Emergency Directive was introduced in 2016 to allow the restriction of mobile services and internet access by the government without an order of court.¹⁰³ In Malawi, although there are hardly cases of blocked websites, online communications are subject to some official manipulations through directives to web editors¹⁰⁴ to block content on social media or shut down access to social media platforms.¹⁰⁵ This is similar to what was obtained under the repealed Malaysia Anti-Fake News Act, that puts an obligation on platform administrators to expeditiously remove offensive content.¹⁰⁶ This is also the position under the Singaporean Online Falsehoods and Manipulation Act 2019, which imposes a responsibility on platform administrators to give rectification notices to end users where the authorities declare a speech untrue, and platform administrators could be required to disable accounts of users.¹⁰⁷

5. Lessons from the USA in Dealing with Offensive Expressions

In the USA, there have been cases of HS and FN over the years, and even in traditional media, there were cases of newspapers being politically biased and often used to make up false and libellous stories against political opponents.¹⁰⁸ This attitude was carried over to social media and was at play in the 2016 United States Elections, where fake news disseminated largely through Facebook and Twitter may have had a significant impact on campaign debates.¹⁰⁹ The challenge today is that ICT accentuates the impact of HS and FN, which demands new strategies and policies to regulate cyberspace. The USA arguably has the highest form of protection for freedom of speech. Hence, it is important to evaluate how it regulates cyberspace and contend with the challenges of HS and FN without infringing on the right of persons to express themselves.

The US Constitution, First Amendment gives almost absolute protection to FE, making it difficult for any government to restrict it by legislation. The US Constitution, First Amendment, expressly bars Congress from enacting any legislation that restricts FS. This is hinged on the principle that it is not justifiable to prevent an individual from expressing his opinion only because others may find it offensive.¹¹⁰ Although the US is a party to the ICCPR, it became a party with a reservation to Article 20 to the effect that the article will not demand any action by the USA that could limit the right to freedom of speech and association guaranteed under the US Constitution and laws.¹¹¹ Hence, regulation of content online is largely at the option of the host of each particular platform through the enforcement of the internal standards.¹¹² In addition, section 230(c) of the Communications Decency Act of 1996 (CDA) provides some immunity for platform hosts against offensive content posted by users on their platforms. Hence, the US Supreme Court held that the Communications Decency Act was unconstitutional in 1997.¹¹³ It is argued that the protection of platforms from liability is to guarantee the right to free speech and restrain the platforms from

¹⁰² Yohannes Eneyew Ayalew, 'The Internet shutdown muzzle(s) freedom of expression in Ethiopia: competing narratives' (n 26) 209.

¹⁰³ Ibid 220.

¹⁰⁴ Malawi June 2016 –May 2017 Freedom House : <https://freedomhouse.org/report/freedom-net/2017/malawi> 2

¹⁰⁵ See also, Article 52 that places restrictions on encryption.

¹⁰⁶ Section 6.

¹⁰⁷ S 11.

¹⁰⁸ Ari Ezra Waldman, 'The Marketplace of Fake News', *Journal of Constitutional Law* Vol. 20:4, 846.

¹⁰⁹ Ibid.

¹¹⁰ Anne-Marie Beliveau, 'Hate Speech Laws in the United States and the Council of Europe: The Fine Balance between Protecting Individual Freedom of Expression Rights and Preventing the Rise of Extremism and Radicalization through Social Media Sites,' *Suffolk University Law Review* 51, no. 4 (2018) 565.

¹¹¹ Evelyn Mary Aswad 'The Future of Freedom of Expression Online' *Duke Law & Technology Review* vol. 17, no. 1, 37.

¹¹² Fernando Nuñez, 'Disinformation Legislation and Freedom of Expression' (n 39), 790.

¹¹³ Halefom H. Abraha, 'Examining approaches to internet regulation in Ethiopia', (n 79), 5.

overregulating to avoid breaching the law.¹¹⁴ Nevertheless, the platform host has the discretion to remove any content without state control.

Generally, the US courts are hesitant to limit free speech even when it is offensive. However, in several cases, the Supreme Court has held that dangerous speeches are not protected by the First Amendment, like words that may lead to the breach of peace.¹¹⁵ Also, in times of war, greater restrictions are permissible,¹¹⁶ and speeches that could produce imminent lawless action are not protected.¹¹⁷ Also, the court in *Brown v Hartlage* stated explicitly that falsehoods do not enjoy the same protection as truth under the First Amendment.¹¹⁸ Although there is resistance to the few exceptions to free speech the courts have allowed, the court, however, allows some limitations to freedom of speech that will not offend the First Amendment, for instance, defamatory and false statements.¹¹⁹ Thus, the tort of defamation is seen as a sufficient remedy for fake news, considering that truth is a complete defence to slander and libel suits. Based on protections in the First Amendment, for a public figure to succeed in defamation, he must prove that there was malice, that is, actual knowledge that the information was false.¹²⁰ However, about 15 states and territories in the US still have criminal libel in their laws.¹²¹ In practice, most criminal libel suits are either substituted or dismissed if the constitutionality of the criminal libel statutes is challenged. For instance, in Wisconsin's three men were prosecuted for criminal libel because on April Fools' Day in 2001, they shared satirical fake news fliers. One of them pleaded guilty to the charge and got a jail term, probation, and fines, while the second also pleaded guilty; he bargained for a reduced verdict of community service and fines. However, the last man pleaded not guilty and, interestingly, was discharged and acquitted.¹²² Some states, like New Jersey, have also introduced anti-cyberbullying laws that criminalise all online transmissions intended to harass or inflict emotional harm on other persons. However, many criminal cyberbullying laws are considered violations of the First Amendment because they contain content-based restrictions.¹²³

It has therefore been argued that to check offensive and extreme expressions online, the US has to reconsider what constitutes protected speech to reflect the realities of today's challenges of adopting ICT in modern communication.¹²⁴ In light of the foregoing, self-regulation seems to be the approach by most platforms, as many platforms have put in place policies and rules to curtail the proliferation of HS and FN.¹²⁵ For example, Facebook and Twitter take down posts they consider fake news after fact-checking, and users are encouraged to report fake news. Some platforms and websites also have terms and conditions that users are made to accept before registration. This is consistent with section 230 of the CDA, which allows private platforms a reasonable level of autonomy in deciding acceptable limitations on FE. It follows that with the rise in private sector regulation or self-regulation of content, platform hosts have assumed the role of regulators of freedom of speech like the government, and therefore they can be held accountable

¹¹⁴ Ibid.

¹¹⁵ *Chaplinsky v. New Hampshire* 315 U.S. at 569-70.

¹¹⁶ *Schenck v. United States*, 3.

¹¹⁷ *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969); Anne-Marie Beliveau, 570, 571.

¹¹⁸ Ari Ezra Waldman, 'The Marketplace of Fake News' (n 112) 857-866.

¹¹⁹ *U.S. v. Stevens*, 559 U.S. 460, 468-69 (2014)

¹²⁰ David O. Klein and Joshua R. Wueller, 'Fake News: A Legal Perspective', *Journal of internet law* (2017) vol 20, no 10, 6.

¹²¹ Ibid 9.

¹²² Ibid.

¹²³ Ibid

¹²⁴ Anne-Marie Beliveau, 'Hate Speech Laws in the United States and the Council of Europe: The Fine Balance between Protecting Individual Freedom of Expression Rights and Preventing the Rise of Extremism and Radicalization through Social Media Sites,' (n 114) 568.

¹²⁵ Evelyn Mary Aswad 'The Future of Freedom of Expression Online' (n 115) 26.

to the same international standards of protections for freedom of expression as state actors.¹²⁶ Furthermore, there is the idea of co-regulation, which allows the ICT or platform infrastructure providers to share responsibility for setting rules of conduct and enforcement mechanisms with the government. Supporters of the co-regulatory approach contend that it is not good for the government or the private sector to have exclusive control of internet regulation standards.¹²⁷ For instance, the European Commission recently adopted a collaborative approach between government and leading ICT firms like Facebook to implement a coregulatory mechanism. This approach is commendable to Africa, as reality may make it difficult for African countries to rely solely on the US model of self-regulation by the platforms.¹²⁸ The US experience provides significant lessons for Africa. Firstly, the US considers freedom of expression as fundamental to its existence and a means to the realisation of other rights and democratic tenets. Hence, in the US, free speech is protected constitutionally to encourage the free flow of ideas as it is suggested that the therapy for offensive expressions is more speech, not enforced silence.¹²⁹ Therefore, free speech should not be restricted except in very exceptional cases of falsehood and the need to promote peace and the security of generality of the general public. This implies that criminalisation of offensive speeches is rare in the US and blocking of access to the internet or websites is hardly considered as an appropriate measure to deal with offensive speeches. Also, the restriction of free speech should not be used as a measure to shield the government or its officials from public scrutiny as is the case in most African countries. Africa should consider decriminalising certain speeches, as they tend to gag people from expressing themselves. Free speech is a critical and necessary ingredient for the sustainable development of any civilised society.

6. Conclusion and Recommendations

There is hardly consensus on how hate speech and fake news should be regulated. While the liberals argue that prohibition or sanction of offensive speech is anti-democratic and infringes on fundamental human rights, others maintain that offensive speech should be regulated because it could lead to harmful consequences on the reputation and dignity of others.¹³⁰ However, African states show a preference for the regulation of offensive speech to prevent violence and the resultant harm to others. Unfortunately, in many instances, African states take advantage of the regulation of offensive speech to clamp down on political opponents, human and the media rights activist. Nevertheless, it is admitted that the regulation of offensive speech has played a significant role in reducing election violence in some African states like Kenya, Côte d'Ivoire, and Ethiopia. Also, it is arguable that ineffective regulation of offensive speech led to the increase of tribal hatred, which is largely responsible for the 2011 and 2007 post-election violence in Nigeria and Kenya, respectively.

Generally, legal response through legislation is necessary to regulate social media. However, the regulation of offensive speech affects freedom of expression significantly. There are indications that internet freedom has reduced substantially after the enactment of the Cybercrime Act in 2015.¹³¹ Again, most of the laws introduced in Africa to address issues of HS and FN did not consider the implication of existing constitutional safeguards and international standards on

¹²⁶ Ibid 67-70.

¹²⁷ Halefom H. Abraha, 'Examining approaches to internet regulation in Ethiopia', (n 79), 6.

¹²⁸ Kinfe Micheal Yilma and Halefom Hailu Abraha, 'The Internet and Regulatory Responses in Ethiopia: Telecoms, Cybercrimes, Privacy, E-Commerce, and the New Media,' 5.

¹²⁹ Ari Ezra Waldman, 'The Marketplace of Fake News' (n 112) 853-855.

¹³⁰ Nicholas Asogwa & Christian Ezeibe, 'The state, hate speech regulation and sustainable democracy in Africa: a study of Nigeria and Kenya', *African Identities* (2020), 1.

¹³¹ Raymond Adibe, Cyril Chinedu Ike and Celestine Uchechukwu Udeogu, 'Press Freedom and Nigeria's Cybercrime Act of 2015: An Assessment,' (n 7) 123.

the right to free speech. Hence, in many instances these laws infringe on the rights of FE beyond the acceptable limits of derogation from this right. The emphasis in Africa is government regulation through criminal sanctions and blocking of websites. However, there other approaches which could be legal, technical or social measures to address HS and FN. For instance, some approaches oblige platform hosts to self-regulate, and there is also a drift towards co-regulation, which allows a synergy between the government and service providers. Lastly, it is important to adopt an approach that determines the extent of liability between the user and the service provider. While it is conceded that primary liability should be on the user for the content, except that it is shown that he lost control of his account either for instance, due to hacking. In the same vein, online service providers could be liable for failure to take down offensive posts brought to their notice. It is therefore imperative for government regulations to, in addition to regulating the activities of users, also regulate platforms. It is therefore recommended that African countries should consider the ratification of the African Union Convention on Cybercrimes as a matter of urgency so that it can get the requisite ratification to come into force. Also, African countries should accede to the Council of Europe Cybercrime Convention, considering it is open for accession by any country, and it has a strong collaborative regime.