

Freedom of expression and African elections: Mitigating the insidious effect of emerging approaches to addressing the false news threat

*Marystella Auma Simiyu**

Doctoral candidate, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa

<https://orcid.org/0000-0001-7070-4917>

Summary: *African governments are increasingly enacting laws that criminalise false news or adopting practices such as internet shutdowns as strategies to address the spread of online false news during elections. These approaches have an adverse effect on the way in which citizens exercise their freedom of expression and access information necessary to develop an informed electorate that can meaningfully participate in elections. Electoral authoritarian regimes also adopt such practices to suppress critical voices and reduce the transparency and integrity of electoral processes that have been tilted in their favour. Admittedly, false news poses a threat to the quality of information in the public sphere, particularly when deployed to manipulate the decisions of voters. This article calls for more proactive and human rights-based approaches to addressing the scourge of false news. In doing so, the article juxtaposes the measures adopted by South Africa (2019 and 2021) and Tanzania (2020) in their elections. It recommends that states and other stakeholders implement media and information literacy measures and ensure that owners of digital technologies apply human*

* LLB (Kenyatta) LLM (Pretoria); marystella.simiyu@up.ac.za. This article emanates from a paper presented during a virtual conference on 'Elections and COVID-19: Harnessing the pandemic to improve elections' organised by the Centre for Human Rights, University of Pretoria, 4-5 November 2020.

rights-based approaches in their policies and practices as opposed to punitive measures and internet shutdowns. This reflects a democratic culture that is more in alignment with international laws and standards on promoting and protecting freedom of expression during elections.

Key words: *democratic elections; digital age; election integrity; false news; freedom of expression; political participation*

1 Introduction

Characterised as a fundamental freedom as well as an enabler of other rights, freedom of expression is indispensable in a free, fair, credible and transparent election process.¹ For the electorate to meaningfully exercise their right to political participation, they need to freely engage in public debate, and access accurate, relevant and credible information that guides their voting decisions. This provides further legitimacy to the electoral process.² The advancement of the internet has provided a wide spectrum of opportunities for the exercise of freedom of expression.³ It has also allowed for greater interaction between the electorate and electoral stakeholders, including political candidates and parties, election management bodies, relevant civil society organisations, election observers and even other voters. By shattering barriers of content creation and distribution, the internet has allowed for the inclusion and participation of a wider section of the polity in public debate.⁴

However, the other side of the coin reveals the dangers posed by this proliferation of online content and interaction to the democratic makeup of a country. Concerns around the quality of information online gained more prominence following the Cambridge Analytica scandal and upsurge of online false news in the 2016 United States (US) elections and Brexit vote.⁵ Closer to home, the influence of

1 W Benedek & MC Kettemann 'Freedom of expression online' in M Susi (ed) *Human rights, digital society and the law: A research companion* (2019); ACE Project 'Media and elections' (2012), <http://aceproject.org/ace-en/topics/me/introduction/me10/me10d> (accessed 14 January 2021).

2 As above.

3 JM Balkin 'Digital speech and democratic culture: A theory of freedom of expression for the information society' (2004) 79 *NYU Law Review* 4-5.

4 As above.

5 N Cheeseman & B Klaas *How to rig an election* (2018) 133; H Allcott & M Gentzkow 'Social media and fake news in the 2016 election' (2017) 31 *Journal of Economic Perspectives* 211-212; J Doward & A Gibb 'Did Cambridge Analytica influence the Brexit vote and the US election?' *The Guardian* 4 March 2017, <https://www.theguardian.com/politics/2017/mar/04/nigel-oakes-cambridge-analytica-what-role-brexit-trump> (accessed 14 January 2021).

Cambridge Analytica and the consequences of online false news were evident in the 2017 elections in Kenya and Nigeria's 2015 elections.⁶ This insidious threat has had a snowball effect, with scholars and experts warning against the risk posed by false news, and manipulated and targeted harmful online content on voter behaviour and the integrity of election processes.⁷ While the trading in lies and propaganda during elections is not a new phenomenon, the ease with which it can be accessed and shared, gaining virality in the digital age, increases its potential to distort democratic processes.⁸

In the wake of these concerns, stakeholders have looked to the law for solutions. The information ecosystem of the digital age with its multiple players, including state and non-state actors, requires a multi-stakeholder approach to regulating online speech and interrelated rights.⁹ The involvement of the private sector in this endeavour, however, has elicited various concerns with the former United Nations (UN) Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Prof David Kaye, stating: 'The rules of speech for public space, in theory, should be made by relevant political communities, not private companies that lack democratic accountability and oversight.'¹⁰

However, given the influence of the private sector actors, such as online media platforms, on how people exercise their freedom of expression, their inclusion is inevitable. It has been posited that the optimum traffic and advertisement-driven business model of social media companies thrives in a context of widespread false information.¹¹ Online media platforms are well aware of this, thus motivating their initial inaction and reluctance to implement appropriate policies

6 B Ekdale & M Tully 'African elections as a testing ground: Comparing coverage of Cambridge Analytica in Nigerian and Kenyan newspapers' (2019) 40 *African Journalism Studies* 27.

7 K Jones *Online disinformation and political discourse: Applying a human rights framework* (2019) 10.

8 JB Whitton 'Hostile international propaganda and international law' (1971) 398 *Propaganda in International Affairs* 14-15; Jones (n 7) 4; B Mutsvairo & B Seba 'Journalism educators, regulatory realities, and pedagogical predicaments of the "fake news" era: A comparative perspective of the Middle East and Africa' (2019) 74 *Journalism and Mass Communication Educator* 143.

9 JM Balkin 'Free speech is a triangle' (2018) 118 *Columbia Law Review* 2011.

10 D Kaye *Speech police: The global struggle to govern the internet* (2019) 112.

11 S Joseph 'Why the business model of social media giants like Facebook is incompatible with human rights' *The Conversation* 2 April 2018, <https://theconversation.com/why-the-business-model-of-social-media-giants-like-facebook-is-incompatible-with-human-rights-94016> (accessed 21 October 2021); C Pennycook 'Shifting attention to accuracy can reduce misinformation online' (2021) *Nature*; A Ohlheiser 'This is how Facebook's fake-news writers make money' *Washington Post* 18 November 2016, <https://www.washingtonpost.com/news/the-intersect/wp/2016/11/18/this-is-how-the-internets-fake-news-writers-make-money/> (accessed 20 October 2021).

for content regulation on their platforms.¹² A favoured defence was reflected in their insistence that they are not arbiters of truth.¹³ It is only recently that social media companies have sought to slightly depart from their capitalistic mind-set, taking action to address the harms propagated by online false news and other harmful content on their platforms following increasing calls for self-regulation, oversight and accountability.¹⁴ This has seen the implementation of measures such as content reduction, content removal, warning labels, disinformation and misinformation education campaigns, and collaboration with fact-checking organisations.¹⁵ A hybrid model of self-regulation and co-regulation, therefore, is crucial for the exercise of freedom of expression on these platforms, particularly around areas that affect democracy and elections.¹⁶

The discussion on approaches to addressing harmful online speech such as false news has gained traction in the global sphere. The point of departure for this discourse is the acceptance that while freedom of expression is a fundamental freedom, it is not an absolute right and is subject to limitations. The three-part test of limitations to rights requires that the restriction be provided by law, serve a legitimate aim, and be necessary and proportionate in a democratic society.¹⁷ Further emphasising protections of these rights is the existing framework on human rights both at the international and regional level. In its 2018 Resolution the UN Human Rights Council stated that '[t]he same rights that people have offline must also be protected online'.¹⁸ From this statement, it can be logically construed

12 As above.

13 T McCarthy 'Zuckerberg says Facebook won't be "arbiters of truth" after Trump threat' *The Guardian* 28 May 2020, <https://www.theguardian.com/technology/2020/may/28/zuckerberg-facebook-police-online-speech-trump> (accessed 21 October 2021).

14 R Stengel *Information wars: How we lost the global battle against disinformation and what we can do about it* (2019); S Zuboff *The age of surveillance capitalism: The fight for a human future at the new frontier of power* (2019).

15 'Civic integrity policy' Twitter January 2021, <https://help.twitter.com/en/rules-and-policies/election-integrity-policy> (accessed 26 January 2021); 'Our approach to policy development and enforcement philosophy' Twitter, <https://help.twitter.com/en/rules-and-policies/enforcement-philosophy> (accessed 26 January 2021); 'Coordinating harm and publicising crime' Facebook, https://www.facebook.com/communitystandards/coordinating_harm_publicizing_crime/ (accessed 26 January 2021); NM Krause et al 'Fact checking as risk communication: The multi-layered risk of misinformation in times of COVID-19' (2020) 23 *Journal of Risk Research* 1-8; L Graves *Deciding what's true: The rise of political fact-checking in American journalism* (2016); L Bode & EK Vraga 'In related news, that was wrong: The correction of misinformation through related stories functionality in social media' (2015) 65 *Journal of Communication* 619.

16 SG Verhulst 'The regulation of digital content' in LA Lievrouw & S Livingstone (eds) *Handbook of new media: Social shaping and social consequences of ICTs, updated student edition* (2010) 330.

17 Human Rights Committee General Comment 34, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> (accessed 22 January 2021).

18 HRC 'The promotion, protection and enjoyment of human rights on the internet' (4 July 2018) A/HRC/38/L.10/Rev.1, <https://documents-dds-ny.un.org/>

that the existing human rights framework applies to rights in the digital age, and serves as a guide for enactment and amendment of laws to cater to the unique developments of the digital age.

However, a critical examination of the emerging laws and practices to address online false news, such as increased criminalisation of false news and internet shutdowns, belies a commitment to protecting freedom of expression and related rights. At least 39 countries in Africa have adopted laws on internet governance, cybercrime and cybersecurity with sanctions against the publication of false news.¹⁹ This article is not anti-regulation and it acknowledges that managing the spread of online false news and mitigating its effect on elections is crucial. However, adopted approaches should be guided by international law, and should not illegally and disproportionately curtail freedom of expression. A careful balance is necessary to ensure that online media platforms offer reliable alternative platforms of information and legitimate expression, especially in contexts where mainstream media is vulnerable to government and economic control.

This article therefore explores the protection of freedom of expression during elections in Africa, with a focus on managing the increasing threat of false news on elections without compromising freedom of expression. Part 1 is this introduction. Part 2 is a conceptual framework on freedom of expression and the developing lexicon around false news in the digital age. Part 3 discusses the UN and African human rights framework on the protection of freedom of expression and links it with the right to political participation. It also explores the tensions in norms calling for decriminalisation of false news against situations where significant harms arise. Part 4 explores the challenge of disinformation in Africa, especially in the context of elections. It examines the approaches adopted by South Africa and Tanzania in managing false news in their most recent elections and the implications of these measures on freedom of expression. This part also discusses relevant case law by African regional and national courts that are developing jurisprudence on freedom of expression in the digital age. Part 5 is the conclusion and contains recommendations.

doc/UNDOC/LTD/G18/203/73/PDF/G1820373.pdf?OpenElement (accessed 22 January 2021).

19 UNCTAD 'Cybercrime legislation worldwide', https://unctad.org/en/Pages/DTL/STI_and_ICTs/ICT4D-Legislation/eCom-Cybercrime-Laws.aspx (accessed 26 January 2021).

2 Freedom of expression and false news in the digital age: A conceptual framework

The protection of freedom of expression has historically elicited scholarly debate, which has taken different dimensions given the social, political, economic and technological developments of the day. It is trite law that freedom of expression is a basic right and essential to the functioning of a democracy. This conceptual framework is guided by four arguments for the protection of freedom of expression, namely, to reveal the truth; for self-development and fulfilment; for participation in a democracy; and suspicion of government.²⁰

The third and fourth arguments, participation in a democracy and suspicion of government, are particularly relevant to this article. Participation in a democracy, as a justification for the protection of freedom of expression, posits that democracies are anchored in the development of an active citizenry that is exposed to diverse ideas and information. This enhances their ability to hold their leaders accountable, and to participate more meaningfully in the democratic process.²¹ To this end, governments should facilitate public discourse including that which is critical of government.²² When an informed electorate actively participates in public discourse, and allows this acquisition and exchange of ideas to inform their voting choices, it helps transform the voting exercise from a passive to an active one. Moreover, given the fact that elections are often branded as the hallmark of democracy, the participation of an informed electorate, as opposed to an electorate solely motivated by bribery, ethnic, tribal, or religious leanings or manipulation, is essential in holding a truly free, fair and credible process.

On suspicion of government, further reference can be made to a quotation by Schauer:²³

Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a general sense.

20 E Barendt *Freedom of speech* (1985) 7-23. Prof Eric Barendt is the Goodman Professor of Media Law at University College London.

21 Barendt (n 20) 18.

22 Barendt (n 20) 20; DAJ Richards *Free speech and the politics of identity* (1999) 22-35.

23 F Schauer *Free speech: A philosophical inquiry* (1982) 86.

This public distrust extends to government approaches to regulation of basic rights, including freedom of expression. Public suspicion of government is a long-standing phenomenon.²⁴ Authoritarian and undemocratic governments have historically misused their powers to clamp down on certain rights such as freedom of expression. This suppression of targeted human rights is especially rife and, more so, detrimental when done in the context of an electoral process. Such measures are often implemented in order to control information, avoid accountability and advance certain agendas that might not be motivated by the public good.²⁵

In the digital age, the increasing influence of the internet on the exercise of human rights, including freedom of expression, is undeniable. The recognition of the internet as a platform for the exercise of freedom of expression within internationally-recognised limitations is increasingly reiterated in international case law.²⁶ Governments, the private sector, civil society organisations and other stakeholders have found it necessary to re-examine approaches to regulating freedom of expression in such a way as to ensure its protection and promotion but still safeguarding it against emergent harms.²⁷

A resounding question that has similarly mutated in the different ages remains: Which expression should be regulated, and which tolerated? When examined under the prism of international law, expression that disrespects the rights or reputations of others, and endangers national security, public health or morals, can be interpreted as propaganda for war, or promotes hatred on grounds of nationality, race or religion and further incites discrimination, hostility or violence, falls under prohibited speech and requires some form of regulation and accountability.²⁸ An element of harm is evident across the spectrum of prohibited speech. The harm principle, as discussed by John Mills, remains as true today as it did in the 1970s: 'The only purpose for which power can be rightfully exercised over

24 As above.

25 Barendt (n 20) 21.

26 *Delfi AS v Estonia* [GC] Application 64569/09, ECHR, judgment, 2015; *Times Newspapers Ltd v The United Kingdom* Application 3002/03 & 23676/03, ECHR, judgment, 2009; *Cengiz & Others v Turkey* Application 48226/10 & 14027/11, ECHR, judgment, 2015; *Yildirim v Turkey* Application 3111/10, ECHR, judgment, 2012. See also HRC 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank la Rue: A/ HRC/17/27' (16 May 2011) para 19; W Benedek & MC Kettemann *Freedom of expression and the internet* (2020).

27 Balkin (n 9).

28 Arts 19 & 20 ICCPR.

any member of a civilised community, against his will, is to prevent harm to others.²⁹

Disinformation, by its very definition, contains an element of harm. It is a category of false news under the composite term ‘information disorder’, which Wardle and Derakhshan categorise as the three types of false news:³⁰

- misinformation – this is information that is false but shared with no intention of causing harm;
- disinformation – this is information that is false and is created and disseminated with the intention of resorting to harm; and
- mal-information – this is information that may be true or false but is intended to be privately consumed but is publicly exposed to cause harm.

Disinformation has become a concerning harm in democratic processes given the fact that it is conceived, designed and disseminated with a particular harm in mind. In achieving this harm, the creators of disinformation often seek to exploit divisive factors in society such as ethnicity, race, class or religion.³¹ Unfortunately, societal divisions are most magnified during emotive processes such as elections.

Although the ease and speed at which information spreads on the internet, as well as its amplification capabilities, which has been touted as revolutionary to modern-day communication, it offers a corresponding disadvantage in the context of false news.³² Further aggravating this situation is the absence of journalistic standards of integrity in social media platforms to serve as a restraining factor.³³ These very elements make social media a choice platform for malicious persons and entities to disseminate disinformation.³⁴ In the context of elections, the harm engendered by false news such as disinformation may be voter suppression; voter confusion; undermining credible electoral information sources; distorting public discourse; discrediting the integrity of election results; and fomenting election conflict.³⁵ The weaponisation of false news to

29 JS Mill *On liberty* (1978) 9.

30 Scholars and pundits have encouraged the use of the term information disorder or information pollution over fake news, which has increasingly been distorted in political conversations to discredit what could be accurate but critical news, and has been wielded as a tool to undermine media. See C Wardle & H Derakhshan ‘Information disorder: Toward an interdisciplinary framework for research and policymaking’ Council of Europe Report (2017) 5.

31 Wardle & Derakhshan (n 30) 4.

32 Wardle & Derakhshan (n 30) 11-12.

33 C Ireton & J Posetti *Journalism, fake news and disinformation: Handbook for journalism education and training* (2018) 15.

34 Allcott & Gentzkow (n 5); Ireton & Posetti (n 33) 15.

35 Ireton & Posetti (n 33) 17.

advance political agendas by varied actors, including governments, and politicians and their agents, is a phenomenon that has added to the challenges facing electoral democracy in Africa.³⁶ In light of this, stakeholders have examined the role the law can play in protecting freedom of expression in the digital age within agreed limitations.

3 Legal framework for freedom of expression in the context of elections

Both the UN and African human rights systems protect freedom of expression and have made efforts to reinforce its protection in the digital age. Strengthening the protections for freedom of expression in the digital age draws from existing frameworks articulated in seminal human rights instruments. Given the fact that this article examines freedom of expression in the context of elections, it will also touch on the framework for protecting political participation.

3.1 UN human rights framework on freedom of expression and elections

Freedom of expression is guaranteed under articles 19 of the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (Universal Declaration).³⁷ Article 19(2) of ICCPR and article 19 of the Universal Declaration provide the link between freedom of expression, the right of access to information, and media freedom, and serve as an apt example of the interdependence, indivisibility and interrelatedness of human rights.³⁸ While freedom of expression enjoys a symbiotic relationship with the right of access to information and media freedom, it has also been described as an enabler of other human rights, including

36 H Wasserman et al 'Audience motivations for sharing dis- and misinformation: A comparative study in five sub-Saharan African countries', <https://cyber.harvard.edu/sites/default/files/2019-12/%20Audience%20Motivations%20for%20Sharing%20Dis-%20and%20Misinformation.pdf> (accessed 22 January 2021).

37 OHCHR 'ICCPR', <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 22 January 2021); UN 'Universal Declaration of Human Rights', <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed 22 January 2021).

38 UNFPA 'Human rights principles', <https://www.unfpa.org/resources/human-rights-principles> (accessed 22 January 2021). Also see OHCHR 'Vienna Declaration and Programme of Action', <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx> (accessed 22 January 2021); T McGonagle 'The development of freedom of expression and information within the UN: Leaps and bounds or fits and starts?' in T McGonagle & Y Donders (eds) *The United Nations and freedom of expression and information* (2015) 1; DJ Whelan *Indivisible human rights: A history* (2011); D Weissbrodt (ed) *The development of international human rights law* (2017).

the right to political participation.³⁹ For meaningful political participation, it is imperative that the electorate has avenues to express themselves and exchange ideas allowing for meaningful debate on the democratic process. Freedom of expression is greatly enabled by an independent and impartial media, which also serves as a campaign platform, and a watchdog on the electoral process, thereby promoting accountability and transparency.⁴⁰

It is worth noting that articles 19 of the Universal Declaration and ICCPR were forward-looking by providing for the exercise of the right of freedom of expression ‘through any other media of choice’, which provided the space for the protection of this right in light of future technological advancements such as the internet.⁴¹ Developing norms, including the Joint Declaration on Freedom of Expression and ‘Fake News’, Disinformation and Propaganda⁴² and the Joint Declaration on Freedom of Expression and Elections in the Digital Age,⁴³ have specific provisions on addressing the harms propagated by online false news in a democracy. These soft law instruments require that regulations on false news should align with international laws and standards.⁴⁴ State and non-state actors such as online media are obligated to adopt positive measures, such as fact-checking and media and information literacy, to combat false news.⁴⁵

The limitations on freedom of expression are articulated in article 19(3) of ICCPR and include the following: to ensure the respect of the rights or reputations of others and to protect national security, public order, public health or public morals. Under article 20 of ICCPR, the Convention requires states to legally restrict propaganda for war and speech that advocates hatred on grounds of nationality, race or religion that incites discrimination, hostility or violence.

39 Mcgonagle (n 38) 3 40; I Chen *Government internet censorship measures and international law* (2020) 88; HRC (n 26) para 22. Art 25 of ICCPR guarantees the right to political participation.

40 Human Rights Committee General Comment 25, ‘The right to participate in public affairs, voting rights and the right of equal access to public service’ paras 11 & 12; ACE Project ‘Media and elections’, <https://aceproject.org/ace-en/topics/me/onePage> (accessed 22 January 2021).

41 HRC A/HRC/17/27 (n 26) para 21.

42 OHCHR ‘Freedom of expression monitors issue joint declaration on “fake news”, disinformation and propaganda’, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21287&LangID=E> (accessed 22 January 2021).

43 OHCHR ‘Joint declaration on freedom of expression and elections in the digital age’, https://www.ohchr.org/Documents/Issues/Opinion/JointDeclarationDigitalAge_30April2020_EN.pdf (accessed 22 January 2021).

44 Recommendation 1 Joint Declaration Joint Declaration on Freedom of Expression and Elections in the Digital Age; Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda.

45 As above; OHCHR (n 43).

The limitations are expounded under General Comment 34 which provides a three-part test for limitations of freedom of expression, which it describes as uninhibited expression. The limitation shall⁴⁶

- be provided by law. A law articulating a limitation on freedom of expression must be precisely drafted to guide citizens on their conduct. It should be publicly accessible, clearly articulate the powers of enforcement agencies, and provide reasonable sanctions.⁴⁷
- serve a legitimate aim;⁴⁸
- be necessary and proportionate to achieve that legitimate aim. If the state can implement a less restrictive means to attain a legitimate aim, it should do so. The principle of proportionality is required not only in the formulation of the law but in its enforcement as well.⁴⁹ States are also urged to exercise greater tolerance for other forms of expressions, especially public debate about public officials even when it involves criticism of said officials.⁵⁰ Finally, in justifying the imposition of a restriction on freedom of expression, a state must show the 'direct and immediate' link between the expression and threat.⁵¹

These principles on limitations of rights have been reinforced in case law, including in *Mukong v Cameroon*,⁵² where the Human Rights Committee decried the use of the limitations to obstruct democracy and human rights.

3.2 African human rights framework on freedom of expression and elections

Article 9 of the African Charter on Human and Peoples' Rights (African Charter)⁵³ provides that everyone has the 'right to receive information' and 'the right to express and disseminate his opinions within the law'. The phrasing of article 9(2) as 'within the law' raised concern as adopting a claw-back clause nature. However, in *Constitutional Rights Project & Another v Nigeria*⁵⁴ The African Commission on Human and Peoples' Rights (African Commission) clarified that the limitation of this right was guided by international law as opposed to domestic law. Therefore, governments cannot draft laws that contradict binding international law provisions. This direction is relevant in the

46 General Comment 34 (n 17).

47 General Comment 34 paras 24 & 25.

48 General Comment 34 para 29.

49 General Comment 34 paras 33 & 34.

50 General Comment 34 paras 34, 38 & 43.

51 General Comment 34 para 35.

52 *Womah Mukong v Cameroon*, Communication 458/1991, Human Rights Committee, 21 July 1994 (*Mukong v Cameroon*) para 9.7.

53 African Commission 'African Charter on Human and Peoples' Rights', <https://www.achpr.org/legalinstruments/detail?id=49> (accessed 22 January 2021).

54 (2000) AHRLR 191 (ACHPR 1998).

wake of increasing scenarios where some African governments adopt laws criminalising expression in the digital age under the guise of reining in the spread of false news among other aims that do not meet the legitimacy and proportionality test.

The African Charter on Democracy, Elections and Governance (African Democracy Charter)⁵⁵ emphasises regular, free and fair elections as a basis of legitimacy for government.⁵⁶ The Democracy Charter emphasises the promotion of democracy, the rule of law and human rights, which includes freedom of expression.⁵⁷ Guarantees for freedom of expression are also provided for among the objectives of the African Democracy Charter, which include the promotion of ‘the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs’.⁵⁸

The African Commission has made strides in further protecting freedom of expression in the digital age through soft law instruments such as the Model Law on Access to Information for Africa, the 2019 revised Declaration of Principles on Freedom of Expression and Access to Information in Africa (Declaration) and the Guidelines on Access to Information during Elections in Africa.⁵⁹ Although non-binding, these instruments are persuasive in African countries and are necessary in guiding the development of Africa’s democratic culture.

The 2019 revision of the Declaration of Principles on Freedom of Expression and Access to Information in Africa⁶⁰ was progressive in its protection of freedom of expression and information given the advancements of the digital age. State parties are obligated to create an enabling environment for the exercise of freedom of expression and the right of access to information.⁶¹ This includes reviewing

55 AU ‘African Charter on Democracy, Elections and Governance’, <https://au.int/sites/default/files/treaties/36384-treaty-african-charter-on-democracy-and-governance.pdf> (accessed 22 January 2021). It should be noted that while the African Charter does not expressly provide for the right to vote, it guarantees the right to participate in government either directly or indirectly under art 13.

56 Art 2 African Democracy Charter.

57 Arts 2, 4(1) & 27 African Democracy Charter.

58 Art 2 African Democracy Charter.

59 African Commission ‘Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019’, <https://www.achpr.org/legalinstruments/detail?id=69> (accessed 22 January 2021); African Commission ‘Model Law on Access to Information for Africa 2013’, <https://www.achpr.org/legalinstruments/detail?id=32> (accessed 22 January 2021); African Commission ‘The Guidelines on Access to Information and Elections in Africa’, https://www.achpr.org/public/Document/file/English/guidelines_on_access_to_information_and_elections_in_africa_eng.pdf (accessed 22 January 2021).

60 African Commission Declaration of Principles (n 59).

61 Principle 1 of the Declaration.

criminal restrictions on expression to ensure that they are justified and aligned with international human rights law and standards by, among other things, repealing criminal laws on sedition, insult and the publication of false news.⁶²

These provisions no doubt are commendable given the strong protection they afford to freedom of expression. However, a question arises about the blanket prohibition on criminal sanctions on the publication of false news, say, in the event it is disinformation and it leads to violence with severe injuries and/or loss of life. Disinformation, by its very nature, is deliberate, coordinated and targeted towards achieving a particular harm. Where it causes death or severe injuries, a civil sanction may not be a punishment proportionate to the harm. It appears that the popular opinion under the human rights parlance is the wholesale decriminalisation of false news. Possibly, where disinformation leads to death or severe injuries, authorities may resort to prosecution under criminal laws such as manslaughter.

An examination of national media and internet laws in Africa reveals that criminal sanctions attached to offences on the publication of false news is a common trend.⁶³ Disturbingly, many of these laws are broadly and/or vaguely worded.⁶⁴ Sound interpretation by courts therefore is crucial to provide guidance on a case-by-case basis on whether the sanctions are necessary and proportionate. However, this is a risky gamble in contexts lacking independent judiciaries and where governments and influential personalities use such laws to clamp down on freedom of expression.

With regard to the internet, the Declaration acknowledges the importance of internet access to freedom of expression. It calls on states to take measures to ensure universal, equitable, affordable and meaningful access to the internet as a means of promoting the exercise of freedom of expression and information.⁶⁵ This is important in the African context given the fact that the internet penetration rate in 2020 was 39,3 per cent, lagging behind other continents.⁶⁶

In ensuring internet access, states are obligated to refrain from interfering with access to information by way of communication and digital technologies using measures such as 'removal, blocking

62 Principle 22 of the Declaration.

63 GPD et al 'Disinformation tracker', <https://www.disinformationtracker.org/> (accessed 26 January 2021).

64 As above.

65 Principle 37 of the Declaration.

66 Internet World Stats 'Internet users statistics for Africa', <https://www.internetworldstats.com/stats1.htm> (accessed 22 January 2021).

or filtering of content’ unless such interference is ‘justifiable and compatible with international human rights law and standards’.⁶⁷ Further, states shall refrain from disrupting internet services as well as adopting unjustifiable economic restrictions on access to the internet.⁶⁸ States are obligated to ensure that measures that may be deemed to interfere with internet access comply with the limitations of rights test.⁶⁹

Internet intermediaries are also required to ensure that their services promote and not hinder the exercise of freedom of expression, and promote net neutrality.⁷⁰ In their service provision, they should adopt a human rights-based approach and address human rights violations that occur.⁷¹ The Declaration further provides a criterion that seeks to ensure transparency and fairness in the event of state requests for content removal.⁷² States have a responsibility to ensure that in the development, use and application of digital technologies by internet intermediaries, the process is in line with international human rights law and standards and do not infringe on human rights.⁷³

The Guidelines on Access to Information and Elections in Africa⁷⁴ represent another worthy addition to the normative framework on freedom of expression. The Guidelines were developed with the aim of promoting access to information during the electoral cycle. The Guidelines instruct states on what information should be proactively disclosed during elections to promote free, fair and transparent processes. The cornerstone principle of facilitating access to information is proactive disclosure of information that encourages the custodians of public interest information to readily avail such information to the public without being requested to do so, to promote transparency and accountability in public affairs.⁷⁵

The Guidelines emphasise the importance of ‘access to accurate, credible and reliable information’ throughout the electoral cycle. This aims at ensuring that African democracies develop an informed electorate that can meaningfully exercise their right to vote; an essential element in free, fair and credible elections.⁷⁶ The Guidelines target electoral stakeholders, including appointing authorities of

67 Principle 38 of the Declaration.

68 Principles 38(2) & 38(3) of the Declaration.

69 Principle 38(2) of the Declaration.

70 Principle 39 of the Declaration.

71 Principle 39(3) of the Declaration.

72 Principles 39(3), (4) & 5 of the Declaration.

73 Principle 39(6) of the Declaration.

74 African Commission Guidelines (n 59).

75 Objectives and rationale of the Guidelines.

76 Preface to the Guidelines.

election management bodies; election management bodies, political parties and candidates; law enforcement agencies; election observers and monitors; media and online media platform providers; media regulatory bodies; and civil society organisations. Media and internet regulatory bodies are obligated to enact regulations that ensure 'fair and balanced coverage of the electoral process and transparency about political advertising policy' both offline and online.⁷⁷

As far as internet shutdowns are concerned, which have become a growing democratic concern during electoral processes, the Guidelines call for states to refrain from blocking the internet or restricting media freedom during elections.⁷⁸ Any such measures should be subject to prior judicial review, proactively disclosed, and meet the international standard of legality, legitimacy, and necessity and proportionality for the limitations of rights.⁷⁹ Governments often justify internet shutdowns as a measure to manage the spread of false news online.⁸⁰

4 Emerging approaches to addressing false news in Africa: A reflection or indifference to international norms?

While Africa's internet penetration capacity is still struggling, mobile penetration is fast growing on the continent with a 45 per cent penetration rate, and a social media penetration rate of 11 per cent.⁸¹ Notwithstanding this growth rate in mobile and social media penetration, mobile and internet penetration remains is low.⁸² However, online disinformation remains a concern in African countries. A 2018 study conducted with respondents from Kenya, Nigeria and South Africa⁸³ revealed that 38 per cent of Kenyans, 28 per cent of Nigerians and 35 per cent of South Africans have shared

⁷⁷ Sec 25 of the Guidelines.

⁷⁸ Sec 26 of the Guidelines.

⁷⁹ Secs 27 & 28 of the Guidelines.

⁸⁰ Jigsaw 'The internet shutdown issue' *The Current* 2021 4, <https://jigsaw.google.com/the-current/shutdown/> (accessed 20 October 2021); F Anthonio '#KeepItOn: 2021 elections watch', <https://www.accessnow.org/keepiton-2021-elections-watch/> (accessed 20 October 2021).

⁸¹ GSMA 'Mobile internet connectivity 2020 sub-Saharan Africa factsheet', <https://www.gsma.com/r/wp-content/uploads/2020/09/Mobile-Internet-Connectivity-SSA-Fact-Sheet.pdf> (accessed 21 January 2021); World Bank Group 'An analysis of issues shaping Africa's economic future' (2019) 19 *Africa's Pulse* 49.

⁸² Internet World Stats (n 66).

⁸³ It should be noted that these countries show good stats on mobile and internet penetration. GSMA (n 81).

news that turned out to be false; a higher percentage than a similar study done in the United States.⁸⁴

Beyond poor digital access and connectivity, a *smorgasbord* of other challenges impact production and consumption of news in Africa, including media freedom; digital literacy; poor telecommunication infrastructure; unreliable energy sources; and poverty.⁸⁵ While fact checking is encouraged as a countermeasure to the spread of false news, these preceding challenges together with cost implications of accessing paid content from credible news sources affect the competencies of verifying the accuracy of news before sharing.⁸⁶ Aptly put, the information poverty faced in many African contexts limits the ability of citizens to combat the challenges posed by online misinformation and disinformation and filters the news in their information ecosystem.⁸⁷ Disturbingly, some African states have adopted a heavy-handed approach to managing the scourge of false news with an increase in criminal sanctions for the publication of false news and internet shutdowns.⁸⁸ In practice, the application of these laws has often been in bad faith to silence voices critical of the establishment and other powerful personalities, obstruct transparency and escape accountability.⁸⁹

4.1 Criminalisation of false news

Stakeholder discussion on approaches to addressing disinformation online has been gaining traction worldwide.⁹⁰ While owners of digital technologies such as Google, Facebook and Twitter have terms and conditions, and practices that seek to moderate online content, there has been an increasing push by states to deviate from this self-regulatory practice to a more co-regulatory approach.⁹¹

84 H Wasserman & D Madrid-Morales ‘“Fake news”, disinformation and media trust in Africa: A comparative study of Kenya, Nigeria and South Africa’ 7 November 2018, http://danimadrid.net/research/2018_icafrica_fakenews.pdf (accessed 21 January 2021).

85 A Mare et al ‘“Fake news” and cyber-propaganda in sub-Saharan Africa: Recentring the research agenda’ (2019) 40 *African Journalism Studies* 6; World Bank Group (n 81) 2-3.

86 J Britz ‘To know or not to know: A moral reflection on information poverty’ (2004) 30 *Journal of Information Science* 192.

87 As above; Mare et al (n 85) 6.

88 GDP et al (n 63).

89 As above.

90 D Funke & D Flamini ‘A guide to anti-misinformation actions around the world’ (2018), <https://www.poynter.org/ifcn/anti-misinformation-actions/> (accessed 18 December 2020).

91 E Culloty & J Suiter *Disinformation and manipulation in digital media: Information pathologies* (2020).

In the wake of these challenges, the approaches embraced by many African countries to criminalise false news with attendant harsh sanctions, as well as to implement social media taxes and internet shutdowns, among other restrictive measures, pose a real threat to a democratic and electoral culture in Africa. Several African countries have used various types of legislation to address the spread of false information online. These include existing penal or media laws as well as new cybersecurity and cybercrime laws, or context-specific laws and regulations such as those that have been enacted in the wake of the COVID-19 pandemic.⁹²

However, there has been apprehension that states are increasingly leaning towards criminalisation of false news as the choice approach to regulating false news as opposed to less punitive and penal measures that focus on addressing the root causes of online misinformation and disinformation.⁹³ The adoption of penal actions for managing false news has often been linked to authoritarian governments while democratic governments have sought to lean more towards encouraging responsible action by platforms and their users.⁹⁴ Further, measures to address false news belie more sinister motives to clamp down on critical voices and media freedom.⁹⁵

4.2 Internet shutdowns

The growing wave of digital authoritarianism has seen some states implement total or partial internet shutdowns as a justification for managing the spread of false news online as well as preventing mobilisation during moments of unrest.⁹⁶ Interference with internet connections has persisted despite the absence of or little evidence to support its effectiveness in achieving these aims.⁹⁷ An internet shutdown is defined as ‘an intentional disruption of internet or

92 GDP et al (n 63).

93 Freedom House ‘Freedom of the net 2014: Tightening the net: Governments expand online controls’ (2014), https://freedomhouse.org/sites/default/files/2020-02/FOTN_2014_Summary_Findings.pdf (accessed 22 January 2021). Also see AO Salau ‘Social media and the prohibition of “false news”: Can the free speech jurisprudence of the African Commission on Human and Peoples’ Rights provide a litmus test?’ (2020) 4 *African Human Rights Yearbook* 254.

94 Culloty & Suiter (n 91).

95 As above; MS Simiyu et al ‘Civil society in the digital age in Africa: Identifying threats and mounting pushbacks’ (2020) CHR & CIPESA, https://www.chr.up.ac.za/images/researchunits/dgdr/documents/reports/Civil_society_in_the_digital_age_in_Africa_2020.pdf (accessed 22 January 2021); HRC ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression A/HRC/35/22’ (2017) para 12.

96 D Flamini ‘The scary trend of internet shutdowns’ (2019), <https://www.poynter.org/reporting-editing/2019/the-scary-trend-of-internet-shutdowns/> (accessed 22 January 2021).

97 As above.

electronic communications, rendering them inaccessible or effectively unusable, for a specific population or within a location, often to exert control over the flow of information'.⁹⁸

In the absence of communication channels to verify information, internet shutdowns have the ability to breed rumours and further suspicion.⁹⁹ This information blackout may increase as opposed to reducing tensions, especially in countries that have a history of election rigging, election-related violence and public distrust towards governments and public institutions.¹⁰⁰ Reiterating the arguments justifying freedom of expression, internet shutdowns restrict the public's ability to participate in democratic processes and encourage further mistrust towards government. Shutdowns have a high potential of grounding election processes, especially given the increased reliance on election technology in African elections. Processes such as confirmation of voter registration, results transmission and publication of results may rely on network and internet connection.¹⁰¹ According to the information and communications technology and elections database of the International Institute for Democracy and Electoral Assistance (IDEA), election management bodies in at least 41 African countries publish election results online.¹⁰² This process will be crippled during an internet shutdown. Not surprisingly, internet shutdowns also offer a cloak to authoritarian and undemocratic governments to conduct electoral malpractices.¹⁰³ The restrictions engendered by internet shutdowns on media reporting, election monitoring, documentation and reporting on electoral malpractices as well as support mobilisation by opposition severely inhibit accountability.¹⁰⁴

According to Berhan Taye, the head of Access Now's #KeepItOn campaign, governments in 33 of the countries that implemented internet shutdowns in 2018 justified these actions on the basis of addressing fake news and other harmful content.¹⁰⁵ In actuality, these actions were meant to ensure information control during periods of unrest. In 2019 at least 14 African countries shut down their

98 Access Now '#Keepiton', <https://www.accessnow.org/keepiton/#campaign> (accessed 22 January 2021).

99 HRC (n 95) para 14.

100 As above.

101 IDEA 'Africa', <https://www.idea.int/data-tools/continent-view/Africa/61> (accessed 22 January 2021).

102 As above.

103 DD Aydin 'Five excuses governments use to justify internet shutdowns', <https://www.accessnow.org/five-excuses-governments-abuse-justify-internet-shutdowns/> (accessed 22 January 2021).

104 As above.

105 B Taye 'Targeted, cut off, and left in the dark: The #KeepItOn report on internet shutdowns in 2019' (2019) 13; Flamini (n 96).

internet, with Benin, the Democratic Republic of the Congo (DRC), Mauritania and Malawi experiencing internet shutdowns during their elections. In 2020 Togo, Burundi and Tanzania implemented internet shutdowns during elections.¹⁰⁶ Most recently, in 2021, Uganda shut down its internet during elections; Niger's shutdown was in response to post-election protests; and DRC shut down the internet just before the presidential election.¹⁰⁷ Encouragingly, targeted lobbying by civil society organisations in Senegal (2019) and Nigeria (2020) influenced their governments to refrain from shutting down the internet during their elections.¹⁰⁸

Beyond activism, courts have also come through to pronounce against internet shutdowns and their effect on fundamental rights and freedoms. In a landmark 2020 judgment the Economic Community of West African States (ECOWAS) Community Court of Justice determined that the Republic of Togo violated the rights to freedom of expression of the applicants following an illegal internet shutdown in September 2017.¹⁰⁹ The government of Togo had previously implemented internet disruptions as well as curfews to curtail protests and prevent mobilisation and protests. The internet shutdown that followed protests limited the ability of journalists and ordinary citizens to report on the continuing harsh response from the state. In its determination the Court stated:¹¹⁰

Access to internet is not *stricto sensu* a fundamental human right but since internet service provides a platform to enhance the exercise of freedom of expression, it then becomes a derivative right that it is a component to the exercise of the right to freedom of expression. It is a vehicle that provides a platform that will enhance the enjoyment

106 F Antonio et al 'How internet shutdowns are threatening 2020 elections, and what you can do about it' 15 October 2020, <https://www.accessnow.org/internet-shutdowns-2020-elections/> (accessed 24 January 2021); F Antonio et al 'Tanzania is weaponizing internet shutdowns. Here's what its people have to say' 16 December 2020, <https://www.accessnow.org/tanzania-internet-shutdowns-victim-stories/> (accessed 24 January 2021); Netblocks 'Post-election internet shutdown in Mauritania following widespread mobile disruptions' 25 June 2019, <https://netblocks.org/reports/post-election-internet-shutdown-in-mauritania-following-widespread-mobile-disruptions-JA6zmeAQ> (accessed 24 January 2021); Netblocks 'Social media and messaging restricted, internet shut down for Uganda elections' 12 January 2021, <https://netblocks.org/reports/social-media-and-messaging-platforms-restricted-in-uganda-ahead-of-general-election-XB7aaO87> (accessed 27 January 2021).

107 MD Hernández et al '#KeepItOn update: Who is shutting down the internet in 2021?' <https://www.accessnow.org/who-is-shutting-down-the-internet-in-2021/> (accessed 20 October 2021).

108 Taye (n 105) 14 15.

109 Amnesty International *Togo v The Togolese Republic* Suit ECW/CCJ/APP/61/18, judgment ECW/CCJ/JUD/09/20, 25 June 2020, http://prod.courtecowas.org/wp-content/uploads/2020/09/JUD_ECW_CCJ_JUD_09_20.pdf (accessed 22 January 2020).

110 Amnesty International *Togo v The Togolese Republic* (n 109) para 38.

of the right to freedom of expression ... Against this background, access to internet should be seen as a right that requires protection of the law and any interference with it has to be provided for by the law specifying the grounds for such interference.

Applauding this jurisprudence from a regional court, it is also encouraging to see national courts make determinations against the implementation of internet shutdowns in Zimbabwe and Sudan.¹¹¹

4.3 Taking the bull by the horns: Lessons from South Africa and Tanzania on combating false news

4.3.1 *Balancing between protection of freedom of expression and managing false news during elections in South Africa: Lessons from the Real411 platform*

4.3.2 *Legislative framework on freedom of expression and elections*

The Constitution of South Africa guarantees freedom of expression with limitations on propaganda for war; incitement of imminent violence; or advocacy of hatred on the basis of race, ethnicity, gender or religion, and that constitutes incitement to cause harm.¹¹² The framing of the scope of freedom of expression resembles that of ICCPR in that it does not guarantee it as an absolute right. South African courts have provided guidance in interpreting the rights contained in its Constitution, as read in *S v Makwanyane*¹¹³ where the Court held that interpretation approaches to the Bill of Rights should be 'generous' and 'purposive' and must 'give ... expression to the underlying values of the Constitution'.¹¹⁴ This interpretation reveals a push for the realisation as opposed to the restriction of human rights.

111 In Zimbabwe, a High Court ruled against an illegal internet shutdown in January 2019 but the case was won on procedural grounds as opposed to merit; MISA Zimbabwe 'High court sets aside internet shutdown directives' 21 January 2019, <https://zimbabwe.misa.org/2019/01/21/high-court-sets-aside-internet-shutdown-directives/> (accessed 27 January 2021). In Sudan's case, the ruling to restore connectivity only benefited the applicant BBC. 'Sudan crisis: Internet restored – but only for lawyer' 24 June 2019, <https://www.bbc.com/news/world-africa-48744853#:~:text=A%20lawyer%20in%20Sudan%20has,ordered%20by%20Sudan's%20military%20rulers.> (accessed 27 January 2021).

112 Sec 16 of the Constitution of South Africa.

113 1995 (3) SA 391 (CC) [9].

114 I Currie & J de Waal *The Bill of Rights handbook* (2017) 339.

It is expected that courts will increasingly face cases on the publication of false news and whether such expression falls within or outside the limitations rule. For example, in the case of defamation through publication of false statements, conventional defences such as truth, public interest, reasonable publication and fair comment remain relevant in assessing whether a person or body is culpable. This is regardless of whether the false and defamatory statement was published on mainstream or online media. Courts are more so acknowledging that online false statements have a unique damaging aspect given the reach of social media, and holding ordinary citizens similarly responsible for online publications. In *Manuel v Economic Freedom Fighters & Others* the Court stated:¹¹⁵

Because of social media platforms like Twitter, Facebook and others, ordinary members of society now have publishing capacities capable of reaching beyond that which the print and broadcast media can ... There is no justification as to why the press should enjoy the privilege of freedom of expression greater than that enjoyed by a private individual. The liberty of the press is no greater than the liberty of any individual. There is, therefore, no justification for limiting the defence of reasonableness as it pertains to both wrongfulness and fault to the media only.

Courts also have more direction from laws on exercising freedom of expression, including in the context of an election.

Section 89(1) of the Electoral Act¹¹⁶ and section 69(1) of the Local Government: Municipal Electoral Act¹¹⁷ prohibit a person from making a statement under the provisions of the Act with the knowledge that it is false or if they do not reasonably believe the information is true.¹¹⁸ Section 89(2) of the Electoral Act and section 69(2) of the Local Government Municipal Electoral Act further prohibit the publication of false information with the intention of (a) disrupting or preventing an election; (b) creating hostility or fear in order to influence the conduct or outcome of an election; or (c) influencing the outcome or conduct of an election.

Conviction under the first sub-section of the laws attracts a fine and an imprisonment term of not more than five years, while the second sub-sections attract a fine and an imprisonment time of not more than 10 years.¹¹⁹

115 (13349/2019) [2019] ZAGPJHC 157 paras 65-67.

116 Act 7 of 1998 (as amended), https://www.gov.za/sites/default/files/gcis_document/201409/act73of1998.pdf (accessed 20 October 2021).

117 Act 27 of 2000, https://www.gov.za/sites/default/files/gcis_document/201409/a27-000.pdf (accessed 20 October 2021).

118 Act 73 of 1998.

119 Sec 98 of the Electoral Act.

Other instruments also contain provisions on publication of false information during elections. Section 9(1)(b) of the Electoral Code of Conduct¹²⁰ prohibits a registered party or candidate from publishing false or defamatory information on elections about a party, its candidates, representatives or members, or a candidate and his or her representatives. Section 3.5 of the Code of Conduct of Accredited Voter Education Providers¹²¹ prohibits accredited voter education providers from publishing, repeating or disseminating false information. The wording of this section is rather broad and can extend to disseminating false information using any form of media during elections.

In the wake of the COVID-19 pandemic, South Africa introduced the criminalisation of false news under the regulations made under section 27(2) of the Disaster Management Act. Regulation 11 criminalised the intentional misrepresentation of COVID-19, any person's COVID-19 infection status, and government measures to address COVID-19.¹²² The offence is punishable by a fine or imprisonment for not more than six months, or both. South Africa held by-elections in 2020 and scheduled local government elections for November 2021. The assessment around the management of the COVID-19 pandemic and its impact on the social and economic lives of South African forms part of the political and electoral discourse. While false news about the government's response to the pandemic may affect a voter's decision-making process, imprisonment for such expression would be a disproportionate sanction. Such punitive measures would also have a chilling effect on freedom of expression. Public debate on management of the pandemic has dominated global conversations. Governments should therefore eschew measures that seek to restrict these conversations. More positive measures should be implemented to ensure that these conversations are guided by accurate, relevant and timely information. The South African government has attempted to implement such measures through its departments and by engaging with other stakeholders.¹²³

120 Schedule 2 of the Electoral Act.

121 Schedule B of the Electoral Act.

122 RSA 'Government Notices', https://www.gov.za/sites/default/files/gcis_document/202003/regulations.pdf (accessed 27 January 2021).

123 NDOH 'Press statements', <https://www.health.gov.za/press-statement/> (accessed 20 October 2021); CovidComms 'Home', <https://covidcomms.org.za/> (accessed 20 October 2021); RSA 'Fake news – Coronavirus COVID-19', <https://www.gov.za/covid-19/resources/fake-news-coronavirus-covid-19?gclid=CjwKCAjw> (accessed 20 October 2021); T Smith & W Bird 'Disinformation in a time of COVID-19: Weekly trends in South Africa' *Daily Maverick* 9 May 2021, <https://www.dailymaverick.co.za/article/2021-05-09-disinformation-in-a-time-of-covid-19-weekly-trends-in-south-africa-30/> (accessed 20 October 2021).

As seen above, the Electoral Act takes a tough stance on dissemination of false news in the context of an election in South Africa, which can attract punishment and in some cases such sanction may include an imprisonment term.¹²⁴ While the criminalisation of expression is discouraged under human rights law, a case-by-case judicial examination is necessary to ascertain whether or not the sanction is disproportionate. For example, disinformation that disrupts or prevents an election, creates hostility or fear in order to influence the conduct or outcome of an election, influences the outcome or conduct of an election or even leads to electoral violence may require more severe punishment, compared to one where the harm does not materialise. The prosecution in such cases is faced with a high burden of proof which is beyond reasonable doubt that the accused person spread false news with the intention of causing a specific harm. Given these consequences, it is important to have avenues that educate citizens on false news and proactively include them in managing the threat of false information. Arguably, the Real411 platform creates this opportunity.

4.3.3 The Real411 platform: Countering digital disinformation

Real411 is the brainchild of the Independent Electoral Commission (IEC) of South Africa and Media Monitoring Africa (MMA), a civil society organisation in South Africa. Real411 was initially conceived as a platform that would enable citizens to report digital disinformation during the 2019 national and provincial elections but has since expanded to include online hate speech, incitement to violence, and harassment of journalists.¹²⁵ This broadening of scope is laudable given their implications on meaningful public participation during elections. The site defines digital disinformation as ‘false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm’.¹²⁶

The digital disinformation complaints process is anchored on promoting free and fair elections in South Africa by addressing the threat posed by disinformation on elections as well as fostering transparency and accountability in the electoral process.¹²⁷ Complaints submitted on the Real411 website or mobile application

¹²⁴ Sec 89 of the Electoral Act.

¹²⁵ Real411 ‘Digital offences’, <https://www.real411.org/digital-offences> (accessed 27 January 2021).

¹²⁶ Real411 ‘Keeping it real in digital media’, <https://elections.real411.org.za/learn> (accessed 26 January 2020).

¹²⁷ Real411 ‘About’, <https://elections.real411.org.za/about> (accessed 26 January 2021).

are received by the IEC's Directorate of Electoral Offences. A complaint can be submitted in any of the 11 official languages of South Africa although the operating language of the Directorate is English. While the process does not allow for anonymous complaints, it guarantees confidentiality of the complainant as well as their personal data.¹²⁸ A panel of experts in the field of media, technology and the law review the complaint as per the guidelines and make the appropriate recommendations to the commissioners who then make a ruling on the complaint and the appropriate action. An aggrieved party has the right to approach the Electoral Court in the event of dissatisfaction with the decision of the commissioners.¹²⁹

In reaching a determination the panel will consider whether the reported information is false, inaccurate or misleading, can reasonably result in public harm, and whether its publication is necessary for the public interest.¹³⁰ Depending on the nature of the complaint, the panel may request online platforms to remove the content, liaise with fact-checking organisations, refer to the appropriate regulatory or public body for action, flag the information as false or misleading content, and issue counter-narratives, among others.¹³¹

Since its conception the platform has received more than 1 800 complaints from the public with an expected increase in reports in the lead-up to the November 2021 local government elections.¹³² Most complaints that have been determined to be misinformation and disinformation have been from posts on Twitter, Facebook and WhatsApp.¹³³ It arguably is an innovative initiative that incorporates the participation of ordinary citizens in addressing the scourge of misinformation and disinformation simply through a mobile app and website. During elections the IEC also engages with stakeholders such as political parties and candidates, and counters narratives through its communication channels to mitigate the spread of digital harms such as disinformation.¹³⁴ As of 2021 the platform has largely issued infographics to counter false and misleading information, but there

128 Real411 'Complaints process', <https://www.real411.org/complaints-process> (accessed 26 January 2021).

129 As above.

130 Real411 (n 125).

131 As above.

132 Real411 'Complaints', <https://www.real411.org/complaints> (accessed 26 January 2021); W Bird & T Smith 'Disinformation in a time of COVID-19: While lying delights in darkness, transparency shines a light' *Daily Maverick* 12 September 2021, <https://www.dailymaverick.co.za/article/2021-09-12-disinformation-in-a-time-of-covid-19-while-lies-delight-in-darkness-transparency-shines-a-light/> (accessed 20 October 2021).

133 Real411 'Trends', <https://www.real411.org/trends> (accessed 26 January 2021).

134 Real411 'Assessing digital disinformation complaints – A guide to the guidelines', <https://news.real411.org.za/assessing-digital-disinformation-complaints-a-guide-to-the-guidelines/> (accessed 20 October 2021).

have been no reports that have led to further action by enforcement agencies such as arrests and prosecutions.¹³⁵ The platform also runs a blog that analyses the weekly trends on disinformation which leads to disinformation education as well as research.¹³⁶ The IEC and MMA, as flag bearers of this initiative, are also working with social media platforms to effectively counter disinformation, with the Real411 initiative as central to this endeavour.¹³⁷

In addition to reporting, flagging and countering false narratives that may interfere with election integrity, there should be more widespread voter and civic education on misinformation and disinformation. Commendably, the IEC's continuous voter education initiatives include multi-lingual fact sheets on electoral offences that include the publication of false news.¹³⁸ The IEC needs to expound this edification and include misinformation and disinformation education in their civic and voter education curricula. Further, the IEC should ensure continued and more dedicated compliance with the Guidelines on Access to Information and Elections in Africa to improve the national information ecosystem.

4.4 Balancing between the protection of freedom of expression and managing false news during elections in Tanzania

4.4.1 *Legislative framework on freedom of expression and elections*

Freedom of expression is guaranteed under the Constitution of Tanzania.¹³⁹ It provides that everyone –

- (a) has a freedom of opinion and expression of his ideas;

135 Conversation with William Bird, Director of MMA; Real411 'Complaint ID: #1841', <https://www.real411.org.za/complaints-view/60A921ZC> (accessed 20 October 2021); M Charles & N McCain 'Elections watchdog IEC backtracks on disinformation probe against Zille accreditation' *News24* 5 October 2021, <https://www.news24.com/news24/southafrica/news/elections-watchdog-iec-backtracks-on-disinformation-probe-against-zille-20211005> (accessed 20 October 2021).

136 Real411 'Blog', <https://blog.real411.org.za/> (accessed 20 October 2021).

137 RSA 'Electoral Commission on multi-stakeholder partnership to combat disinformation in 2021 municipal elections', <https://www.gov.za/speeches/electoral-commission-multi-stakeholder-partnership-combat-disinformation-2021-municipal> (accessed 20 October 2021).

138 IEC 'Document library', <https://www.elections.org.za/pw/Downloads/Documents-Municipal-Election-Reports> (accessed 20 October 2021).

139 Sec 18 of the Constitution of Tanzania, <https://rsf.org/sites/default/files/constitution.pdf> (accessed 27 January 2021).

- (b) has out right to seek, receive and, or disseminate information, regardless of national boundaries;
- (c) has the freedom to communicate and a freedom with protection from interference from his communication;
- (d) has a right to be informed at all times of various important events of life and activities of the people and also of issues of importance to the society.

While freedom of expression and the right of access to information are provided for under this section, sub-sections 18(c) and (d) are unique in their phrasing in the recognition of the principle of non-interference, as well as the emphasis on the right to information of events and other matters of public interest. Free, fair and credible elections are enabled by channels that facilitate public, voter and democracy education.¹⁴⁰ Interestingly, the Constitution does not explicitly provide for media freedom.

Despite the constitutional guarantees of freedom of expression, the provisions on limitation of rights appear to espouse claw-back clauses with a great potential for broad interpretation. Section 30(2) provides that the principles of rights, freedom and duties do not nullify existing law or prohibit the enactment of any law or the doing of any lawful act that seeks to protect the aims outlined under the section. While the section lists legitimate aims, it also proceeds to include other aims that justify the limitation of these rights beyond internationally-recognised legitimate aims such as development planning, mining interests, administration of the 'formation, management and activities of private societies and organisations' and the general promotion and preservation of national interest, among other aims.¹⁴¹ These broad provisions leave a high risk of interference with freedom of expression. It therefore rests with the courts to adopt a purposive approach to interpretation of the Constitution, where the case requires, to protect these human rights and fundamental freedoms.¹⁴²

Provisions on addressing false news in Tanzania are mainly found in its media laws and cybercrime law. The threat to media freedom in Tanzania is concerning, more so when the establishment seeks to further rein this in during elections, as was seen during the 2020

¹⁴⁰ Art 21 of the Constitution of Tanzania provides for the right to political participation.

¹⁴¹ Sec 30(2)(f) of the Constitution of Tanzania.

¹⁴² *Joseph Warioba v Stephen Wassira & Another* [1997] TLR 272 (CA).

general elections.¹⁴³ Section 16 of the Cybercrimes Act¹⁴⁴ criminalises the deliberate publication of false information with the intention 'to defame, threaten, abuse, insult, or otherwise deceive or mislead the public' or to conceal a crime. This offence is punishable by a minimum fine of TZS 5 million (\$2 100) or three years' imprisonment or both.

Section 118(a) of the Electronic and Postal Communications Act¹⁴⁵ prohibits the publication of information that among other things is false with the intention to 'annoy, abuse, threaten or harass' someone else. Phrases such as 'annoy, abuse, threaten or harass' are ambiguous and fail to meet the lawful test of limitations of rights.¹⁴⁶ Some elements of this provision require a high standard of proof, for example, the prosecution will face some difficulty proving an intention to annoy another person.¹⁴⁷

Regulation 16 of the Electronic and Postal Communications (Online Content) Regulations 2020¹⁴⁸ restricts the publication of prohibited content, which includes false, untrue or misleading information unless there is an unequivocal caveat that the content is satire, parody, fiction, or not factual.¹⁴⁹ These provisions affect online content producers of platforms such as WhatsApp, Facebook, Twitter, Instagram and YouTube. Under the Regulations, publications on the outbreak of a deadly or contagious disease, in this context, the coronavirus, without the approval of relevant authorities, could also attract sanction.¹⁵⁰ There is a patriarchal undercurrent to this provision in making the publication of an outbreak of a disease the sole prerogative of relevant authorities. This offence attracts a minimum fine of five million shillings (\$2 100) or to imprisonment for a term of not less than 12 months or both.¹⁵¹ The provision of

143 Freedom House 'Freedom in the world 2020: Tanzania', <https://freedomhouse.org/country/tanzania/freedom-world/2020> (accessed 19 January 2020).

144 ICT Policy Africa 'The Cybercrimes Act 2015', <https://ictpolicyafrica.org/en/document/c2m8s3qnqws?page=1> (accessed 19 January 2020).

145 Research ICT Africa 'The Electronic and Postal Communications Act', https://www.researchictafrica.net/countries/tanzania/Electronic_and_Postal_Communications_Act_no_3_2010.pdf (accessed 19 January 2020).

146 GDP et al (n 63).

147 Research ICT Africa (n 145).

148 Under the Electronic and Postal Communications Act Cap 306, <https://crm.misa.org/upload/web/supp-gn-no-133-16-03-2018-epoca-online-content-regulations-2018.pdf> (accessed 19 January 2020).

149 3rd Schedule sec 10 The Electronic and Postal Communications (Online Content) Regulations, 2020, [https://www.tkra.go.tz/document/The%20Electronic%20and%20Postal%20Communications%20\(Online%20Content\)%20Regulations,%202020](https://www.tkra.go.tz/document/The%20Electronic%20and%20Postal%20Communications%20(Online%20Content)%20Regulations,%202020) (accessed 19 January 2020). Under 3rd Schedule sec 8(c) (Online Content) Regulations, 2020 prohibited content also extends to information 'against the State and public order including content that aims to or publishes information, news, statements or rumours for the purpose of ridicule, abuse or harming the reputation, prestige or status of the United Republic'.

150 Under 3rd Schedule sec 8(c) (Online Content) Regulations, 2020.

151 Sec 21 (Online Content) Regulations, 2020.

an imprisonment term runs the risk of imposing a disproportionate sanction. The broad scope of these provisions is worrying given that it seeks to impose an overarching restriction on freedom of expression that may be misused by enforcement authorities. Parliament should amend or repeal these provisions and align them with international laws and standards.

The Regulations also require that a person who provides online content services¹⁵² must be licensed by the Tanzania Communications Regulatory Authority (TCRA). The high cost of registration and licensing fees of about \$400 to \$900 may likely restrict entry for many producers of online content.¹⁵³ In the event that an online content service provider is found in breach of the Regulations, they may be subject to additional sanctions including a warning, orders to apologise to the public and the victim of complained content, an order for content removal and a fine.¹⁵⁴

Section 50(1)(a) of the Media Services Act 2016¹⁵⁵ makes it an offence to intentionally, recklessly, maliciously, fraudulently or unjustifiably publish false information. Some parts of the section attach the offence to a legitimate aim such as the protection of public defence, safety and order, public morals, public health, as well as the rights, reputation and freedoms of others. However, it also includes the protection of the economic interests of Tanzania, which is not an internationally-recognised legitimate aim and requires a broader interpretation to avoid misuse by enforcement agencies. The section also has broadly-phrased provisions such as the prohibition of dissemination of prohibited content (a phrase that is not further expounded in the Act),¹⁵⁶ and false news, thereby providing enforcement agencies with broad discretion.¹⁵⁷ These offences attract harsh and disproportionate penalties of between TZS 5 million and 20 million (\$2 100 to \$8 600) or three to five years' imprisonment or both.

Section 54 of the Act also criminalises the publication of false information that is likely to cause public fear and alarm or disturb public peace. This is a broadly-phrased provision worsened by its

152 Reg 3 defines online content services to include content broadcasting to the public through internet websites, application software, forums, blogs, weblogs, microblogs, public account, instant messaging tools, online live streaming, aggregators and other related platforms.

153 2nd Schedule (Online Content) Regulations, 2020.

154 Reg 21 (Online Content) Regulations, 2020.

155 ACME 'Media Service Act', <http://acme-ug.org/wp-content/uploads/1481107152-MEDIA-SERVICE-ACT-20161.pdf> (accessed 19 January 2020).

156 Sec 50(1)(f) of the Media Services Act.

157 Sec 50(2) of the Media Services Act.

subjectivity given that various factors can influence fear, alarm and public disturbance. The available defence for the accused is that he or she took reasonable measures to verify the accuracy of the information leading to a reasonable belief of its accuracy.¹⁵⁸ The section attracts a disproportionate sanction of between TZS 10 million and TZS 20 million (\$4 300 to \$8 600) or four to six years' imprisonment or both.

In a 2019 judgment the East African Court of Justice (EACJ) in *Media Council of Tanzania & Others v Attorney-General*¹⁵⁹ found sections of the Media Services Act on criminal defamation, the publication of false news, sedition, a restriction on publication of certain content, limitations to media independence through government control, and onerous requirements for accreditation of journalists, to unjustifiably violate freedom of expression. Resultantly, the Court ordered Tanzania to align it with the Treaty for the Establishment of the East African Community.¹⁶⁰ Tanzania, however, has failed to implement this court order.

The regulatory environment of Tanzania is emblematic of the use of restrictive and punitive laws on false news to unreasonably and unjustifiable limit freedom of expression. Media freedom is under threat in Tanzania given the uncondusive regulatory environment as well as clampdown by authorities.¹⁶¹ The discussed legislation in Tanzania has broadly stretched the scope of limitations on freedom of expression to an extent that gravely threatens the realisation of this right. Further barriers to entry in online and offline media through costly registration and licensing fees further restrict freedom of expression. This legislative landscape has nurtured and enabled an environment that faces increased political intolerance, repression and silencing of critical voices. Unlike South Africa, Tanzania's electoral laws do not specifically provide for the offence of disinformation.¹⁶² However, persons were charged with publication of false news under the laws above during the 2020 elections.

¹⁵⁸ Sec 54(2) of the Media Services Act.

¹⁵⁹ *Media Council of Tanzania & Others v Attorney General* No 2 of 2017, <https://www.eacj.org/wp-content/uploads/2019/03/Referene-No.2-of-2017.pdf> (accessed 19 January 2020).

¹⁶⁰ As above.

¹⁶¹ Freedom House 'Freedom of the world 2021: Tanzania', <https://freedomhouse.org/country/tanzania/freedom-world/2021> (accessed 20 October 2021).

¹⁶² EISA 'Compendium of electoral laws and regulations of Tanzania', <https://www.eisa.org/pdf/CompendiumElectoralLawsandRegulationsTanzania2016.pdf> (accessed 20 January 2021).

4.4.2 *Managing false news during Tanzania's 2020 elections: Of punitive laws and network disruptions*

Tanzania held its general elections on 28 August 2020, one of the few countries in Africa to proceed with scheduled elections amid the COVID-19 pandemic.¹⁶³ However, reports on curtailment of freedom of expression in the lead-up to the elections were among the challenges that marred the credibility of the elections.¹⁶⁴

On 21 October 2020 TCRA issued a directive temporarily suspending bulk short messaging and bulk voice calling services from 24 October to 11 November to prevent their adverse effects on the elections.¹⁶⁵ On the eve of the elections there were reports of widespread network disruption, especially on Twitter, WhatsApp, Instagram and some Google services of users of select internet service providers.¹⁶⁶ The need to address the spread of false information online was raised as a threat to the credibility of the elections.¹⁶⁷ However, these actions contravened section 18(c) of the Tanzanian Constitution on non-interference with communication. These measures further contradicted international and regional laws and standards on freedom of expression. The government should have implemented less restrictive measures given that there were no widespread reports of false news disrupting the elections that would provide a direct link between expression and actual harm on the election process. Therefore, the internet disruption did not serve a legitimate aim, and was not necessary or proportionate in a democratic society.

The chilling effect of laws on false news and, arguably, their real objective, was witnessed in the silencing of dissenting voices. Journalists, media houses and individual persons were penalised and accused of spreading false and misleading information.¹⁶⁸ Journalists and media houses that featured critical news stories on the government response to COVID-19 were accused of violating

163 IDEA 'Global overview of COVID-19 impact on elections', <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections> (accessed 20 January 2021).

164 Freedom House (n 161).

165 Access Now, <https://www.accessnow.org/cms/assets/uploads/2020/10/TCRA-Directive-to-telcos-in-TZ-to-filter-content.jpeg> (accessed 20 January 2021).

166 Netblocks 'Internet disrupted in Tanzania on eve of general elections', <https://netblocks.org/reports/internet-disrupted-in-tanzania-on-eve-of-presidential-elections-oy9abny3> (accessed 20 January 2021).

167 DW 'Tanzania restricts social media during election', <https://www.dw.com/en/tanzania-restricts-social-media-during-election/a-55433057> (accessed 20 January 2021).

168 HWR 'Tanzania: Freedoms threatened ahead of elections', <https://www.hrw.org/news/2020/09/02/tanzania-freedoms-threatened-ahead-elections> (accessed 2 September 2020); Freedom House (n 161).

the Electronic Communications Act and Regulations and were subject to fines and a suspension of their licences, and required to apologise.¹⁶⁹ The Department of Information of the Ministry of Information, Culture, Arts and Sports also revoked the licence of *Daima* newspaper, which was accused of repeatedly violating media laws, poor journalistic ethics and the spreading of false information. Previously, its journalist had been questioned over a news report that advocated electoral reform.¹⁷⁰

Tanzania is a reflective example of how an electoral authoritarian regime can misuse laws on addressing false news, restrictive media laws and repressive practices such as internet shutdowns to clamp down on critical voices and control the information ecosystem. It goes to the question of free, fair and transparent elections when elections take place in an environment of fear that curtails basic human rights essential to ensuring credible elections. Given the fact that the internet has also been used as a tool of promoting transparency and openness in electoral processes by documenting and publishing electoral malpractices, restricting access to internet services and curtailing media freedom significantly tilts the scales in favour of incumbents who control these systems.

Sadly, apart from punitive legal measures and network disruptions, there is no research to show that the country took other proactive human rights-centred measures to counter the spread of false news during the elections. Voter and civic education on this aspect and generally can be approved.¹⁷¹ More meaningful collaboration with civil society organisations and the media would enhance this process.

169 Amnesty International 'Tanzania: Authorities must end crackdown on journalists reporting on COVID-19' 21 April 2020, <https://www.amnesty.org/en/latest/news/2020/04/tanzania-authorities-must-end-crackdown-on-journalists-reporting-on-covid19/> (accessed 20 January 2021); J Mosenda 'COVID-19: Media fined for broadcasting against Tanzania's stance' *The Citizen* 4 April 2020, <https://www.thecitizen.co.tz/news/Covid-19--Media-fined-for-/1840340-5514540-ojukruz/index.html> (accessed 20 January 2021); J Mosenda 'TCRA suspends Mwananchi's online license for six months' *The Citizen* 17 April 2020, <https://www.thecitizen.co.tz/news/TCRA-suspends-Mwananchi-s-online-license-for-Six-months/1840340-5527310-13ixgsgz/index.html> (accessed 20 January 2021).

170 J Mosenda 'Government revokes "Tanzania Daima" newspaper licence' *The Citizen* 23 June 2020, <https://www.thecitizen.co.tz/news/Government-revokes-Tanzania-Daima--newspaper-license/1840340-5581552-fjs6c8z/index.html> (accessed 20 January 2021); Reuters 'Tanzania arrests opposition party leader, revokes newspaper licence' 23 June 2020, <https://www.reuters.com/article/us-tanzania-politics/tanzania-arrests-opposition-party-leader-revokes-newspaper-licence-idUSKBN23U319> (accessed 20 January 2021).

171 EISA 'EISA pre-election assessment mission report: Tanzania October 2020' 19, <https://www.eisa.org/pdf/tan2020pam.pdf> (accessed 20 October 2021).

5 Conclusion and recommendations

Protecting and promoting freedom of expression both offline and online greatly enable the conduct of free, fair and transparent election processes. Access to platforms that allow for citizens to sample diverse views, and engage with accurate, credible and relevant information ensures the development of an informed electorate. While the spreading of false news threatens election integrity, it is important that in addressing this risk, states do not illegally, unnecessarily and disproportionately jeopardise the exercise of freedom of expression and related rights. This is increasingly seen in laws that criminalise false news as well as internet shutdowns that have been instrumental in fostering a culture of fear and self-censorship. Initiatives such as Real411 in South Africa are more proactive in identifying and countering false news through the participation of the public. More can certainly be done. The empowerment of the masses to identify and counter false narratives is a more rights-promoting approach as opposed to a heavy reliance on punitive measures, as has been the case in countries such as Tanzania. Penal sanctions as a means of managing false news should be relegated to extreme circumstances resulting in severe casualties. States, civil society organisations and other stakeholders should consciously engage on what proportionate actions should address incidences where false news leads to death or severe injuries, and civil sanctions may not afford adequate remedy. This may require the strengthening of criminal laws to meet this exigency.

Measures such as media and information literacy are crucial to reducing the information poverty facing Africa. They will further promote political participation by developing an informed electorate with access to accurate information to guide their political decisions. Media and information literacy should be integrated into civic and voter education curriculums used by election management bodies, civil society organisations and other voter education providers. More broadly, states should incorporate media and information literacy in education curricula to inculcate responsible online practices from early ages. States should also liaise with social media sites and adopt co-regulatory practices given that social media sites may be better placed to adapt their terms and conditions to emergent harms caused by false news on their platforms as compared to a complete reliance on national laws that are susceptible to bureaucracy. However, decisions on content regulation should be open and transparent, preceded by broad public consultation with relevant stakeholders, and subject to administrative and judicial review.