

**TOWARDS A RIGHTS-BASED APPROACH TO MEDIA PROTECTION IN THE  
DIGITAL AGE FOR MEANINGFUL POLITICAL PARTICIPATION OF THE  
ELECTORATE IN KENYA**

**A thesis submitted in fulfilment of the requirements for the degree of Doctor of Laws  
(LLD) In the Faculty of Law, University of Pretoria**



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Marystella Auma Simiyu

LLD Candidate



## **Dedication**

I dedicate this thesis to my family. To my parents, Agnes and Stephen Simiyu, whose love I have never doubted and whose unceasing prayers and support have set my soul at ease even in the toughest of times. To my siblings, Terry and Ben, who shower me with love, laughter and good vibes as they celebrate my every milestone. You have my gratitude and my love.

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At the beginning of this academic journey, I was told that the PhD life is a lonely one. But as I reflect, I do not remember loneliness. Yes, this thesis is my baby and I was primarily responsible for nurturing it but I was surrounded by an amazing support system who I credit for staving off forlornness.

First, I thank God, because He put all the right people on my path and opened the right doors for me to undertake my PhD studies.

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## **Abstract**

Traditional and online media share the contemporary media landscape in Kenya. Both media types contended with diverse challenges, including the political economy of the media, some restrictive media laws and law enforcement actions, and peace and conflict that significantly impact the media's performance of its institutional functions. The media is a crucial actor in Habermas's public sphere theory. Habermas envisioned a space open and accessible to all, separated from the state, where free and equal citizens engage in critical and rational discourse towards informed public opinion, agreement and decision-making. This public sphere is arguably chimerical but ideal. The media is the medium to objectively set and frame the agenda, collect, disseminate and amplify information, and guide the public in decision-making. This is important during critical processes such as elections where access to accurate and credible information helps nurture an informed electorate that can meaningfully exercise their right to political participation. The extent of media freedom is also a determinant of the freeness and fairness of an election.

This thesis explores how Kenya can better protect media freedom in the digital age to enhance meaningful political participation of the electorate. In doing so, it recognises that regulation significantly affects media freedom and its ability to play its normative functions. Both international and national laws have adapted to protect media in the digital age, with more rights-based approaches at the international level. The research also finds that media regulation has often adopted a tripartite approach of self, state or co-regulation that revolves around the regulatory actors. However, it pivots and explores a contextualised human rights-based approach to protecting media freedom in the digital age focused on substance, actors and unique situational opportunities and challenges.

International law and the Constitution of Kenya provide the foundational normative guide for a contextualised human rights-based approach. In describing the proposed human rights-based approach, the research borrows from the advantages of media self, state and co-regulation and builds on this traditional regulatory framework. The approach appreciates the role of diverse stakeholders in the media ecosystem of the digital age and calls for multi-stakeholder participation, including the state, independent media regulators, internet intermediaries, the technical community, the private sector, the international community, and civil society. This

multi-stakeholder representation is necessary for improved norm development, enforcement and accountability. Tiered multi-stakeholder intervention at the international and national levels arguably establishes legal safeguards that ameliorate the political economy challenge that affects media freedom in Kenya pronouncedly.

The human rights-based approach seeks to foster an enabling media framework that is contextually relevant to the media and electoral milieu in Kenya. On the one hand, Kenya has robust traditional and online media, a politically engaged citizenry, a relatively independent judiciary with activist judges and a progressive Constitution. However, it is also vulnerable to electoral violence fuelled by incendiary public discourse, political and economic interference in media, media overregulation and restrictive media laws and practices. The three-pronged limitation of rights approach under international law requiring restrictions to respect the principles of legality, legitimate aim, necessity and proportionality is relevant. It is at the juncture of legality, necessity and proportionality that some media laws in Kenya have failed to pass muster. Concerningly is the presence of vague and broad provisions and disproportionate sanctions, including the criminalisation of expression contrary to international law. Political and powerful actors have misused these laws to limit media rights, especially during elections.

The proposed framework further calls for a change in the largely self-regulatory parlance of social media, given its popularity as a source of political and electoral news and a platform for activism and public debate in Kenya, second only to television. International law requires businesses such as social media platforms to adopt rights-respecting policies and practices and, to some extent, promote human rights. However, the study argues for a narrow extension of rights-protecting and fulfilling obligations to businesses, including very large social media platforms such as Facebook, Twitter (now X), YouTube and TikTok because their products, policies and actions significantly impact media rights and meaningful participation online. The study calls for a collective continental effort to enhance social media accountability as opposed to disparate national frameworks which may violate media freedom, constrain tech innovation and contradict international law. The African Commission on Human and Peoples' Rights, through the Office of the Special Rapporteur on Freedom of Expression and Access to Information, has the requisite promotional mandate to shepherd the process of addressing the legal gap in social media accountability in Africa and guide state action. Lessons can be drawn

from the regional and conditional liability approach of the European Union, the broad immunity approach of the United States of America, and conditional liability approach in select African countries.

By adopting the proposed human rights-based approach to media regulation in the digital age, the thesis argues that Kenya will nurture a more vibrant public sphere mediated by offline and online media that can effectively counter political and economic interference and other challenges to promote meaningful political participation of the electorate and free and fair elections.

## CHAPTER ONE: INTRODUCTION

### 1 Background to the study

It is axiomatic that an independent and vibrant media is indispensable to free and fair elections and democratic development.<sup>1</sup> The role of the media in elections manifests in different capacities, including as a watchdog, educator, campaign platform, and debate forum.<sup>2</sup> Media platforms report on electoral and political developments and foster public participation, especially on issues that impact society's socio-economic and political fabric.<sup>3</sup> As a watchdog, the media is responsible for protecting the transparency of elections and promoting electoral accountability.<sup>4</sup> Importantly, the media plays an oversight role in exposing incidents of electoral malpractices and, therefore, safeguards the credibility of the electoral process.<sup>5</sup> Ultimately, these factors influence meaningful political participation by the electorate and the integrity of elections.<sup>6</sup>

Media freedom is closely intertwined with freedom of expression and right to information.<sup>7</sup> These rights are collectively encapsulated in seminal human rights instruments, including article 19 of the Universal Declaration of Human Rights (Universal Declaration),<sup>8</sup> article 19 of the International Covenant on Civil and Political Rights (ICCPR),<sup>9</sup> and article 9 of

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<sup>1</sup> A Sen *Development as freedom* (1999); BP Lange & D Ward *The media and elections: A handbook and comparative study* (2004); M Esipisu & IE Khaguli *Eyes of democracy: the media and elections* (2009) & IDEA 'Media assistance and elections: Toward an integrated approach' (2015) <https://www.idea.int/publications/catalogue/media-assistance-and-elections-toward-integrated-approach> (accessed 8 November 2023).

<sup>2</sup> As above. Also see ACE Project 'Media and elections' (2012) <http://aceproject.org/ace-en/topics/me/introduction/me10/me10d> (accessed 8 November 2023).

<sup>3</sup> S Birch & C Van Ham 'Getting away with foul play? The importance of formal and informal oversight institutions for electoral integrity' (2017) 56 *European Journal of Political Research Paper* 496.

<sup>4</sup> Lange & Ward (n 1) x & xi.

<sup>5</sup> Lange & Ward (n 1) & ACE Project (n 2).

<sup>6</sup> CH Vreesea & H Boomgaardenb 'News, political knowledge and participation: The differential effects of news media exposure on political knowledge and participation' (2006) 41 *Acta Politica* 371.

<sup>7</sup> IACHR 'Compulsory membership in an association prescribed by law for the practice of journalism, Inter-American Court of Human Rights' (1986) 74 *Human Rights Law Journal* 7.

<sup>8</sup> Universal Declaration <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed 8 November 2023).

<sup>9</sup> ICCPR <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (accessed 8 November 2023).

the African Charter on Human and Peoples' Rights (African Charter),<sup>10</sup> under the umbrella of freedom of expression. The African Commission on Human and Peoples' Rights (African Commission) adopted the revised Declaration of Principles on Freedom of Expression and Access to Information in Africa (the 2019 Declaration) in 2019,<sup>11</sup> and the Guidelines on Access to Information and Elections in Africa (the Guidelines) in 2017<sup>12</sup> that further reinforce the protection of these rights. This thesis refers to these intertwined rights of freedom of expression, media freedom and the right to information that affect the media as media rights.

The media landscape has been revolutionised by the emergence and growth of new media, which has been described in various ways. This thesis adopts three definitions that describe new media through the lens of the medium of operation (technology), utility (interactive communication) and types (various social media). Socha and Eber-Schmid characterise new media as 'all that is related to the internet and the interplay between technology, images and sound.'<sup>13</sup> Robert Logan similarly defines new media as 'digital media that is interactive, incorporate two-way communication, and involve some form of computing...'<sup>14</sup> Friedman and Friedman describe it as 'blogs, wikis, online social networking, virtual worlds and other social media forms.'<sup>15</sup> New media, digital media or online media has challenged the monopoly of broadcast (television [TV] and radio) and print media, commonly referred to as traditional or legacy media, as the gatekeepers of information. As a result, digital citizen journalism flourished.<sup>16</sup> Interestingly, traditional media has also leveraged the internet in its reporting, leading to an evolution in the composition of players in the online media space, including

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<sup>10</sup> African Charter [https://au.int/sites/default/files/treaties/36390-treaty-0011\\_-\\_african\\_charter\\_on\\_human\\_and\\_peoples\\_rights\\_e.pdf](https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf) (accessed 8 November 2023).

<sup>11</sup> The 2019 Declaration [https://www.chr.up.ac.za/images/researchunits/dgdr/documents/ati/Declaration\\_of\\_Principles\\_on\\_Freedom\\_of\\_Expression\\_ENG\\_2019.pdf](https://www.chr.up.ac.za/images/researchunits/dgdr/documents/ati/Declaration_of_Principles_on_Freedom_of_Expression_ENG_2019.pdf) (accessed 8 November 2023). The 2019 version was a revision of the original Declaration of Principles on Freedom of Expression in Africa adopted in 2002 by the African Commission at its 32<sup>nd</sup> session. The 2019 version more comprehensively examines freedom of expression, access to information and media protection. Importantly, it enhances protections for these rights in light of digital opportunities and challenges. For the 2002 version see <http://hrlibrary.umn.edu/achpr/expressionfreedomdec.html> (accessed 4 June 2024).

<sup>12</sup> The Guidelines [https://www.chr.up.ac.za/images/researchunits/dgdr/documents/resources/guidelines\\_on\\_access\\_to\\_information\\_and\\_elections\\_in\\_africa\\_en.pdf](https://www.chr.up.ac.za/images/researchunits/dgdr/documents/resources/guidelines_on_access_to_information_and_elections_in_africa_en.pdf) (accessed 8 November 2023).

<sup>13</sup> B Socha & B Eber-Schmid 'Defining new media isn't easy' (2014) <https://thanamezbanj.files.wordpress.com/2015/06/new-media-group-8-pdf1.pdf> (accessed 8 November 2023).

<sup>14</sup> RK Logan *Understanding new media: Extending Marshall McLuhan* (2010) 10.

<sup>15</sup> LW Friedman & HH Friedman 'The new media technologies: Overview and research framework' (April 2008) 1.

<sup>16</sup> ACE Project (n 2) & JH Lipschultz *Social media communication: Concepts, practices, data, law and ethics* (2015) 53.

professional journalists, citizen journalists and even ordinary citizens. New media has provided an invaluable complementary and alternative platform for freedom of expression, especially in countries where traditional mainstream media has been besieged by government or corporate interests, compromising its independence and credibility.<sup>17</sup> The influence of politics and economic factors on media composition, agenda-setting, news framing and behaviour is referred to as the political economy of the media.<sup>18</sup> Conventionally, established media houses in broadcast and print media represented mainstream media. However, with the redefinition of media in the digital age and the growth of online media, such as social media, new media is complementing, competing with, and replacing traditional media as a media source for some population segments. Therefore, it is feasible that large social media companies such as Meta, Google and Twitter (now X)<sup>19</sup> also form part of mainstream media.<sup>20</sup>

Online media has given rise to a new field of digital rights and legal and ethical concerns regarding spreading harmful and illegal content, privacy infringements, cybercrimes, unlawful online surveillance, and intellectual property violations.<sup>21</sup> New media governors have also emerged as internet intermediaries like social media companies.<sup>22</sup>

Given the ever-growing influence of online media, it inevitably features in democratic development discourse. Rights-based regulation that is founded on international human rights law principles, emphasises human rights enjoyment over unreasonable restrictions, and involves diverse state and non-state actors in norm creation, monitoring and enforcement, is crucial to protect this space. The reality is that legal developments usually lag behind technological

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<sup>17</sup> N Nyabola 'The battle for Kenya's fourth estate: State capture and the Kenyan media during the 2017 election' in M Meirotti & G Masterson (eds) *State capture in Africa: Old threats, new packaging* (2018) 117-178.

<sup>18</sup> O Boyd-Barrett 'The political economy approach' in O Boyd-Barrett & C Newbold (eds) *Approaches to media: A reader* (1995) 186.

<sup>19</sup> Elon Musk, the owner of the social media platform formally known as Twitter, rebranded the platform to X in July 2023. This thesis however will continue to refer to the platform as Twitter, the globally recognized brand name, whose policies are best aligned with the arguments proffered in the thesis. This is also informed by the uncertainty of the policy trajectory of the platform under the Elon Musk management.

<sup>20</sup> Maryville University 'What is mainstream media' <https://online.maryville.edu/blog/what-is-mainstream-media/> (accessed 8 November 2023).

<sup>21</sup> SJ Drucker & G Gumpet 'Introduction' in SJ Drucker & G Gumpert (eds) *Regulating social media: Legal and ethical considerations* (2013) 7-8.

<sup>22</sup> D Kaye *Speech police: The global struggle to govern the internet* (2019) 10-12 & K Klonick 'The new governors: The people, rules, and processes governing online speech' (2018) 131 *Harvard Law Review* 1602-1603.

innovations, impairing the ability to regulate a fast-developing space effectively.<sup>23</sup> Arguably, entrenching a solid human rights-based foundation for digital rights may improve the regulation of technological innovations.<sup>24</sup>

Media regulation blends self and co-regulatory approaches, focusing on the regulatory actors. Traditional approaches to regulating broadcasting systems, such as television and radio, must be more adequate for online media.<sup>25</sup> While existing civil and criminal laws on defamation, intellectual property, hate speech, privacy, and data protection can apply to offline and online communication, emerging concerns around online harms have necessitated a global discussion on approaches to regulating online media.<sup>26</sup> The spread of illegal and harmful content online is a growing concern during democratic processes such as elections, given its ability to distort public debate and decision-making in the public sphere, as well as foment violence, leading to implications on the right to life and personal integrity.<sup>27</sup>

The discussion around regulating these spaces cannot be done without the active participation of the technical community.<sup>28</sup> While regulation often lies in the domain of governments and the international community, internet intermediaries,<sup>29</sup> such as social media

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<sup>23</sup> Drucker & Gumpert (n 21) 8; M Giandomenico *Deregulation or reregulation? Regulatory reform in Europe and the United States* (1990) 10; & T Proser *Law and the regulators* (1997) cap 10.

<sup>24</sup> 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.

<sup>25</sup> L Waverman 'Broadcasting policy hits the internet' in WH Lehr & L Pupillo (eds) *Cyber policy and economics in an internet age* (2002) 43-44.

<sup>26</sup> House of Lords Select Committee on Communications 'Regulating in a digital world' (2019) 7-8 & Lipschultz (n 16) 161.

<sup>27</sup> GPD 'A rights-respecting model of online content regulation by platforms' (2018)18 & 32 <https://www.gp-digital.org/wp-content/uploads/2018/05/A-rights-respecting-model-of-online-content-regulation-by-platforms.pdf> (accessed 8 November 2023) & UNESCO 'Letting the sun shine in: transparency and accountability in the digital age' (2021) 1-2 <https://unesdoc.unesco.org/ark:/48223/pf0000377231> (accessed 8 November 2023). For a discussion on information disorder that has elements of harmful and illegal expression, as the case may be see C Wardle & H Derakhshan 'Information disorder: Toward an interdisciplinary framework for research and policy making' (2017) 5 <https://rm.coe.int/information-disorder-toward-an-interdisciplinary-framework-for-research/168076277c> (accessed 8 November 2023).

<sup>28</sup> HRC 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 38th session' A/HRC/38/35 2018 (2018) 5.

<sup>29</sup> See the definition adopted by Council of Europe 'Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries' (7 March 2018) paras 4 & 5 [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=0900001680790e14](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14) (accessed 8 November 2023). '[I]nternet intermediaries facilitate interactions on the internet between natural and legal persons by offering and performing a variety of functions and services. Some connect users to the internet, enable the processing of information and data, or host web-based services, including for user-generated content. Others aggregate information and enable searches; they give access to, host and index content and services designed and/or operated by third parties. Some facilitate the sale of goods and services, including audio-visual services, and enable other



companies, increasingly influence how people exercise human rights online and shape online governance. Checks and balances are necessary, hence the need for self-regulatory and co-regulatory measures grounded in human rights.<sup>30</sup> Self-regulatory measures for social media already manifest in the policies guiding user activity on these sites, which may limit the exercise of these rights within certain conditions.<sup>31</sup> However, social media companies have attracted widespread criticism for poor compliance and enforcement actions globally<sup>32</sup> and, more so, lopsided implementation in African countries.<sup>33</sup>

The existing international normative framework is the starting point for reassessing the regulation of online media spaces, including social media. The United Nations (UN) Internet Resolution provides that ‘the same human rights that people have offline must be protected online.’<sup>34</sup> This is the lodestar for regulating media rights offline and online, in addition to the duties of states and social media companies.<sup>35</sup> However, at the national level, it is worrying that some legislative approaches to online media show a trend towards unreasonable and unjustifiable limitations on media rights. Restrictive measures have been witnessed in draconian freedom of expression and media laws, internet shutdowns, especially during elections or unrest, taxes on social media, intimidation, harassment and arrests of journalists and online content creators, censorship, online surveillance, and withdrawal or suspension of broadcasting licences.<sup>36</sup> Governments have implemented these measures to maintain public order and protect national

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commercial transactions, including payments...They may also moderate and rank content, including through automated processing of personal data, and may thereby exert forms of control which influence users’ access to information online in ways comparable to media, or they may perform other functions that resemble those of publishers. Intermediary services may also be offered by traditional media, for instance, when space for user-generated content is offered on their platforms.’

<sup>30</sup> RJ Rosen ‘What to make of Google's decision to block the 'Innocence of Muslims' movie’ *The Atlantic* 14 September 2012 <https://www.theatlantic.com/technology/archive/2012/09/what-to-make-of-googles-decision-to-block-the-innocence-of-muslims-movie/262395/> (accessed 8 November 2023).

<sup>31</sup> Lipschultz (n 16) 161.

<sup>32</sup> L Munn ‘Angry by design: Toxic communication and technical architectures’ (2020) 7 *Humanities and Social Sciences Communications* 2.

<sup>33</sup> O Madung ‘Opaque and overstretched, Part II: How platforms failed to curb misinformation during the Kenyan 2022 election’ <https://foundation.mozilla.org/en/campaigns/opaque-and-overstretched-part-ii/#case-study-labeling-failures> (accessed 8 November 2023).

<sup>34</sup> UN HRC ‘The promotion, protection and enjoyment of human rights on the Internet A/HRC/38/L.10/Rev.1’ (4 July 2018) [https://digitallibrary.un.org/record/1639844/files/A\\_HRC\\_38\\_L.10\\_Rev.1-EN.pdf?ln=en](https://digitallibrary.un.org/record/1639844/files/A_HRC_38_L.10_Rev.1-EN.pdf?ln=en) (accessed 8 November 2023).

<sup>35</sup> HRC ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue’ (16 May 2011) A/HRC/17/27 paras 53-59.

<sup>36</sup> Drucker & Gumpet (n 21) 12 & Freedom House ‘About freedom of the net’ <https://freedomhouse.org/report-types/freedom-net> (accessed 8 November 2023).

security, among other justifications for technology capture.<sup>37</sup> At times, these measures have grossly infringed international law, particularly the requirement that states should only restrict a right if the limitation is provided for in law, serves a legitimate purpose, and is necessary and proportionate to achieve the stated aim in a democratic society.<sup>38</sup>

Narrowing in on the focus of this research, the push for human rights-based regulation of traditional and new media is meant to ensure that the media can undertake its functions in a democracy. In turn, the electorate also has access to credible information to actively engage in public debate and participate in elections and other democratic processes through an informed perspective. In this way, new media can effectively complement or substitute the conventional functions of traditional media of watchdog, public education, public debate, and campaign platform while also allowing for more interactive and timely engagement between the electorate and electoral stakeholders.<sup>39</sup> To harness the benefits of this space throughout the electoral cycle, international and national stakeholders and internet intermediaries, particularly social media companies, need to address the challenges facing media rights in the digital space.

Kenya, the main focus of this research, is considered a hybrid regime under the democracy index, meaning it has elements of both democracy and authoritarianism.<sup>40</sup> It is also moderately ranked under the Perceptions of Election Integrity (PEI) index, with an overall rating of 56.<sup>41</sup> Media coverage has a rating of 52 under the PEI index, which is a moderate score, implying that media performance needs to improve to enhance the integrity of the election

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<sup>37</sup> J Simon *The new censorship: Inside the global battle for media freedom* (2015) 112-113.

<sup>38</sup> Art 19(3) ICCPR & principle 11 2019 Declaration.

<sup>39</sup> ACE Project (n 2).

<sup>40</sup> EIU 'Democracy index 2022' (2023) 9 [https://www.eiu.com/n/campaigns/democracy-index-2022/?utm\\_source=google&utm\\_medium=paid-search&utm\\_campaign=democracy-index-2022&gclid=CjwKCAjwjMiiBhA4EiwAZe6jQ7P6NV0LoRhM8rPqsyankPkoSTHWU0ikG6NIxJ\\_8tu8DJ2HyqXT\\_CFRoCmQgQAvD\\_BwE#mktoForm\\_anchor](https://www.eiu.com/n/campaigns/democracy-index-2022/?utm_source=google&utm_medium=paid-search&utm_campaign=democracy-index-2022&gclid=CjwKCAjwjMiiBhA4EiwAZe6jQ7P6NV0LoRhM8rPqsyankPkoSTHWU0ikG6NIxJ_8tu8DJ2HyqXT_CFRoCmQgQAvD_BwE#mktoForm_anchor) (accessed 8 November 2023). A hybrid regime under the democracy index is characterised by flawed electoral processes, intolerance towards opposition, weak rule of law, threats to free press, weak civil society, systemic corruption, and lack of an independent judiciary.

<sup>41</sup> HA Garnett & others 'Electoral integrity global report 2023' (2023) 6 [https://static1.squarespace.com/static/58533f31bebafe99c85dc9b/t/649dee1ee6e6c50219e9fbd9/1688071716978/EI\\_electoral+Integrity+Global+Report+2023.pdf](https://static1.squarespace.com/static/58533f31bebafe99c85dc9b/t/649dee1ee6e6c50219e9fbd9/1688071716978/EI_electoral+Integrity+Global+Report+2023.pdf) (accessed 8 November 2023).

process.<sup>42</sup> Nevertheless, Kenya's media has gained a reputation for being vibrant and influential despite vulnerability to political and economic interference.<sup>43</sup>

The history of media development in Kenya and its relationship with government has been tumultuous since independence. In spite of this, Kenyan media has endeavoured to report for democracy.<sup>44</sup> However, following the 2007, 2013, 2017, and 2022 electoral cycles, there are growing fears that the Kenyan media is more vulnerable to state and economic capture owing to increased interference and media concentration and control.<sup>45</sup> This media capture has engendered public distrust in traditional media.<sup>46</sup> Unsurprising consequences are undermining media rights and the meaningful political participation of the electorate.<sup>47</sup>

This state of affairs in Kenya's traditional media has allowed online media to flourish as an alternative and complementary source of information.<sup>48</sup> The influence of digital technologies on citizen journalism has further enhanced media rights.<sup>49</sup> Online media, particularly social media and websites, has destabilised the position of traditional mainstream media as the gatekeepers of information. It has also enhanced the plurality of voices and inclusion in the media with increased participation of vulnerable groups such as women and youth.<sup>50</sup> The growth of the internet, including social media, has presented great opportunities for enhancing discursive participation for Kenyans.<sup>51</sup> Kenya's social media landscape is home to strong digital activism

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<sup>42</sup> P Norris, T Wynter & S Cameron 'Corruption and coercion: The year in elections 2017' (2018) 12 <https://static1.squarespace.com/static/58533f31bebafe99c85dc9b/t/5aa60e298165f533f6462e58/1520832089983/T+he+Year+in+Elections+2017.pdf> (accessed 8 November 2023).

<sup>43</sup> N Nyabola *Digital democracy analogue politics* (2018) 55-56 & P Oriare, R Okello-Orlale & W Ugangu 'The media we want: The Kenya media vulnerabilities study.' (2010) 5 <https://library.fes.de/pdf-files/bueros/kenia/07887.pdf> (accessed 8 November 2023). Also, see EU EOM 'Final report Republic of Kenya general elections 2017' (2018) 38 [https://www.europarl.europa.eu/cmsdata/212568/Kenya-general-elections\\_2017\\_EU-EOM-report.pdf](https://www.europarl.europa.eu/cmsdata/212568/Kenya-general-elections_2017_EU-EOM-report.pdf) (accessed 8 November 2023).

<sup>44</sup> Nyabola (n 17) 106 & G Ogola 'The political economy of the media in Kenya: From Kenyatta's nation building press to Kibaki's local language FM Radio' (2011) 57 *Africa Today* 77-95.

<sup>45</sup> Nyabola (n 17) 104-105; HRW 'Not worth the risk: Threats to free expression ahead of Kenya's 2017 elections' (30 May 2017) 10 & Freedom House 'Freedom of the press 2017: Kenya profile' (2018) [https://freedomhouse.org/sites/default/files/FOTP\\_2017\\_booklet\\_FINAL\\_April28.pdf](https://freedomhouse.org/sites/default/files/FOTP_2017_booklet_FINAL_April28.pdf) (accessed 8 November 2023).

<sup>46</sup> As above.

<sup>47</sup> Oriare, Okello-Orlale & Ugangu (n 43) 5.

<sup>48</sup> IREC 'Report on the general elections held in Kenya on 27 December 2007' (2008) 63-65 & F Ogenga 'The role of the Kenyan media in the 2007 elections' (2009) 7 *Journal of African Elections* 129.

<sup>49</sup> BBC 'Bridging theory and practice' (2015) 11; SIMElab Africa 'Social media consumption in Kenya: Trends and practices' (2019) 14 [https://www.usiu.ac.ke/assets/file/SIMElab\\_Social\\_Media\\_Consumption\\_in\\_Kenya\\_report.pdf](https://www.usiu.ac.ke/assets/file/SIMElab_Social_Media_Consumption_in_Kenya_report.pdf) (accessed 8 November 2023); Reelforge & TIFA Research 'Kenya media landscape report' (2019) 6-7 & Nyabola (n 43) 97.

<sup>50</sup> Nyabola (n 43) 39.

<sup>51</sup> BBC (n 49) 15.

that has inspired several successful social media campaigns that have prompted government action.<sup>52</sup> Traditional mainstream media have indeed recognised the influence of Kenya's online media as a platform to source and share information and have websites and social media accounts which are used to disseminate news and engage with audiences in real-time on popular sites such as Facebook, Twitter, and YouTube.<sup>53</sup> Digital technologies are also used by election observers and the larger public to capture incidents of electoral malpractices, electoral violence, and state brutality, as seen in the 2013, 2017 and 2022 elections.<sup>54</sup> This information was widely shared among media, civil society networks and social media platforms, increasing public debate on the electoral process. The internet has also revolutionised the election campaign landscape and enhanced engagement between political candidates and the electorate.<sup>55</sup>

The double-edged nature of the internet, however, is manifest in Kenya. The spread of misinformation, disinformation, hate speech and propaganda was rife on social media platforms during the 2013, 2017 and 2022 general elections in Kenya.<sup>56</sup> Further, the former president, Uhuru Kenyatta, successfully used the data mining company Cambridge Analytica to run his political campaign in 2013 and 2017. This raised concerns about the privacy of voters' data as well as ethical questions around the exploitation of data during political campaigns and its impact on voter behaviour.<sup>57</sup> Given the vibrancy and diversity of Kenyan media and its significance in the electoral period, it is important to leverage the benefits of online media, including social media, to promote the exercise of media rights in a manner that meaningfully contributes to political participation and free and fair elections.

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<sup>52</sup> Freedom House 'Freedom on the net 2017: Manipulating social media to undermine democracy' (2018) 7 <https://freedomhouse.org/report/freedom-net/2017/manipulating-social-media-undermine-democracy> (accessed 8 November 2023).

<sup>53</sup> As above.

<sup>54</sup> EU EOM (n 43) 37 & COE 'Internet and electoral campaigns: Study on the use of internet' (2017) 7 <https://edoc.coe.int/en/internet/7614-internet-and-electoral-campaigns-study-on-the-use-of-internet-in-electoral-campaigns.html> (accessed 8 November 2023).

<sup>55</sup> COE (n 54) 7.

<sup>56</sup> IFES 'Fighting fake news on the digital frontier of elections' 16 July 2018 <https://www.ifes.org/news/fighting-fake-news-digital-frontier-elections> (accessed 8 November 2023); LA Dahir 'Fake news is already disrupting Kenya's high-stakes election campaign' *Quartz Africa* 25 June 2017 <https://qz.com/1011989/fake-news-and-misinformation-are-upstaging-kenyas-upcoming-high-stakes-election> (accessed 8 November 2023); & P Mayoyo 'Fake news by bloggers could mess Kenya's 2017 elections' *The Standard* 21 April 2017 <https://www.standardmedia.co.ke/business/article/2001237115/fake-news-by-bloggers-could-mess-2017-elections> (accessed 8 November 2023).

<sup>57</sup> N Cheeseman & B Klaas *How to rig an election* (2018) 147 & House of Commons Digital, Culture, Media and Sport Committee 'Disinformation and 'fake news': Final report' (2019) 60.

The threats to media freedom in Kenya are unfortunate, given the strong constitutional safeguards for civil and political rights. In particular, guarantees for freedom of expression, freedom of the media, and right to information are provided under articles 33, 34 and 35 of the Constitution, respectively. Additionally, Kenya has ratified seminal international instruments, including the ICCPR and the African Charter, that protect these human rights.<sup>58</sup> However, the trajectory of media laws in Kenya has not been strongly grounded on advancing human rights, given that some provisions have failed to pass legal muster when challenged before courts.<sup>59</sup> A more rights-based dispensation on media rights is needed in Kenya.

The above provides the general outlook of this thesis. The next sections detail the problem statement, research questions, study objectives, definition of terms, study scope and limitations, research methodology, theoretical framework, literature review, and thesis outline.

## 2 Problem statement

Although Kenya has a relatively vibrant and robust traditional and online media, the media's ability to play its normative functions of watchdog, public debate, education and campaign forum, especially during elections, is gravely impaired by the political economy of the media, restrictive national laws, policies and actions, ineffective enforcement of constitutional human rights guarantees and international law as well as poor enforcement of social media policies. Nevertheless, Kenya has strong constitutional guarantees and has ratified seminal international human rights law instruments on protecting media rights. The restrictive media regulatory and operational environment and inadequate compliance with the Constitution's Bill of Rights and international law provide a strong basis for interrogating the need for adopting a human rights-based approach to media regulation in the transformative digital age and the anatomy of such an approach. As a result of adopting a human rights-based approach to media regulation, traditional and online media, which make up the contemporary media landscape, will be better enabled to

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<sup>58</sup> Art 19 ICCPR & art 9 African Charter.

<sup>59</sup> See *Royal Media Services Limited & 2 Others v Attorney General & 8 Others* [2014] eKLR, Court of Appeal Civil Appeal No 4 of 2014 <http://kenyalaw.org/caselaw/cases/view/96676> (accessed 8 November 2023); *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR Supreme Court Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated) <http://kenyalaw.org/caselaw/cases/view/101689/> (accessed 8 November 2023) & *Nation Media Group Limited & 6 Others v Attorney General & 9 Others* [2016] eKLR, High Court Judicial Review Miscellaneous App 30 & 31 of 2014 <http://kenyalaw.org/caselaw/cases/view/122358/> (accessed 8 November 2023) cases.

play their normative functions in the public sphere towards reinforcing meaningful political participation of the electorate. Therefore, this thesis proposes a human rights-based approach to media protection in Kenya that confronts the political economy and legal challenges and reflects the national, social and political context, the modern-day media landscape, and the diverse regulatory actors. The approach deviates from traditional approaches that largely focus on regulatory actors, but instead, it emphasises the substantive and accountability aspects of media protection in the digital age.

### **3 Research questions**

The main research question in this study is: how can Kenya better protect media freedom in the digital age towards enhancing meaningful political participation of the electorate?

The sub-questions below will assist in answering the above main question and are linked to the structure of the thesis:

1. How has the evolution of Kenya's traditional and online media impacted meaningful political participation of the electorate in Kenya?
2. How effective are the international and national legislative and policy approaches to protecting offline and online media freedom and political participation throughout the electoral cycle in Kenya?
3. Is there a dissonance between international and national laws on media rights? If so, why is there a disparity and how does it manifest?
4. What is the performance of social media platforms in protecting online media freedom in Kenya, especially during elections?
5. How can stakeholders enhance social media accountability to promote online media freedom and meaningful political participation in Kenya?

### **4 Objectives of the study**

The objectives of this thesis flow from the research questions. The main objective of the study is to explore how Kenya can better protect media freedom in the digital age towards enhancing meaningful political participation of the electorate.

The sub-objectives are:

1. To assess how the evolution of Kenya's traditional and online media has influenced its role in facilitating meaningful political participation in Kenya.
2. To evaluate the effectiveness of the regulatory approaches at the international and national level towards protecting offline and online media freedom and political participation throughout the electoral cycle in Kenya.
3. To unpack the presence and manifestation of tensions between international and national laws on media rights.
4. To discuss the performance of social media platforms in protecting online media freedom in Kenya, especially during elections.
5. To explore how stakeholders can enhance social media accountability to promote online media freedom and meaningful political participation in Kenya.

## 5 Clarification of terms

### *Media*

The term media has necessitated re-examination in the paradigm-shifting digital age. International law defines it broadly to include professional journalists and other self-publishing content creators, offline and online, including bloggers, social media influencers, comedians, and graffiti artists.<sup>60</sup> While this broad definition does not have an overall consensus, this study adopts it as it illustrates the diverse modern-day media ecosystem.

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<sup>60</sup> On addressing the conundrum of defining journalism in the evolving media environment also see HM Mabweazara & A Mare *Participatory journalism in Africa: Digital news engagement and user agency in the South* (2021) 1-4; S Eldridge 'Boundary maintenance and interloper media reaction: Differentiating between journalism's discursive enforcement processes' (2014) 15(1) *Journalism Studies* 1-16; S Eldridge *Online journalism from the periphery: Interloper media and the journalistic field* (2018) & V Belair-Gagnon & E Avery 'Boundary work, interloper media, and analytics in newsrooms: An analysis of the roles of web analytics companies in news production' (2018) 6(4) *Digital Journalism* 492-508. Also see Human Rights Committee, General Comment 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> (accessed 8 November 2023) & HRC 'Reinforcing media freedom and the safety of journalists in the digital age' A/HRC/50/29 (20 April 2022) paras 15-16 <https://www.ohchr.org/en/documents/thematic-reports/ahrc5029-reinforcing-media-freedom-and-safety-journalists-digital-age> (accessed 8 November 2023).

### ***Media rights***

This thesis uses the phrase media rights to mean freedom of expression, media freedom and the right to information. These rights usually fall under the broader umbrella of freedom of expression under international law and are indispensable to the media's operation and performance in the public sphere.

### ***Digital age***

Statti and Torres define the digital age as the time period commencing in the 1970s 'in which personal computers and other subsequent technologies were introduced to provide users the ability to easily and rapidly transfer information' with the introduction of the internet playing a central role.<sup>61</sup> This thesis adopts this definition and uses it together with other synonyms such as information age, computer age or new media age.

### ***Information disorder***

Information disorder is a composite phrase for misinformation, disinformation and mal-information.<sup>62</sup> Misinformation is false news that is shared without the intention to harm or the knowledge of its falsity. Disinformation is false news that is created and shared with the intention to harm. Mal-information is accurate information that is shared with the intention to harm.

### ***International law***

International law is defined as '...a body of law which applies to all states regardless of their specific and distinctive cultures, belief systems and political organizations'.<sup>63</sup> Otherwise defined,

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<sup>61</sup> A Statti & KM Torres 'Multiple intelligence theory in the digital age of learning' in RZ Zheng *Examining multiple intelligences and digital technologies for enhanced learning Opportunities* (2020) 1-18. Also see TS Muwani & others 'The global digital divide and digital transformation: The benefits and drawbacks of living in a digital society' in M Zhou, G Mahlangu & C Matsika *Digital transformation for promoting inclusiveness in marginalized communities* (2022) 217-218.

<sup>62</sup> Wardle & Derakhshan (n 27) 5.

<sup>63</sup> A Anghie *Imperialism, sovereignty and the making of international law* (2005) 32 & M Mutua 'Savages, victims, and saviors: The metaphor of human rights' (2001) 42 *Harvard International Law Journal* 209-211. Also see SN Grovogui *Sovereigns, quasi sovereigns and Africans: Race and self-determination in international law* (1996) 11-16 & SP Sinha *Legal polycentricity and international law* (1996) 1-3.



international law is the set of rules that govern the relationship between states, states and individuals, and international organisations.<sup>64</sup>

International law is codified under international customary law, treaties and conventions, and soft law instruments such as declarations, resolutions, general comments, guidelines, and principles.<sup>65</sup> While the United Nations (UN) human rights framework has often typified international law and has consolidated the principle of universality of human rights, the umbrella definition of international law also encapsulates regional frameworks that set out the rules governing state interactions with other actors. Therefore, this thesis also refers to regional instruments, such as those under the African human rights system, as international law.

### ***Meaningful political participation***

This thesis defines meaningful political participation as free and active engagement of the citizenry, from an informed perspective, in politics and in decision-making activities that shape the democratic anatomy of their country. While voting is one of the key indicators of political participation of the electorate, their meaningful political participation also involves various other activities including engaging with political institutions and campaign activities, participating in public and political debate, enhancing personal political education and awareness, engaging in human rights activism and advocacy, and monitoring elections and other decision-making processes.<sup>66</sup> Enjoyment of freedom of expression, the right of access to information, and freedom of association and assembly enable meaningful political participation.<sup>67</sup>

### ***A human rights-based approach***

The human rights-based approach has been advanced by the UN and is founded on the human rights standards and principles of ‘the Universal Declaration of Human Rights and other international human rights law instruments.’<sup>68</sup> These human rights principles are ‘universality

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<sup>64</sup> OHCHR ‘International human rights law’ <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law> (accessed 8 November 2023).

<sup>65</sup> As above.

<sup>66</sup> General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), CCPR/C/21/Rev.1/Add.7 para 5-9 <https://www.equalrightstrust.org/ertdocumentbank/general%20comment%2025.pdf> (accessed 8 November 2023).

<sup>67</sup> General Comment 25 para 8.

<sup>68</sup> UN ‘The human rights based approach to development cooperation towards a common understanding among UN agencies’ (2003) 1 <https://unsdg.un.org/sites/default/files/6959->

and inalienability; indivisibility; interdependence and inter-relatedness; non-discrimination and equality; participation and inclusion; accountability and the rule of law.’<sup>69</sup> The concluding chapter of this thesis more broadly frames a human rights-based approach specific to enhancing media protection in the digital age and meaningful political participation of the electorate in Kenya.

## **6 Scope and limitations of the study**

Using Kenya as a country study, this thesis will synthesise two concepts, media freedom and meaningful political participation. In doing so, it will primarily examine how regulatory approaches to media freedom affect the ability of media to play its normative functions and the impact on meaningful political participation. Adopting the broad definition of media under international law and the diverse media space, the discussion includes both traditional and online media. It also uses freedom of expression, media freedom and the right to information collectively, given the inseparability of these rights and refers to them as media rights. Where the situation requires, the thesis also refers to these rights distinctly. Analysing the effectiveness of regulatory approaches to media freedom as a protective measure will narrow in on how this is integrated into electoral laws and processes to ensure the role of media during elections is fulfilled. However, the focus remains on the influence of media in the digital age on meaningful political participation of the electorate and approaches to protecting media freedom. This lays the foundation for the proposed contextualised human rights-based approach. While this thesis references online media, which encompasses various new media, it largely focuses on social media, particularly four social media platforms: Facebook, YouTube, Twitter (now X), and, briefly, TikTok. As such, the discussion on regulatory approaches covers international and national laws and social media policies. In October 2022, Elon Musk bought Twitter and later rebranded it to X. Several policy changes followed. This thesis does not examine the ongoing policy changes by X under Elon Musk but focuses on the policies under Twitter.

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[The Human Rights Based Approach to Development Cooperation Towards a Common Understanding among UN.pdf](#) (accessed 2 June 2024).

<sup>69</sup> UN (n 68) 2.

## 7 Significance of the study

The study argues for adopting a contextualised human rights-based approach to media protection in Kenya towards enhancing the media's ability to promote meaningful political participation of the electorate in the evolving digital age and nurture a vibrant public sphere. The proposed approach reflects the opportunities and challenges of the political economy of the media, the national context, the contemporary media and regulatory landscape, and digital opportunities and threats.

## 8 Research methodology

This research will adopt a mixed methodology that incorporates doctrinal and socio-legal methods.

Under the doctrinal method, the thesis takes a legalistic approach to media rights and the right to political participation. It examines primary sources of law under the international human rights system (United Nations and Africa), including treaties, conventions, case law, and soft law instruments such as General Comments, declarations, resolutions and guidelines. At the national level, the study explores primary sources of law in Kenya's legal and policy framework as well as relevant case law. It also looks at social media policies representing a central self-regulatory parlance of new media. Further, the study refers to secondary sources, including legal journals, articles, reports and guides.

The study also uses the socio-legal methodology, a form of interdisciplinary method.<sup>70</sup> In adopting this mixed methodology approach, the thesis seeks to temper the weaknesses of a purely doctrinal method by assessing both law in the books and law in action.<sup>71</sup> The exercise of media rights and political participation are closely tied to the socio-political zeitgeist, particularly the level of freedom accorded to the exercise of fundamental rights. Under the socio-legal methodology, the thesis adopts historical and theoretical approaches. Under the historical method, the thesis charts the evolution of Kenyan media from the pre-colonial era to the digital

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<sup>70</sup> M McConville & WH Chui 'Introduction and overview' in M McConville & WH Chui *Research methods for law* (2007) 4-5.

<sup>71</sup> A Bradney 'Law as a parasitic discipline' (1998) 25 *Journal of Law and Society* 71; R Cotterrell *Law's community: Legal theory in sociological perspective* (1995) 296 & DW Vick 'Interdisciplinary and the discipline of law' (2004) 31 *Journal of Law and Society* 184.

era, the evolving influence of the law, society and politics through the different epochs, and how this transformation has influenced political participation in Kenya. It refers to Du Plessis's assertion that broadens legal historical studies from the mere research of 'the development of material legal norms' but also includes 'the analysis of these rules in the light of the external legal history (the economical, cultural, political, social, philosophical and religious development)'.<sup>72</sup> The study critically examines how social, political, and economic interests have influenced Kenyan media's functioning, independence, and credibility in traditional and online media. This history is the bedrock for assessing the democratising potential of Kenyan online media in relation to meaningful political participation of the electorate. Further, the history will inform the proposed contextualised human rights-based approach to media protection.

Under the theoretical approach, the study will examine media theories focusing on Habermas' concept of the public sphere and the political economy of the media. The Habermas public sphere theory has inspired various writings on the same that centre on developing a public sphere that provides a platform for rational-critical public debate by free and equal citizens. An independent and robust media facilitates this process. The theory provides an appropriate framework for this study to examine the evolving role of media as a conduit for a vibrant public sphere that nurtures active citizen engagement in elections and politics and contributes to a healthy democracy. The theory of the political economy of the media explores how political and economic interests in mainstream traditional and online media affect media performance, and decision-making and participation in the public sphere.<sup>73</sup>

This study mainly focuses on Kenya. However, the research will draw lessons from other jurisdictions, including the United States of America (USA), the European Union (EU), and select African countries in chapter five. The USA online media regulatory approach is important to this study because the major social media companies, Meta, Twitter and Google, are American. USA's regulation of the internet and social media may therefore have extraterritorial effects. In a landmark move, the European Union passed the first regional legislation on online safety and intermediary and platform responsibility in 2023.<sup>74</sup> The EU's legal frameworks have

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<sup>72</sup> W du Plessis 'A self help guide research methodology and dissertation writing' (2007) 30.

<sup>73</sup> N Chomsky & ES Herman *Manufacturing consent: The political economy of the mass media* (2002) 1-2.

<sup>74</sup> DSA <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0825&from=en> (accessed 8 November 2023).

historically influenced the substance of legislation across the world in what has been termed the Brussels Effect.<sup>75</sup> It is therefore conceivable that other countries such as Kenya may draw lessons from the framework in developing laws on the internet and social media. The African countries examined include some of the few countries that have enacted provisions on the liability of internet intermediaries including Ethiopia, South Africa, Uganda and Zimbabwe. An examination of these countries provides a picture of the evolving regulatory trends in African countries. These jurisdictions allow for a reflection on best practices in social media regulation.

## 9 Theoretical framework

The theoretical framework that underpins this thesis is a modern interpretation of the Jürgen Habermas concept of the public sphere.<sup>76</sup> In this conceptualisation of the public sphere, this thesis highlights the contribution of the online space to the holistic concept of the public sphere and analyses how it can be protected to ensure that it realises its potential as a platform for enhancing public participation of ordinary citizens in democratic processes such as elections by allowing citizens to engage in debate on matters of public interest.<sup>77</sup>

In Habermas' initial discussion of what he called the bourgeois public sphere, he defined it as:<sup>78</sup>

... the sphere of private people come together as a public; they soon claimed the public sphere regulated from above against the public authorities themselves, to engage them in a debate over the general principles governing relations in the basically privatised but publicly relevant sphere of commodity exchange and social labor. The medium of this political confrontation was peculiar and without historical precedent: people's public use of their reason.

In his later writings, Habermas refined the definition of the public sphere as:<sup>79</sup>

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<sup>75</sup> A Bradford 'The Brussels effect' (2012) 107 (1) *Northwestern University Law Review* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2770634](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770634) (accessed 8 November 2023).

<sup>76</sup> The term public sphere was coined by Jürgen Habermas in his book *J Habermas The structural transformation of the public sphere* (translated by T Burger) (1989). His writings focused on how discussion of issues of public interest evolved in the different social and cultural contexts and inspired various other authors who supported, criticized and/or built on his theories.

<sup>77</sup> RC Holub *Jürgen Habermas: Critic in the public sphere* (1991) 3.

<sup>78</sup> Habermas (n 76) 27.

<sup>79</sup> J Habermas *Between facts and norms* 360.

...network for communicating ideas and points of view, which filters and synthesizes diverse streams of communication . . . in such a way that they coalesce into bundles of topically specified public opinions.

To put it more simply, the public sphere is the social milieu where people engage in rational-critical debate that facilitates the formation of reasoned public opinion. Habermas's concept of the public sphere has inspired considerable discussion worldwide, with other authors developing their definitions of the public sphere.<sup>80</sup> The public sphere bears a comparison to the concept of the palaver framed by the Congolese theologian, Bénézet Bujo.<sup>81</sup> Entrenched in the communal nature of African societies, the palaver denotes an inclusive public space that emphasises free and open communication by community members that fosters social cohesion and problem-solving.<sup>82</sup>

A common thread in the public sphere discourse is the coming together of a public consisting of free and equal citizens to discuss matters of public interest towards public accord and informed decision-making.<sup>83</sup> Therefore, in developing a democratic public sphere, equality and accessibility are key requirements that facilitate meaningful public participation in democratic processes.<sup>84</sup> Further, ensuring equal access to the public sphere and integrating public opinion in political decision-making gives legitimacy to the arms of government and their decisions.<sup>85</sup> Arguably, the public is more likely to accept decisions made by the government if their opinion is considered and integrated into public decision-making processes through direct public participation or indirectly through their chosen representatives in free and fair elections.<sup>86</sup>

The public sphere concept has inspired many critiques, particularly the immanent idealism that it is chimerical, causing many to question if it ever existed and can ever exist.<sup>87</sup> That being said, its existence is largely desirable.

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<sup>80</sup> P O'Mahony *The contemporary theory of the public sphere* 388; Holub (67) 3 & Gripsrud & others *The idea of the public sphere: A reader* 6.

<sup>81</sup> B Bujo *Foundations of an African Ethic* (2001) 1-3.

<sup>82</sup> Bujo (n 81) 52-54. Also see AF Scheid 'Under the Palaver Tree: Community ethics for truth-telling and reconciliation' (2011) 31 *Journal of the Society of Christian Ethics* 22-23.

<sup>83</sup> Gripsrud & others (n 80) 7.

<sup>84</sup> Holub (n 77) 4.

<sup>85</sup> P Johnson *Habermas: Rescuing the public sphere* (2006) 24 & Habermas (n 76) 83.

<sup>86</sup> BO Rothstein 'Creating political legitimacy' (2009) 53 *American Behavioral Scientist* 311 & M Grimes 'Organizing consent: The role of procedural fairness in political trust and compliance' (2006) 45 *European Journal of Political Research* 285.

<sup>87</sup> S Splichal 'Does history matter? Grasping the idea of public service at its roots' in GF Lowe & J Bardoel (eds) *From public service broadcasting to public service media* (2007) 242 &

A critical examination of the original conception of the bourgeois public sphere by Habermas ironically reveals an elitist and exclusionary framework that favoured the thoughts and opinions of educated land owners, usually men, over those of ordinary citizens.<sup>88</sup> In his depiction of the bourgeoisie public sphere, Habermas referenced the intellectual debate that took place in coffee houses, salons, secret societies, and the agora that was reminiscent of the Enlightenment era.<sup>89</sup> The elitist connotations of these depictions are inescapable and have drawn criticism from various fronts.<sup>90</sup> It was only later that the voice of the wider public outside this classist and patriarchal system was considered, and even then, it could not be said that there was total equality and access.<sup>91</sup> Fidelity to the human rights principles of non-discrimination and equality was weak. Critics have noted that while Habermas acknowledged the class dynamics of the bourgeoisie public sphere that limited accessibility to all, he failed to deeply examine its patriarchal nature, giving credence to Marx's portrayal of the public sphere as an arena of conflict that was universalistic in intention but exclusionary in application.<sup>92</sup> Authors such as Fraser,<sup>93</sup> and Negt and Kluge<sup>94</sup> have examined this exclusionary nature under a gender and proletarian lens, respectively and argued for the development of counter-publics to accommodate minority voices.

The exclusionary nature of the public sphere also prompted radical propositions such as by Mouffe, who examines the dilemma of the democratic paradox, arguing that democracy pursues homogeneity in the public sphere, which may inhibit pluralism, another component of democracy.<sup>95</sup> Alternatively, she posited the concept of agonistic pluralism, which is defined as a 'vibrant clash of democratic political positions'.<sup>96</sup> Rather than discourse that pursues accord and elevates rationality and morality, the antagonism in many social relationships, given the

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P Masip, C Ruiz-Caballero & J Suau-Martínez 'Active audiences and social discussion on the digital public sphere. Review article' (2019) 28(2) *El profesional de la información* 3-4.

<sup>88</sup> Habermas (n 76) 35, 85 & 201.

<sup>89</sup> P Schlesinger 'After the post-public sphere' (2020) 42 *Media, Culture & Society* 1555.

<sup>90</sup> D Mahlouly 'Rethinking the public sphere in a digital environment: Similarities between the eighteenth and the twenty-first centuries' (2013) 20 *New Horizons* 7.

<sup>91</sup> Habermas (n 77) 35, 85 & 201 & O Negt & A Kluge *Public sphere and experience: Toward an analysis of the bourgeois and proletarian public sphere* (1993) 56.

<sup>92</sup> Negt & Kluge (n 91) 56 & N Fraser 'Rethinking the public sphere: A contribution to the critique of actually existing democracy' in C Calhoun (ed) *Habermas and the public sphere* (1992) 109-110; Holub (n 77) 5 & O'Mahony (n 80) 11.

<sup>93</sup> Fraser (n 92) 109-142.

<sup>94</sup> Negt & Kluge (n 91) 56.

<sup>95</sup> C Mouffe *The democratic paradox* (2000) 51.

<sup>96</sup> Mouffe (n 95) 104.

coexistence of differing and multiple voices, should be harnessed to redefine and promote democracy.<sup>97</sup>

The emphasis on rationality and morality also ignores other worthy forms of expression contributing to deliberative democracy, such as satire, irony, comedy, and poems that have found even more fertile ground in the digital age.<sup>98</sup> The elitist and power dynamics that determine what is rational and reasonable also cannot be ignored. Kohn writes that ‘reasonableness is itself a social construction which usually benefits those already in power’.<sup>99</sup> Often so, these power dynamics have a regional hierarchal tenor, where Western countries set the standard of rationality and reasonability that may have a cultural relativism disconnect.

Synthesising this literature, this thesis concludes that while public agreement is desired, it should not be pursued to achieve imperceptible uniformity in thought and public opinion. True democracy is fashioned in a free space where multiple differing opinions are given voice and consideration, even if it means challenging what is conventionally considered rational and reasonable but still falls under the category of legitimate speech. Reference, however, should be made to international human rights laws and standards on what is (il)legitimate speech. There is democratic value in protecting public discourse from expression that is deemed illegal, such as war propaganda, advocacy for national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, and disinformation.<sup>100</sup> Therefore, this thesis favours the term meaningful debate as opposed to rational debate, as it denotes discourse that, while critical, is more egalitarian, inclusive and substantive.

## 9.1 The evolving role of the media in the public sphere

The media has long been recognised as an institution of the public sphere, given its role as an instrument of publicity and transmitter and amplifier of public opinion.<sup>101</sup> Historically, various media forms, including salons, coffee houses, political journals, private letters, newspapers and

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<sup>97</sup> C Mouffe ‘Deliberative democracy or agonistic pluralism?’ (1999) 66 *Social Research* 756.

<sup>98</sup> P Dahlgren ‘The internet, public spheres, and political communication’ (2005) 22(2) *Dispersion and Deliberation, Political Communication* 156.

<sup>99</sup> M Kohn ‘Language, power, and persuasion: Towards a critique of deliberative democracy’ (2000) 7 *Constellations* 409.

<sup>100</sup> See article 19 and 20 ICCPR.

<sup>101</sup> Habermas (n 76) 183 & O’Mahony (n 80) 381 & 410.



televisions, and the digital age tools of social media, blogs, vlogs, and websites, have provided platforms for public discussion—rational-critical, meaningful, and otherwise.<sup>102</sup>

The digital age has seen both traditional and online media develop and share this space as critical platforms for facilitating political communication within the public sphere and has brought to the fore the tensions between state and society.<sup>103</sup> The political economy of the media theory discusses the twin dangers of state and economic interests and the risks sometimes posed by media freedom to these interests, which have been an impediment to the authentic realisation of media rights and meaningful debate.<sup>104</sup> Media regulation, political influence, media ownership, and economic considerations and their sway on media content, behaviour and composition characterise the phenomenon of the political economy of the media.<sup>105</sup> O'Mahony argues that the interplay of politics and economy in private media makes it an 'unstable platform for the public sphere' politically.<sup>106</sup> Habermas envisioned the public sphere as mediating between the state and the society.<sup>107</sup> Ideally, the public can only exercise their free will to debate on issues of public interest towards common accord and critical decision-making when this process is uncorrupted by interference from coercive factors such as state, capitalism, military, organised religion, and manipulated mass media. He decried the bastardisation of the public sphere by state and economic forces. Particularly the commodification of the media that shifted 'priorities from facilitating public debate and informed public opinion to public relations and advertising'.<sup>108</sup> The adoption and enforcement of media regulatory frameworks that protect media independence from undue political and economic influence and enhance pluralism fortify the media's role in midwifing and sustaining a vibrant public sphere and healthy democracy.

The immanent critique of the public sphere has been engendered by disproportionate access to media, lack of equality of voice with powerful actors shaping the agenda, and interference by political and economic forces.<sup>109</sup> Increased media commercialisation caused an

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<sup>102</sup> Habermas (n 76) 20, 29 & 33; A Phillips *Engendering democracy* (1991) 51 & P Gamham 'The media and the public sphere' in P Golding, G Murdock & P Schlesinger (eds) *Communicating politics: Mass communication and the political process* (1986) 4.

<sup>103</sup> O'Mahony (n 80) 388 & Habermas (n 76) 141 & 184.

<sup>104</sup> Habermas (n 76) 195; Holub (n 77) 6; Negt & Kluge (n 91) 56-57; O'Mahony (n 80) 13 & Johnson (n 85) 19.

<sup>105</sup> Habermas (n 76) 195.

<sup>106</sup> O'Mahony (n 80) 389.

<sup>107</sup> J Habermas *Theory and practice* (1973) 351.

<sup>108</sup> Habermas (n 76) 140.

<sup>109</sup> C Fuchs 'Social media and the public sphere' (2014) 12 *Triple C* 63.

oligarchy in the media ecology where debate is disproportionately framed and controlled by powerful players in the economy and politics as opposed to the public interest.<sup>110</sup> This has fashioned an inauthentic public sphere and slowly chipped away at the democratic building blocks of the public sphere.

Resultantly, the distortion of meaningful debate in the media public sphere compromises the accuracy and relevance of information conveyed to the public, affects the public decision-making and consensus-reaching process, and leads to a reality where decisions are reached through ‘engineered consent.’<sup>111</sup> In Bobbio’s list of ‘broken promises of democracy,’ he rightfully lists manipulation of consensus as one of the inhibiting factors to public education.<sup>112</sup> Manipulated media distorts the cognitive frames directing debate, shaping public opinion and facilitating public consensus, therefore necessitating the protection of this space from malicious interference.<sup>113</sup>

The role of the media as a watchdog of democracy and facilitator of public education becomes especially important during electoral processes.<sup>114</sup> An active and informed citizen, capable of meaningful debate and critical judgment, is a crucial building block to a voter’s personality structure that helps promote democratic development.<sup>115</sup> The engagement of the electorate in deliberative and bargaining activities that precede casting their vote transforms the voting act from a passive act of inserting a vote into the ballot box to an active act.<sup>116</sup> Consequently, the legitimisation of political authority largely derives from the participation of an informed electorate and the ‘formation of reasonable public will’ through meaningful discourse.<sup>117</sup>

Unfortunately, in the world of political competition, it remains a strategy that during decisive events such as elections, political parties and candidates, as well as those whose

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<sup>110</sup> Habermas (n 76) 171 & 248.

<sup>111</sup> Habermas (n 76) 184, 187 & 189 & EL Bernays *The engineering of consent* (1955) 1-2.

<sup>112</sup> N Bobbio *The future of democracy: A defense of the rules of the game* (1984) 24-25.

<sup>113</sup> Habermas (n 76) 195 & 221 & L Mayhew *The new public: Professional communication and the means of social influence* (1997) 5-6.

<sup>114</sup> Gripsrud & others (n 80) 7.

<sup>115</sup> B Berelson ‘Democratic theory and public opinion’ (1952) 16 *Public Opinion Quarterly* 315 & 329 & Habermas (n 76) 212. ‘A voter’s personality structure includes: interest in public affairs; possession of information and knowledge; of stable political principles or moral standards; ability to observe accurately; engagement in communication and discussion; rational behaviour; consideration of community interest.’

<sup>116</sup> Gripsrud & others (n 80) 14.

<sup>117</sup> O’Mahony (n 80) 8-9.

interests are intrinsically linked with having a particular candidate in power, seek control over the information available to the electorate to influence voting behaviour.<sup>118</sup> Undecided voters who are inactive participants in public debate are more vulnerable to manipulation.<sup>119</sup> Often, the strategy for wooing undecided voters is not channelling credible, accurate and timely information but transmitting content that will best persuade them to side with a particular course of action, political candidate or political party.<sup>120</sup>

It is also important to consider the quality of information in the public sphere that is in the repository of other voters who are viewed as well-informed and active electorate. Sometimes, voting behaviour is moulded by group interests such as religion, tribe, and ethnicity.<sup>121</sup> For example, in Kenya, ethnicity has long influenced voting decisions, given the historical correlation between the ethnicity of a leader and regional access to state resources and power.<sup>122</sup> The electorate's willingness to consciously and actively engage in public debate, which may present them with alternative and diverse facts that may require an acknowledgement of personal and group biases and an openness to confront these prejudices, will also determine the quality of debate in the mediated public sphere. Both traditional media and online media play a crucial role in educating not only the undecided voters but also active voters.

## 9.2 The role of the internet in the public sphere

Technological advancement has elevated the prominence of online media as avenues for 'mediated and dialogical' public debate.<sup>123</sup> Online media, particularly social media platforms, has transformed how people exercise their freedom of expression. Agenda-making and transmitting and amplifying news is no longer the preserve of traditional media but can be taken

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<sup>118</sup> Habermas (n 76) 203.

<sup>119</sup> Habermas (n 76) 214 & M Janowitz & D Marvick *Competition, pressure and democratic consent* (1956) 17.

<sup>120</sup> As above.

<sup>121</sup> Habermas (n 76) 214.

<sup>122</sup> ES Atieno-Odhiambo 'Hegemonic enterprises and instrumentalities of survival: Ethnicity and democracy in Kenya' (2002) 61(2) *African Studies* 223; M Apollos 'Ethnicity, violence and democracy' (2001) 26 *Development* 99-144; M Bratton & SM Kimenyi 'Voting in Kenya. Putting ethnicity in perspective' (2008) 95 *Afrobarometer Working Papers* 4 <https://afrobarometer.org/sites/default/files/publications/Working%20paper/AfropaperNo95.pdf> (accessed 4 April 2022); S Orvis 'Moral ethnicity and political tribalism in Kenya's 'virtual democracy' (2001) 29 *African Issues* 8-13 & WO Oyugi 'Ethnicity in the electoral process: The 1992 general elections in Kenya' (1997) 2(1) *African Journal of Political Science* 42.

<sup>123</sup> S Splichal 'In search of a strong European public sphere: Some critical observations on conceptualizations of publicness and the (European) public sphere' (2006) 28 *Media, Culture & Society* 702.

up by the wider public with access to a digital device and the internet.<sup>124</sup> This has prompted broadening the definition of media beyond the conventional reference of professional journalists and formal institutions.<sup>125</sup>

At its embryonic formation, the internet inspired significant optimism from pundits on its democratising potential, particularly in reviving the public sphere that was declining under the weight of the political economy of the media.<sup>126</sup> The ability to create new and more inclusive spaces for discourse, reduce the cost of access and participation, accommodate more voices that transcend borders, reinforce social capital, and temper the gatekeeping function of mainstream traditional media was seen as an asset for injecting life into deliberative democracy, crucial for the functioning of the public sphere. Given traditional media's failings, the internet inspired hope for a more egalitarian process of public opinion formation. On his part, Habermas was sceptic about the democratising potential of the internet, much to the ire of a section of diehard supporters of the public sphere theory.<sup>127</sup> He assigned a parasitical role to online communication, stating:<sup>128</sup>

The Internet has certainly reactivated the grassroots of an egalitarian public of writers and readers. However, computer-mediated communication in the web can claim unequivocal democratic merits only for a special context: It can undermine the censorship of authoritarian regimes that try to control and repress public opinion. In the context of liberal regimes, the rise of millions of fragmented chat rooms across the world tend instead to lead to the fragmentation of large but politically focused mass audiences into a huge number of isolated issue publics. Within established national public spheres, the online debates of web users only promote political communication, when news groups crystallize around the focal points of the quality press, for example, national newspapers and political magazines.

Habermas is not alone in his cynicism about the democratising capabilities of the internet. Much literary effort has been expended on theorising and studying the influence of the internet in the public sphere. Central to these studies was the question of whether the internet in itself constitutes a public sphere or rather creates a mediating space in the public sphere, as did the mass media and the bourgeoisie. Papacharissi, for example, concludes that it offers a space and

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<sup>124</sup> IFES (n 56).

<sup>125</sup> General Comment 34 para 44 & A/HRC/50/29 (n 60) paras 15-16.

<sup>126</sup> M Poster 'Cyberdemocracy: Internet and the public sphere' in D Porter (ed) *Internet culture* (1997) 201-202.

<sup>127</sup> RS Geiger 'Does Habermas understand the internet? The algorithmic construction of the blogo/public sphere' (2009) 10(1) *Gnovis: A Journal of Communication, Culture, and Technology* 4-6.

<sup>128</sup> J Habermas 'Political communication in media society: Does democracy still enjoy an epistemic dimension? The impact of normative theory on empirical research.' (2006) 16(4) *Communication Theory* 423-424.

not a public sphere in its inability to meet the defining aspects of a public sphere.<sup>129</sup> The below discussion conducts a synthesis of some of the literature on the subject by assessing the online space against the components of a public sphere in enhancing democracy, that is, facilitating the formation of public opinion, allowing access to all citizens unencumbered by political and economic control, and enabling rational-critical (meaningful) discourse, and found it both enabling and wanting in critical aspects as discussed below.

### **9.2.1 Access to information and access to the internet**

The realisation of media rights is crucial to enabling the formation of public opinion. Interlinked goals are enhanced public debate, public engagement, and meaningful political participation. While it is tacitly agreed that the internet has enabled unparalleled access to information, this is a privileged right only true for connected populations. Universal, equitable, affordable and meaningful access to the internet faces significant barriers in sub-Saharan Africa that restrict equal access to vast populations. As of June 2022, internet penetration in Africa was 43.2% against a global average of 67.9%.<sup>130</sup> When examined more holistically, accounting for other aggravating factors such as the high cost of data amidst rising poverty levels, poor and unreliable internet infrastructure, and unstable supply of electricity, the communicative potential of the internet becomes more dire.<sup>131</sup> While the cross-pollination of information between online and offline spaces further advances the networked sphere, inequalities of access to the digital sphere limit participation.

### **9.2.2 Political and economic control**

Visions of reduced state and economic interference and censorship in the online space invigorated early debates on the democratising potential of the internet.<sup>132</sup> However, as the internet evolved, so did tactics to control information in the space. This is largely being shaped

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<sup>129</sup> Z Papacharissi 'The virtual sphere 2.0: The internet, the public sphere, and beyond' in A Chadwick & PN Howard (eds) *Routledge handbook of internet politics* (2008) 230-231.

<sup>130</sup> Statista 'Internet penetration rate in Africa as of June 2022, compared to the global average' <https://www.statista.com/statistics/1176654/internet-penetration-rate-africa-compared-to-global-average/> (accessed 8 November 2023).

<sup>131</sup> World Bank Group 'An analysis of issues shaping Africa's economic future' (2019) 19 *Africa's Pulse* 49.

<sup>132</sup> Dahlgren (n 98) 156; H Jenkins *Convergence culture: Where old and new media collide* (2006) 4-9 & J Van Dijck *The culture of connectivity: A critical history of social media* (2013) 12.

by regulatory frameworks and actions of governments and social media companies as they determine the extent of free expression and media freedom on online platforms.<sup>133</sup>

The design and processes of digital technologies influence social interactions and the communicative force of the internet as a platform of information and discourse in the public sphere.<sup>134</sup> Facebook, Google, and Twitter have emerged as the dominating forces on the internet and can be characterised as the mainstream online media. Their policies and practices, therefore, determine the realisation of media rights and justify the increased scrutiny of the business models of social media companies. Profit remains a strong motivator of decision-making in markets. In the social media ecosystem, increased user engagement as producers and consumers of media content on these platforms scales up profits.<sup>135</sup> Social media companies are in a continuous marathon to capture and hold the fleeting attention of their users, which has been best achieved by exposure to negative and controversial content.<sup>136</sup> Social media companies have capitalised on human nature's ills, often to the detriment of social capital, democratic values and human rights.

On the political side, governments have adopted measures to control the exercise of human rights on the internet. Some of these approaches unlawfully and unreasonably limit human rights. Legal frameworks and jurisprudence on computer use (and misuse), cybercrime, cyber security, and artificial intelligence are gradually developing with varying impacts on human rights.<sup>137</sup> Government actions such as network disruptions, including complete and partial internet shutdowns, unlawful surveillance, and website blocking and throttling, often executed under national security and public order justifications, affect access to the online space. Such limiting actions are disproportionately experienced in the African context. Restrictive legal frameworks and government actions grossly inhibit the democratising potential of the internet.

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<sup>133</sup> Fuchs (n 109) 89.

<sup>134</sup> Van Dijck (n 132) 12.

<sup>135</sup> C Fuchs 'Labour in informational capitalism and on the internet' (2010) 26(3) *The Information Society* 191; D Milmo 'Frances Haugen takes on Facebook: The making of a modern US hero' *The Guardian* 10 October 2021 <https://www.theguardian.com/technology/2021/oct/10/frances-haugen-takes-on-facebook-the-making-of-a-modern-us-hero> (accessed 8 November 2023); Van Dijck (n 132) 12 & Munn (n 32) 2.

<sup>136</sup> Van Dijck (n 132) 12; Milmo (n 135); Munn (n 32) 2 & S Levy *Facebook: The Inside Story* (2020) 6-7.

<sup>137</sup> LEXOTA <https://lexota.org/> (accessed 8 November 2023).

### 9.2.3 Quality of discourse

Habermas places a premium on the quality of discourse in the public sphere, which should be characterised by truth, intelligibility, veracity and honesty.<sup>138</sup> He envisioned a sphere where the public engages in critical and rational discourse, actively listens, and shares different perspectives towards agreement and opinion shaping. This aligns with his earlier theory of communicative rationality.<sup>139</sup> In linguistically mediated social interactions, communicative theory is more desirable as it prioritises discourse based on personal conviction about one's argument and is geared toward mutual conflict resolution and consensus. This contrasts with strategic or instrumental rationality, where language is employed selfishly, manipulatively, and purposively to achieve a personal objective.<sup>140</sup>

The internet's nature as a trove of information and a platform that millions traverse is indisputable, but whether the community of online users use these spaces to engage in civic participation for the betterment of democracy is open to debate. The potential to enhance participation and influence decision-making can be gleaned from actions such as posting content or a reaction, commenting, and sharing online information. Notably, many Western studies on online news consumption and sharing trends have negated politics or political debate as a central reason for online news consumption and sharing. While public debate may be heightened during certain events such as elections,<sup>141</sup> conflict,<sup>142</sup> civil unrest, or a natural disaster, information is often shared or debated on social media for its entertainment or personal connection value.<sup>143</sup> Politically active citizens, leaders, thought influencers and those who follow diverse news sites are prone to sharing news regularly and engaging in political debates online.<sup>144</sup> The participatory

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<sup>138</sup> J Habermas *The theory of communicative action* (1984) 287 & 306-311.

<sup>139</sup> As above.

<sup>140</sup> As above.

<sup>141</sup> PJ Boczkowski, E Mitchelstein, & M Matass 'News comes across when I'm in a moment of leisure: Understanding the practices of incidental news consumption on social media' (2018) 20 (10) *New Media and Society* 3523-3539.

<sup>142</sup> N Fahmy 'News diffusion and facilitation of conversation' (2012) 8(1) *Journal of Middle East Media* 1-21.

<sup>143</sup> C Baden & N Springer 'Com(ple)menting the news on the financial crisis: The contribution of news users' commentary to the diversity of viewpoints in the public debate' (2014) 29(5) *European Journal of Communication* 529-548; D Batorski & I Grzywińska 'Three dimensions of the public sphere on Facebook' (2018) 21 (3) *Information, Communication and Society* 356-374 & B Kalsnes & A Larsson 'Understanding news sharing across social media' (2018) 19(11) *Journalism Studies* 1669-1688.

<sup>144</sup> A Kalogeropoulos, S Negrodo & RK Nielsen 'Who shares and comments on news?: A cross-national comparative analysis of online and social media participation' (2017) 3(4) *Social media + society* 1-12.

potential for lurkers, users who read information online but do not manifestly engage with it, also cannot be discounted as the information may influence decision-making, though indiscernibly.<sup>145</sup>

Revisiting Habermas' pessimism about the online space is the fragmentation of the internet that has begotten what he calls 'isolated issue publics'. Arguably, fragmentation is not necessarily disadvantageous. Positive fragmentation can be seen in the case of counter-publics, which denotes spaces where disadvantaged groups can convene, deliberate and strategize on a shared subject in a more refined way, away from dominant actors.<sup>146</sup> However, the online space can also nefariously fragment, segment, and personalise popular participation.<sup>147</sup> On the negative is the creation of echo chambers and filter bubbles that close off communities in spaces where they do not interact with diverse content but rather engage with content and opinions that reinforce their often subjective positions, in what is known as confirmation bias.<sup>148</sup> Algorithms and recommender systems designed to learn user interests and channel similar information are centrally responsible for incubating internet spaces. Inversely, algorithms are uniting. Benkler's concept of a networked public sphere posits that computer networks unify the subjects in the sphere.<sup>149</sup> Going a step further, online and offline audiences are further connected through the cross-pollination of information through mainstream traditional and social media and informal social networks that are present in both spaces.

While there are opportunities for accidental exposure to other diverse content,<sup>150</sup> filter bubbles restrict communicative power in the public sphere by limiting the chances of engaging with alternative views, employing communicative rationality, and finding consensus.<sup>151</sup> In the increasingly polarised world, the nature of emerging online conversations depicts a cacophony of voices speaking at each other and not with each other. Antagonistic debates on controversial issues or strong political positions often defy the 'vibrant clash of democratic political positions'

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<sup>145</sup> R Barnes 'The 'ecology of participation'. A study of audience engagement on alternative journalism websites' (2013) 2(4) *Digital Journalism* 542-557.

<sup>146</sup> Fraser (n 92) 109-142 & Negt & Kluge (n 91) 56-58.

<sup>147</sup> Gripsrud & others (n 80) 8 & CR Sunstein *Republic.com* (2002) 3.

<sup>148</sup> As above.

<sup>149</sup> Y Benkler *The wealth of networks: How social production transforms markets and freedom* (2007) 2.

<sup>150</sup> J Brundidge 'Encountering 'difference' in the contemporary public sphere: The contribution of the internet to the heterogeneity of political discussion networks' (2010) 60(4) *Journal of Communication* 680-700 & P Masip, J Suau-Martínez & C Ruiz-Caballero 'Questioning the selective exposure to news: Understanding the impact of social networks on political news consumption' (2018) 62(3) *American Behavioral Scientist* 300-319.

<sup>151</sup> Sunstein (n 147) 3-4.



and denigrate into incivility.<sup>152</sup> The result is increased polarization, disillusionment with online deliberations, and the withdrawal or exiting of alternative voices from toxic spaces, contributing to the echo chamber effect.<sup>153</sup>

Digital democracy is further hamstrung by the quality of information online necessary to inform opinion shaping, deliberation and decision-making. Of the many pins that deflated the optimistic bubble of the democratising potential of the internet is the proliferation of illegal and harmful content online enabled by the absence of the journalistic ethical filter present in mainstream traditional media. When the information menu fed to users is corrupted by harmful content such as misinformation, disinformation, hate speech and violent content in the absence of strong countermanding forces, the process of opinion formation and decision-making is severely constrained. The scenario becomes more malignant when governments and other powerful actors coordinate it. Poor enforcement of social media policies for moderating harmful and illegal content further hampers the quality of information online. Contexts such as Africa are further disadvantaged, given reduced attention from social media companies contributing to the corruption of online information.<sup>154</sup>

Therefore, while the internet holds a democratising potential that has overcome some of the challenges that corrupted traditional mass media, at the same time, it is constrained by familiar challenges that bedevilled legacy media, albeit in a unique fashion. By providing a space that enhances media rights and public participation directly to connected populations and indirectly to unconnected populations and facilitating public discourse and opinion-shaping towards informed decision-making in the public sphere, the internet enhances meaningful political participation and democracy. However, this requires a balancing act by states and non-state actors to mitigate the spread of harmful and illegal content online, address unreasonable and unjustifiable interference with the exercise of human rights online, and promote digital and media literacy as a bare minimum.

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<sup>152</sup> AA Anderson & others 'The 'Nasty effect:' Online incivility and risk perceptions of emerging technologies' (2014) 19 (3) *Journal of Computer-Mediated Communication* 373-387 & K Coe, K Kenski & SA Rains 'Online and uncivil? Patterns and determinants of incivility in newspaper website comments' (2014) 64 (3) *Journal of Communication* 658-679.

<sup>153</sup> CR Sunstein #*Republic*. *Divided democracy in the age of social media* (2017) 1-2.

<sup>154</sup> B Taye 'Until the machine learns your language, you stay put' (13 June 2022) *The Four Domains of Global Platform Governance Essay Series* <https://www.cigionline.org/articles/until-the-machine-learns-your-language-you-stay-put/> (accessed 31 January 2023).

## 10 Literature review

### *Conceptualising media, media freedom and related concepts*

The contemporary media space is complex and diverse, accommodating traditional players (print, radio, and television) and new media actors, including internet intermediaries such as social media companies, digital citizen journalists, and other users generating content. The blurring of lines of traditional and online media is witnessed in various ways, including online content published by professional journalists of traditional mainstream media on websites, social media pages and other online platforms. This has prompted international law and researchers to re-examine the conceptualisation of media in the digital age. Various authors agree with the international law definition of the media in the digital age, which includes professional journalists and other offline and online self-publishing content creators such as bloggers.<sup>155</sup> Cheruiyot and others refer to these players outside the scope of traditional professional journalists as peripheral journalists, a term that this thesis also adopts.<sup>156</sup>

Cheruiyot and others have argued that historically, even before the explosion of digital technologies in the communication and information landscape, the African journalism parlance included actors who do not neatly fit in the fold of traditional journalism definitions of the Global North.<sup>157</sup> In proffering a contextualised conceptualisation of journalism, Cheruiyot and others argue that '[b]roadening our conceptualization of journalism beyond the daily routines and practices of professional journalists and digital peripheral actors allows us to bring traditional and emerging peripheral actors in African journalism fields into the mainstream journalistic equation.'<sup>158</sup> These conventional and emerging actors have scaled up citizen journalism.

Banda defines citizen journalism as 'a rapidly evolving form of journalism where common citizens take the initiative to report news or express views about happenings within their community'.<sup>159</sup> Using secondary research, this thesis provides a contextualised picture of

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<sup>155</sup> On addressing the conundrum of defining journalism in the evolving media environment also see Mabweazara & Mare (n 60) 1-4; Eldridge (n 60) 1-2 & Belair-Gagnon & Avery (n 60) 492-493. Also see General Comment 34 & A/HRC/50/29 (n 60) paras 15-16.

<sup>156</sup> D Cheruiyot & others 'Making news outside legacy media' (2021) 42(4) *African Journalism Studies* 4-6.

<sup>157</sup> Cheruiyot & others (n 156) 6.

<sup>158</sup> As above.

<sup>159</sup> F Banda *Citizen journalism & democracy in Africa: An exploratory study* (2010) 26.

the manifestation of citizen journalism in the digital age media landscape in Kenya and how it is enabling meaningful political participation and engagement.

Admittedly, the broad definition of media under international law does not have an overall consensus. Some authors have advocated for a functional and/or content-based definition of media based on its role in democracy. This definition may be more attuned to an institutional perspective of media.<sup>160</sup> These arguments are strongly grounded in ensuring special protections for media, particularly given the informational paradigmatic shift propelled by digital technologies.<sup>161</sup> For example, Oster defines media as ‘a natural or legal person gathering and disseminating to a mass audience information and ideas pertaining to matters of public interest on a periodical basis and according to certain standards of conduct governing the newsgathering and editorial process’, and media freedom as ‘protection to persons or companies categorised as ‘media’ that goes beyond freedom of expression protection afforded to private individuals or non-media entities.’<sup>162</sup> Oster bases this media protection privilege on publishing information of public interest and adherence to standards of conduct. While there is credence to these arguments, this thesis avoids an overly structural formulation of media that would atrophy the essence of online media and the democratic potential it holds and fulfils.

Take social media as an example. Manning defines it as ‘new forms of media that involve interactive participation.’<sup>163</sup> It is a trove of public interest information published by various users as content or comments. Periodicity or formulaic newsgathering or editing processes are not guaranteed. While online formats of traditional mainstream media and some bloggers may be more structured in their publishing, news reporting online is more fluid and driven by events and public interest. Social media community guidelines provide the standards of conduct when

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<sup>160</sup> DA Anderson, 'Freedom of the press' (2002) 80 *Texas Law Review* 442-444.

<sup>161</sup> SR West, 'Press exceptionalism' (2014) 127 *Harvard Law Review* 2434-2435 & SR West 'Awakening the press clause' (2011) 58 *UCLA Law Review* 1025.

<sup>162</sup> J Oster, 'Theory and doctrine of "media freedom" as a legal concept' (2013) 5(1) *Journal of Media Law* 58 & 74.

<sup>163</sup> J Manning 'Social media, definition and classes of' in K Harvey (ed.) *Encyclopedia of social media and politics* (2013) 1158-1162. Other definitions include: 'platform to create profiles, make explicit and traverse relationships' by DM Boyd & NM Ellison 'Social network sites: Definition, history, and scholarship' (2008) 13 *Journal of Computer-Mediated Communication* 210-230. Definitions drawn from the interactive and networking aspects of social media are provided by G Oestreicher-Singer & L Zalmanson 'Content or community? A digital business strategy for content providers in the social age' (2013) 37 *MIS Quarterly* 592-594 & KK Kapoor & others 'Advances in social media research: Past, present and future' (2017) *Information Systems Frontiers* 531-534. In AM Kaplan & M Haenlein 'Users of the world, unite! The challenges and opportunities of social media' (2010) 53(1) *Business Horizons* 59-68, the authors breakdown social media into six categories: blogs, social networking sites, collaboration projects, content communities, virtual social worlds, and virtual game worlds.

respected and enforced. Legal frameworks, such as those on the spread of harmful and illegal content, also guide online conduct. Crowd correcting measures further editorialise content.<sup>164</sup> Although social media platforms maintain that they are mere conduits of information, content moderation practices affect the access and visibility of information online.<sup>165</sup> Social media companies have resisted being characterised as media companies rather than or in addition to tech companies despite their massive influence on the online media ecosystem.<sup>166</sup> Drawing from the three activities central to media companies—content production, distribution and exhibition—social media companies have argued that they are content curators, not creators.<sup>167</sup> Analysts, including Napoli and Caplan, and Bogost, have pushed back against these arguments, noting that the defining activities are not mutually exclusive.<sup>168</sup>

Circling back on who forms the media, in addition to the different arguments above, this thesis underscores the spirit of the social milieu that exudes a growing sense of the people as the media. ‘We are the media’. Essentially, the online space has communalised and democratised the news gathering and distribution processes and decentralised agenda-setting in the public sphere to birth an expanded definition of the media. This thesis posits that the metamorphosis of the media in the information age that has increased its border porosity will continue to resist strict boundaries on who forms media.

Researchers such as Koltay and Berlin discuss the bifurcated character of the concept of media freedom that has long influenced its discourse—negative and positive media freedom.<sup>169</sup> Negative media freedom seeks to insulate the institution from external interference, while

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<sup>164</sup> A Arif & others ‘A closer look at the self-correcting crowd: Examining corrections in online rumors’ (2017) *CSCW '17: Proceedings of the 2017 ACM Conference on Computer Supported Cooperative Work and Social Computing* 1 [https://faculty.washington.edu/kstarbi/Arif\\_Starbird\\_CorrectiveBehavior\\_CSCW2017.pdf](https://faculty.washington.edu/kstarbi/Arif_Starbird_CorrectiveBehavior_CSCW2017.pdf) (accessed 8 November 2023).

<sup>165</sup> PM Napoli & R Caplan ‘Why media companies insist they’re not media companies; and why they’re wrong’ <https://firstmonday.org/ojs/index.php/fm/article/view/7051/6124> (accessed 8 November 2023) & I Bogost ‘Facebook is not a technology Company: Neither are Google nor Amazon. Here’s why that matters’ *The Atlantic* 3 August 2016 <https://www.theatlantic.com/technology/archive/2016/08/facebook-is-not-a-technology-company/494183/> (accessed 8 November 2023). See also Meta’s reference to a technology company in Meta ‘Update on Meta’s year of efficiency’ (14 March 2023) <https://about.fb.com/news/2023/03/mark-zuckerberg-meta-year-of-efficiency/> (accessed 8 November 2023).

<sup>166</sup> As above.

<sup>167</sup> Napoli & Caplan (n 165) & Bogost (n 165).

<sup>168</sup> As above.

<sup>169</sup> A Koltay, ‘The concept of media freedom today: New media, new editors and the traditional approach of the law’ (2015) 7 *Journal of Media Law* 41. On the concept of negative and positive freedom, see I Berlin *Four essays on liberty* (1969) 121-122.

positive freedom aims to impose measures to protect the right. However, a balance of rights and responsibilities must be struck to ensure media accountability in performing its normative functions. International law advances positive media freedom, and proffers separate protections for media freedom and freedom of expression. Several scholars support this approach.<sup>170</sup> A different school of thought popularised by the USA argues for similar protection for freedom of expression and media freedom; otherwise, media will be vulnerable to interference and censorship of the media.<sup>171</sup> Tambini asserts that this international divergence is problematic in view of the discourse on the regulation of social media.<sup>172</sup> This challenge is already seen in the different approaches to internet regulation in the USA,<sup>173</sup> the EU,<sup>174</sup> and selected African countries.<sup>175</sup> Tambini also argues that media freedom should be a separate right conditional upon ‘serving truth, democratic self-government and human autonomy’ and accountability to the public and civil society and not the state.<sup>176</sup>

Building on this literature on the conceptualisation of media in the digital age, this thesis adopts a broad description of media that is in alignment with the modern-day composition of the space and international laws and standards. It also supports a broad definition of media freedom as freedom and independence from state and private control and a pluralistic medium where multiple players produce, publish and disseminate information of public interest. Arguably, this

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<sup>170</sup> LB Lidsky, 'Not a free press court?' (2012) *Brigham Young University Law Review* 1819, 1831-1835; West (n 161) 2434 & J Oster *Media freedom as a fundamental right* (2015) 69 & 268-269.

<sup>171</sup> See AT Kenyon, 'Assuming free speech' (2014) 77 *The Modern Law Review* 379, 381-385 for a discussion on negative and positive law theory looking at the positions by the US and Europe legal systems. Also see E Barendt *Freedom of Speech* (2005) 1-6 & D Tambini 'A theory of media freedom' (2021) 13 *Journal of Media Law* 142. Barendt argues for the regulation of freedom of speech to make it more effective.

<sup>172</sup> Tambini (n 171) 142.

<sup>173</sup> VC Brannon & EN Holmes 'Section 230: An overview' (2021) *CRS Reports* 30 <https://crsreports.congress.gov/product/pdf/R/R46751> (accessed 8 November 2023) & E Goldman 'Want to learn more about section 230? A guide to my work' [Want to Learn More About Section 230? A Guide to My Work \(UPDATED\) - Technology & Marketing Law Blog \(ericgoldman.org\)](https://www.ericgoldman.org) (accessed 8 November 2023).

<sup>174</sup> The Digital Services Act <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0825&from=en> (accessed 8 November 2023).

<sup>175</sup> For example, Ethiopia's Proclamation No. 1185 /2020 Hate Speech and Disinformation Prevention and Suppression Proclamation <https://www.accessnow.org/cms/assets/uploads/2020/05/Hate-Speech-and-Disinformation-Prevention-and-Suppression-Proclamation.pdf> (accessed 8 November 2023); South Africa's Electronic Communications and Transaction Act (25 of 2002) [https://www.internet.org.za/ect\\_act.html](https://www.internet.org.za/ect_act.html) (accessed 8 November 2023); Uganda's Electronic Transactions Act (2011) <https://ulii.org/akn/ug/act/2011/8/eng%402011-03-18> (accessed 8 November 2023) & Zimbabwe's Criminal Law (Codification and Reform) Act [https://www.veritaszim.net/sites/veritas\\_d/files/Cyber%20%26%20Data%20Protection%20Act%20Cap1207%20No%205%20of%202021%20gaz%202022-03-11.pdf](https://www.veritaszim.net/sites/veritas_d/files/Cyber%20%26%20Data%20Protection%20Act%20Cap1207%20No%205%20of%202021%20gaz%202022-03-11.pdf) (accessed 8 November 2023).

<sup>176</sup> Tambini (n 171) 149-150.

description gives more latitude to incorporate the transforming media space.<sup>177</sup> The study also avoids the polarity of media freedom protections for institutionalised or public interest media (usually traditional media), and freedom of expression protections for other media. That being said, given that the adopted definition of media is amorphous and dynamic and the lagging legal protections for the contemporary media space, the position of this thesis is that media freedom in the digital age is inseparable from the umbrella concept of freedom of expression that encapsulates rights accruing to the individuals that make up new media. This study refers to these rights collectively as media rights, and where the situation may require, separately touches on freedom of expression or media freedom protections. From a doctrinal perspective, this thesis uniquely examines how regulatory frameworks under international law, Kenyan national law and social media policies respond to the conceptual evolution of media and the implications on media rights.

### ***The role of media in democracy and elections***

The role of the media in the democratic process has been the subject of considerable research.<sup>178</sup> The media, commonly called the fourth estate,<sup>179</sup> represents a crucial actor in the public sphere as a watchdog and a platform for discussing matters of public interest, political campaigns, and facilitating public education.<sup>180</sup> The media is the society's mirror and should be unbiased and objective.<sup>181</sup> In the context of elections, the watchdog function of the media ensures that the public has access to relevant, credible information in a timely manner that allows for meaningful political participation, that the process is conducted in a transparent manner, and that there is a

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<sup>177</sup> A/HRC/50/29 (n 60).

<sup>178</sup> See select writings by B Mc Nair *Cultural chaos: Journalism, news, and power in a globalised world* (2006); D McQuail *McQuail's mass communication theory (6th ed)* 2010; E Skogerbo 'Normative theories in media research: Four theories of the press revisited' in H Ronning & K Lundby (eds) *Media and communication: Reading in methodology and culture* (1991); FB Nyamnjoh *Africa's media, democracy and the politics of belonging* (2005); FS Siebert, T Peterson & W Schramm *Four theories of the press: The authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (1984); G Mytton *Mass communication in Africa* (1983); J Stromback 'In search of a standard: Four models of democracy and their normative implications for journalism' (2005) 6 *Journalism Studies* 331–345; L Bougalt *Mass media in sub-Saharan Africa* (1995) & PAV Ansah 'In search of a role for the African media in the democratic process' (1988) 2(2) *Africa Media Review* 6-9.

<sup>179</sup> On the fourth estate see EF Adanlawo & R Hemduth 'Media and democracy: Is conventional media performing the role of the fourth estate of the realm?' (2021) 4 *Journal of African Films & Diaspora Studies*; P Von Doepp & DJ Young 'Assaults on the fourth estate: Explaining media harassment in Africa' (2013) 75 *The Journal of Politics* & J Schultz *Reviving the fourth estate: Democracy, accountability and the media* (1998).

<sup>180</sup> Habermas (n 76) 183; S Livingstone & P Lunt 'The mass media, democracy and the public sphere' in S Livingstone & P Lunt (eds) *Talk on television, audience participation and public debate*. London (1994) 9-35.

<sup>181</sup> Z Ekron 'A critical and functional analysis of the mirror metaphor with reference to the media's responsibility towards society' (2008) 2 *Global Media Journal* 1-2 & McQuail (n 178) 10.

push for accountability for electoral malfeasance.<sup>182</sup> Scholars and indexes on democracy<sup>183</sup> have long recognised civil liberties, including media rights and free and fair elections, as crucial components of democracy, supporting a multidimensional conceptualisation.

Media plays a critical role in agenda-setting in the public sphere. The effectiveness of the media's agenda-setting ability affects public opinion, participation, decision-making, and policy action.<sup>184</sup> Authors such as Graber, and Walgrave and Van Alset have noted that through agenda-setting and framing approaches, media content influences public knowledge, attitudes, behaviours, and consequently, the reactions of political actors and policymakers.<sup>185</sup> Ihlen and Thorbjørnsrud further add that strong frames accepted by society, plus extensive media pressure, can lead to policy change or action.<sup>186</sup>

Mwangi looks at the influence of the media on policy development in Kenya, especially through directing and shaping public debate. She agrees with the widely accepted position that where diverse media consistently and persistently covers the same issue under a similar frame, there is an increased likelihood of influencing policy action.<sup>187</sup> Mwangi is, however, critical of Kenyan media, noting that it is good at telling political actors what is happening and what to talk about but not what to do about the issues, and calls for improvement in media analytical skills and their watchdog role.<sup>188</sup>

Ownership and control of the media and its impact on media content have been age-old global concerns with regard to media independence and credibility and inspired writings around

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<sup>182</sup> AR Dahl *On democracy* (1998) 130-142; McQuail (n 178) & Nyamnjoh (n 178) 39 & 65.

<sup>183</sup> See CSP 'The polity project' <https://www.systemicpeace.org/polityproject.html> (accessed 8 November 2023); EIU (n 40) 9 & Freedom House 'Freedom in the world' <https://freedomhouse.org/report/freedom-world> (accessed 8 November 2023). Another useful index is the EIP 'Perceptions of election integrity' <https://www.electoralintegrityproject.com/pei> (accessed 8 November 2023).

<sup>184</sup> D Graber 'Political Communication Faces the 21st Century' (2005) 55 *Journal of Communication* 479-507.

<sup>185</sup> D Graber (n 184) 479-507; S Walgrave & P Van Aelst 'The contingency of the mass media's political agenda setting power: Towards a preliminary theory' (2006) 56 *Journal of Communication* 88-109 & S Koch-Baumgarten & K Voltmer (eds) *Public policy and the mass media: The interplay of mass communication and political decision making* (2010) 5. Also see DA Scheufele 'Framing as a theory of media effects' (1999) 49 *Journal of Communication* 103-122 & JN Druckman 'The implications of framing effects for citizen competence' (2001) 23 *Political Behavior* 225-256.

<sup>186</sup> O Ihlen & K Thorbjørnsrud 'Making news and influencing decisions: Three threshold cases concerning forced return of immigrants' (2014) 29 *European Journal of Communication* 139-152.

<sup>187</sup> C Mwangi 'Media influence on public policy in Kenya: The case of illicit brew consumption' (2018) *Sage* 11 & C Eilders 'Media as political actors? Issue focusing and selective emphasis in the German quality press' (2000) 9 *German Politics* 181-206.

<sup>188</sup> Mwangi (n 187) 12.

the political economy of the media.<sup>189</sup> The political economy of the media delves into how the economics of ownership, control, diversification, privatisation and internationalisation of the media landscape affect media behaviour and output.<sup>190</sup> Habermas criticised how the media's political economy has compromised its ability to undertake its normative functions in the public sphere effectively.<sup>191</sup> Chomsky and Herman expertly discuss the propaganda model on how media owners, major advertisers and political interests influence news content.<sup>192</sup> They posit five filters that distort the accuracy of news items in mainstream traditional media, including media ownership, advertising revenue, media elite made up of governments and media owners, 'flak' or modern-day trolls who discredit media that fail to conform and report the agreed narrative, and the common enemy.<sup>193</sup> These filters arguably take shape in tactics to control expression in social media platforms by state and non-state actors and negatively impact meaningful public debate in this digital sphere.<sup>194</sup> This has already been witnessed in Kenya's public sphere, with politicians holding a significant ownership stake in traditional media, targeted harassment, and even arrests of critical online voices, as well as the spread of government-sponsored propaganda and disinformation.<sup>195</sup> This thesis develops the argument that when state and non-state actors adopt a contextualised human rights-based approach to media protection that is adaptive to the contemporary digitalised media landscape and the ensuing opportunities and threats, there will be enhanced implementation of laws, and checks and balances of power that allow the media to better undertake its normative functions that enhance meaningful political participation of the

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<sup>189</sup> BH Bagdikian *The media monopoly* (1983); D McQuail, D Graber & P Norris 'Conclusion: Contemporary challenges in journalism and democracy' in DA Graber, D McQuail & P Norris (eds) *In the politics of news the news of politics* (2008); H Hardt *Social theories of the press. Early German and American perspectives* (1979); ES Atieno-Odhiambo 'Democracy and the ideology of order in Kenya, 1888-1987' in M Schatzberg (ed) *The political economy of Kenya* (1987) 177-201; JL Martin & AG Chaudhary *Comparative mass media systems* (1983) 244-247; J Tunstall and M Palmer (eds) *Media moguls* (1991) 107-109; LM Oosthuizen *Media policy and ethics* (1989); LM Oosthuizen 'Media ownership and control' in PJ Fourie (ed) *Media studies: Institutions, theories and issues* (2004) 129-160; PJ Humphrey *Media and media policy in West Germany. The press and broadcasting since 1945* (1990) & RE Heibert, DF Ungurait & TW Bohn *Mass media VI. An introduction to modern communication* (1991).

<sup>190</sup> CJ Hamelink *Trends in world communication. On disempowerment and self-empowerment* (1994) 1-3; G Burton *Media and Society: Critical perspectives* (2010) 46; G Murdock & P Golding 'Culture, communications and political economy' in J Curran & M Gurevitch (eds) *Mass media and society* (2005) 200-204 & Boyd-Barrett (n 18) 186.

<sup>191</sup> Habermas (n 76) 140.

<sup>192</sup> Chomsky & Herman (n 73) xii –xiii.

<sup>193</sup> Chomsky & Herman (n 73) xii –xiii; N Chomsky & ES Herman 'A propaganda model: Excerpted from manufacturing consent, 1988' <https://chomsky.info/consent01/> (accessed 8 November 2023) & N Chomsky 'Noam Chomsky: The five filters of the mass media' <https://pruk.org/noam-chomsky-the-five-filters-of-the-mass-media-machine/> (accessed 8 November 2023).

<sup>194</sup> Tunstall & Palmer (n 189) 107-111 & Oosthuizen (n 189) 131

<sup>195</sup> Nyabola (n 43) & Ogola (n 44) 77.



electorate. Further, the effective implementation of the strategy confronts the threat of the political economy of the media.

### ***Evolving performance of Kenyan media***

Several authors have analysed the media dynamics in Kenya generally and during elections, particularly its ability to play the watchdog and public education role and ensure fair and accurate news presentation.<sup>196</sup> Ogola and Galava, for example, trace the evolution of media ownership in Kenya from independence and throughout the different regimes and discuss how media control affected media output and credibility.<sup>197</sup> Despite recognising the robustness of Kenyan media, they point to state interference, media concentration and the dangerous tacit alliance between mainstream media and politicians that compromises its independence, performance, and democracy.<sup>198</sup> Simiyu similarly seeks to establish the relationship between media concentration and media freedom in Kenya.<sup>199</sup> He concludes that the increasing consolidation of media ownership around prominent politicians or businessmen with ties to politicians has compromised the diversity of media in Kenya and contributed to the shrinking of

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<sup>196</sup> On the media in Kenya pre-1990s see A Okoth-Owiro 'The law and the mass media in Kenya (1990) 4(1) *Africa Media Review*; DW Throup 'Daniel Arap Moi and one-party rule (1978-1971)' in N Cheeseman, K Kanyiga & G Lynch *The Oxford handbook of Kenyan politics* (2020) 56-68; J Abuoga & A Mutere *The history of the press in Kenya* (1988); R Ainslie *The press in Africa: Communications past and present* (1966) 99; F Barton *The press of Africa; Persecution and perseverance* (1979); K Coppard *The defence of press freedom* (1988) 160; P Mwaura *Communications policy in Kenya* (1980); P Ochieng *I accuse the press* (1992) & W Ugungu 'Kenya's difficult political transitions ethnicity and the role of media' in LL Mukhongo & JW Machari (eds) *Political influence of the media in developing countries* (2016) 12. Post the 1990s to the 2013 election cycle see B Andreassen, G Geisler & A Tostensen 'A hobbled democracy: The Kenya general elections 1992: Report No 5' (1993) 18-19 [https://open.cmi.no/cmi-xmlui/bitstream/handle/11250/2436021/R1993.5%20Bard.A%2c%20Gisela%20og%20Arne-07182007\\_4.pdf?sequence=2&isAllowed=y](https://open.cmi.no/cmi-xmlui/bitstream/handle/11250/2436021/R1993.5%20Bard.A%2c%20Gisela%20og%20Arne-07182007_4.pdf?sequence=2&isAllowed=y) (accessed 8 November 2023); CW Heath 'Structural changes in Kenya's broadcasting system: A manifestation of presidential authoritarianism' (1992) 37 *Gazette* 44-48 <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1018.2281&rep=rep1&type=pdf> (accessed 8 November 2023); G Imanyara *Freedom of the press in Kenya 1993* (1993); J Kadhi & M Rutten 'The Kenyan media in the 1997 general elections: A look at the watchdogs' in M Rutten, A Mazrui & F Grignon *Out for the count: The 1997 general elections and prospects for democracy in Kenya* (2001); KHRC 'Shackled messengers - the media in multiparty Kenya' (1997); KHRC & Article 19 'Elections '97'. *Media monitoring in Kenya, August 1997* (1997); PM Nyamora 'The role of alternative press in mobilization for political change in Kenya 1982-1992: Society magazine as a case study' Master of Arts thesis, School of Mass Communications College of Arts and Sciences, University of South Florida, 2007 & W Waruru 'The press in Kenya' (May-June 1996) 157 *The Courier* 26.

<sup>197</sup> D Galava 'The role of traditional media' in N Cheeseman, K Kanyiga & G Lynch (eds) *The Oxford handbook of Kenyan politics* (2020) 283-296 & Ogola (n 44) 77-95. Also see LL Mukhonga 'Friends or foes? A critique of the development of the media and the evolving relationship between press and politics in Kenya' (2015) 29 *Critical Arts* & Ochieng (n 196).

<sup>198</sup> Ogola (n 44) 91. Also see Galava (n 197) 283-296.

<sup>199</sup> TF Simiyu 'Media concentration and the coverage of the 2013 general election in Kenya: Democracy at the crossroads' (2013) 7 *AUDC* 45-71.

the democratic space.<sup>200</sup> Low public confidence in both private and public media has given room for the flourishing of citizen journalism and user-generated content online as an alternative source of information.<sup>201</sup> Another researcher on Kenyan media, Ouma, argues that Kenyan broadcast and print media have not had a constant culture of reporting for democracy and only do so when promoted by corporate interests or grudges with the government rather than as a serious undertaking of their watchdog function.<sup>202</sup>

The 2007 general elections were pivotal, given the unprecedented levels of violence that shook the foundations of Kenya's democracy. The complicity of Kenyan media in stoking and pacifying the violence has attracted considerable research.<sup>203</sup> The influence of online media in Kenyan elections starts taking shape in these elections, which Nyabola characterised as fashioning 'the conditions for Kenya's most seismic social and digital change.'<sup>204</sup> In 2013, Kenyan traditional mainstream media adopted a version of peace journalism<sup>205</sup> that was largely criticised as contradicting its normative functions and possibly compromising the public's ability

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<sup>200</sup> Simiyu (n 199) 69.

<sup>201</sup> As above.

<sup>202</sup> S Ouma 'Reporting for democracy or convenience? The Kenyan media and the 2017 elections' (2018) *The Commonwealth Journal of International Affairs* 185-186.

<sup>203</sup> BBC 'The Kenyan 2007 elections and their aftermath: The role of media and communication' (April 2008) 1 *Policy Briefing*; F Brisset-Foucault 'The electoral campaign on television. Communication strategies and models of democracy' in J Lafargue (ed) *In the general elections in Kenya 2007*; F Ogenga 'The role of the Kenyan media in the 2007 elections' (2008) 7(2) *Journal of African Elections*; GM Khadiagala 'Forty days and nights of peace-making in Kenya' (2008) 7 *Journal of African Elections*; H Ndunde 'From cyberspace to the public: Rumor, gossip and hearsay in the paradoxes of the 2007 general election in Kenya' Paper presented at CODESRIA 12th General Assembly, Yaounde, 2008; J Goldstein & J Rotich 'Digitally networked technology in Kenya's 2007-2008 post-election crisis' (2008) 2008-09 *Berkman Center Research Publication*; M Makinen & MW Kuiru 'Social media and post-election crisis in Kenya' (2008) *Information & Communication Technology – Africa* 13; K Makokha 'The dynamics and politics of media in Kenya: The role and impact of mainstream media in the 2007 general elections' in K Kanyinga & D Okello (eds) *Tensions and reversals in democratic transitions* (2010); MW Mungai 'Soft power', popular culture and the 2007 elections' in K Kanyinga & D Okello (eds) *Tensions and reversals in democratic transitions* (2010) & N Cheeseman 'The Kenyan elections of 2007: An introduction' (2008) 2(2) *Journal of Eastern African Studies*. Also see election reports including CIPEV 'Report of the Commission of Inquiry into the Post-Election Violence (CIPEV)' (2008); IREC 'Report of the Independent Review Commission on the general elections held in Kenya on 27 December 2007' (2008) & KNCHR 'On the brink of the precipice: A human rights account of Kenya's post 2007 election violence' (2008).

<sup>204</sup> Nyabola (n 43) 23. Also see E Zuckerman 'Citizen media and the 2007 Kenyan election crisis' in S Allan & E Thorsen (eds) *Citizen journalism: Global perspectives* (2009) 187-188.

<sup>205</sup> The concept has been explored by J Galtung & J Lynch *Reporting conflict: New directions in peace journalism* (2010); J Lynch *A global standard for reporting conflict* (2014) & J Lynch & A McGoldrick *Peace journalism* (2005). Other authors who have written on it include IS Seaga, J Lynch & RA Hackett (eds) *Expanding peace journalism. comparative and critical approaches* (2011) & RL Keeble, J Tulloch & F Zollmann (eds) *Peace journalism, war and conflict resolution* (2010).

to have an objective narrative of the quality of the elections.<sup>206</sup> In turn, the reliance on online media as an alternative media platform intensifies to counter gatekeeping by traditional mainstream media.<sup>207</sup> In the 2017 and 2022 elections, the media ecosystem was shared by traditional mainstream media and online media. Authors have noted the challenges facing traditional mainstream media, including legislative amendments close to the election date, repressive media laws and government actions, limited resources, self-censorship, disproportionate focus on peace journalism, and most critically, biased and sensationalistic reporting, even from longstanding media giants, which subverted ethics of journalistic reporting and democratic ideals.<sup>208</sup> Additionally, the media was criticised for poor agenda setting, especially by failing to adequately cover pertinent issues such as campaign financing, misuse of state resources, and the conduct of party primaries.<sup>209</sup>

Given the challenges facing the Kenyan media landscape, the influence of online media, particularly social media, as a complementary and alternative media platform crucial for public debate, political discourse, diverse opinions, activism and electoral campaigns is undeniable.

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<sup>206</sup> C Odote ‘The 2013 elections and the peace narrative’ in N Cheeseman, K Kanyiga & G Lynch (eds) *The Oxford handbook of Kenyan politics* (2020) 96-97; D Galava ‘From watchdogs to hostages of peace’ in HM Mabweazara (ed) *Newsmaking cultures in Africa* (2018) 324; H Maupeu ‘Kenyan elections: The ICC, God and the 2013 Kenyan general elections’ in C Thibon & others (eds) *Kenya’s past as prologue* (2013); J Gustafsson ‘Media and the 2013 Kenyan election: From hate speech to peace preaching’ (2016) 15 *Conflict & Communication Online*; JC Hoste ‘Kenya’s elections: The peace lobotomy?’ (2013) *Africa Policy Brief*; JD Long & others ‘Kenya’s 2013 elections: Choosing peace over democracy’ (2013) 3 *Journal of Democracy*; G Lynch, N Cheeseman & J Willis ‘From peace campaigns to peaceocracy: Elections, order and authority in Africa’ (2019) 118 (473) *African Affairs*. Also see the election report by KHRC ‘The democratic paradox: A report on Kenya’s 2013 general elections’ (2014).

<sup>207</sup> G Ogola ‘Social media as a heteroglossic discursive space and Kenya’s emergent alternative/citizen experiment’ (2015) 36(4) *African Journalism Studies* 66. Also see C Odinga ‘Use of new media during the Kenya elections’ Master’s thesis, Department of Informatics and Media, Uppsala University, 2013 at 26-28.

<sup>208</sup> G Ogola ‘How African governments use advertising as a weapon against media freedom’ *The Conversation* (18 April 2017) <https://theconversation.com/how-african-governments-use-advertising-as-a-weapon-against-media-freedom-75702> (accessed 8 November 2023); PPC ‘Media besieged: A media monitoring report on the coverage of the Kenya general elections 2017’ (2018) 6 & Z Ismail ‘Government communication capacity and media freedom’ (2019) 2 [https://assets.publishing.service.gov.uk/media/5cf66a65ed915d097e06897d/579\\_Government\\_Communication\\_and\\_Media\\_Freedom.pdf](https://assets.publishing.service.gov.uk/media/5cf66a65ed915d097e06897d/579_Government_Communication_and_Media_Freedom.pdf) (accessed 8 November 2023).

<sup>209</sup> C Hornsby ‘Forms and substance: Comparing predictions and results from Kenya’s general election’ *The Elephant* 7 September 2019 <https://www.theelephant.info/features/2017/09/07/forms-and-substance-comparing-predictions-and-results-from-kenyas-general-election/> (accessed 8 November 2023); D Odunga ‘ODM leader was short-changed in 2007 polls – Macharia’ *Daily Nation* 4 January 2017 <https://www.nation.co.ke/news/politics/Raila-won-2007-elections--says-Macharia/1064-3506012-q12oic/index.html> (accessed 8 November 2023); GW Gathigi ‘How the media covered Kenya’s general election’ *The Conversation* 17 August 2017 <https://theconversation.com/how-the-media-covered-kenyas-general-election-82324> (accessed 8 November 2023) & N Komu ‘Release poll results at your own peril: CS warns media’ *Daily Nation* 30 July 2017 <https://www.nation.co.ke/news/CS-Mucheru-sends-warning-to-media-houses/1056-4038724-q5f3a8z/index.html> (accessed 8 November 2023).

Nyabola expertly details how internet use has transformed politics in Kenya and given citizens new approaches to democratic participation.<sup>210</sup> Social media has provided new spaces for freedom of expression and information that were absent, closing or compromised in Kenyan broadcast and print media.<sup>211</sup> The evolution of citizen journalism in new media and its ability to allow citizens to participate in the democratic process and advocate for change actively is a growing research area.<sup>212</sup> In some cases, online campaigns, naming and shaming, and online organising have led to offline responses from the government.<sup>213</sup> The penchant for some governments, including many African ones, to favour restrictive over enabling frameworks is implied in writings by Nyabola and Tufekci, who argue that online media grew because governments did not anticipate its revolutionary power in human rights, particularly in developing countries.<sup>214</sup>

Several researchers on the democratic potential of digital technologies for Kenya note that while the online space has allowed for a more inclusive platform for Kenyans, it can also mutate into a space pungent with ethnic, political, religious, and stereotypical vitriol.<sup>215</sup> This can also negatively affect the same vulnerable populations that have found their voice in these spaces. Norris also fears politicians can dominate online spaces through sponsored campaigns, propaganda and bots to reinforce their influence and control the narratives.<sup>216</sup> This would skew public debate in their favour.

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<sup>210</sup> Nyabola (n 43) 101-114.

<sup>211</sup> Nyabola (n 43) 38-39.

<sup>212</sup> A Haugerud, DJ Mahoney & M Ference 'Satire, social media, and cultures of resistance' in N Cheeseman, K Kanyiga & G Lynch (eds) *The Oxford handbook of Kenyan politics* (2020) 269 -282; C Shirky *Here comes everybody: The power of organizing without organizations* (2008); IRMA (ed) *Media influence: Breakthroughs in research and practice* (2018); MN Ndlela & W Mano (eds) *Social media and elections in Africa: Theoretical perspectives and election campaigns Volume 1* (2020) & Z Tufekci *Twitter and teargas: The power and fragility of networked protest* (2017).

<sup>213</sup> Haugerud, Mahoney & Ference (n 212) 279; Nyabola (n 43) 152 & Tufekci (n 212) ix-xii.

<sup>214</sup> As above.

<sup>215</sup> L Mukhongo 'Negotiating the new media platforms: Youth and political images in Kenya' (2014) 12 *Triple C* 334; JM Kirigha, LL Mukhongo & R Masinde 'Beyond web 2.0. Social media and urban educated youths participation in Kenyan politics' in LL Mukhongo & JW Macharia (eds) *Media influence: Breakthroughs in research and practice* (2018) 156-174.

<sup>216</sup> P Norris *A virtuous circle: political communications in post-industrial societies* (2000) 9-10; P Norris *Digital divide: Civic engagement, information poverty, and the internet worldwide* (2000) 3-4 & P Norris 'Revolution, what revolution? The internet and U.S. Elections, 1992-2000' in E Kamarek & JS Nye (eds) *Governance.com: Democracy in the Information age* (2002) 59-80. Also see F Pasquale *The black box society. The secret algorithms that control money and information* (2015); G Nyabuga & FM Okoth "'Misclick" on democracy: New media use by key political parties in Kenya's disputed December 2007 presidential election' in OF Mudhai, WJ Tettey & F Banda (eds) *African media and the digital public sphere* (2009) 47-49 & Ndlela (n 212) 34.

Further challenges to online media are seen in the spread of harmful and illegal content such as misinformation, disinformation, propaganda, and hate speech, which has compromised access to credible information, particularly during elections.<sup>217</sup> This represents some of the limiting factors that prevent the realisation of Habermas' public sphere. Fuchs identifies three conflicting aspects that prevent the realisation of an ideal online public sphere for meaningful public debate, including corporate interests of tech companies versus the rights of users, political interests versus the privacy of online users and their desire for accountable leadership, and corporate and state colonisation of public spheres created by civil society.<sup>218</sup> Research on Kenyan elections in 2017 and 2022 substantiates these fears and concerns.<sup>219</sup> This thesis builds on this discussion by charting the evolution and performance of traditional Kenyan media from pre-independence and in subsequent election cycles to the most recent 2022 elections. The assessment of the performance of Kenyan media and its impact on meaningful participation of the electorate is linked with shaping and realising the Kenyan networked sphere specifically and the general public sphere. The historical arch of media performance unpacks the place of the law, politics and the economy in enabling and constraining the Kenyan traditional and new media in effectively undertaking its normative functions and the ricochet effects on meaningful political participation of the electorate. In particular, the thesis proposes a framework to strongly safeguard the blended ecosystem of offline and online media given the evident growing impact on enhanced meaningful political participation of the electorate and democratic development.

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<sup>217</sup> A Mare, HM Mabweazara & D Moyo "Fake news" and cyber-propaganda in sub-Saharan Africa: Recentring the research agenda' (2019) 40 *African Journalism Studies* 1-12; C Ireton & J Posetti *Journalism, fake news & disinformation: Handbook for journalism education and training* (2018) 7-9; E Culloty & J Suiter *Disinformation and manipulation in digital media: Information pathologies* (2020) 1-2; 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 & MA Simiyu 'Freedom of expression and African elections: Mitigating the insidious effect of emerging approaches to addressing the false news threat' (2022) 22 *African Human Rights Law Journal* 76-107.

<sup>218</sup> Fuchs (n 109) 89 & C Fuchs 'The contemporary world wide web: Social medium or new space of accumulation?' in D Winseck & DY Jin (eds) *The political economies of media: The transformation of the global media industries* (2011) 201-206.

<sup>219</sup> See ADDO 'How hate speech trolls targeted Kenya's 2022 elections' <https://disinfo.africa/early-detection-and-counterung-hate-speech-during-the-2022-kenyan-elections-e0f183b7bdd1> (accessed 8 November 2023); LA Dahir "'We'd stage the whole thing': Cambridge Analytica was filmed boasting of its role in Kenya's polls" *Quartz* 20 March 2018 <https://qz.com/africa/1233084/channel-4-news-films-cambridge-analytica-execs-saying-they-staged-kenya-uhuru-kenyatta-elections/> (accessed 8 November 2023); Madung (n 33); O Madung 'Inside the shadowy world of disinformation for hire in Kenya' (2021) [https://assets.mofoprod.net/network/documents/Report Inside the shadowy world of disinformation for hire in Kenya 5. hcc.pdf](https://assets.mofoprod.net/network/documents/Report%20Inside%20the%20shadowy%20world%20of%20disinformation%20for%20hire%20in%20Kenya%205.%20hcc.pdf) (accessed 8 November 2023) & O Madung 'From dance app to political mercenary: How disinformation on TikTok gaslights political tensions in Kenya' (2022) <https://foundation.mozilla.org/en/campaigns/kenya-tiktok/> (accessed 8 November 2023).

## *Regulation of media*

An examination of seminal human rights instruments at the international level (UN and African human rights system) reveals a firm foundational basis for protecting media rights and political participation in the digital age.<sup>220</sup> International human rights bodies have reinforced the protection of these rights to address emerging rights-related needs and challenges in the digital age, largely through soft law instruments and jurisprudence.<sup>221</sup> Former Chief Justice Willy Mutunga and others have written on the progressive nature of Kenya's Constitution for qualities such as the strong Bill of Rights.<sup>222</sup> Kenya also has a robust statutory framework for regulating media rights and political participation.<sup>223</sup> However, successful legal challenges of some media laws on the basis of violation of the Constitution and international law on freedom of expression and media freedom, as well as arguments by authors such as Wanyama and Ndanyi portray the disconnect with state commitment to advance rather than limit these rights.<sup>224</sup> Overregulation of

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<sup>220</sup> See the ICCPR, Universal Declaration, African Charter & African Charter on Democracy, Elections and Governance <https://au.int/sites/default/files/treaties/36384-treaty-african-charter-on-democracy-and-governance.pdf> (accessed 8 November 2023).

<sup>221</sup> Relevant soft law instruments at the UN level include General Comment 34, Windhoek Declaration <https://www.europarl.europa.eu/document/activities/cont/201104/20110429ATT18422/20110429ATT18422EN.pdf> (accessed 8 November 2023); HRC 'The promotion, protection and enjoyment of human rights on the Internet' (7 July 2021) A/HRC/47/L.22. (UN Internet Resolution) <https://digitallibrary.un.org/record/3937534?ln=en> (accessed 8 November 2023) & The Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda <https://www.ohchr.org/Documents/Issues/Expression/JointDeclaration3March2017.doc> (accessed 8 November 2023). At the African level see 2019 Declaration & Guidelines on Access to Information and Elections in Africa. Notable case law includes *Amnesty International Togo v The Togolese Republic*, suit ECW/CCJ/APP/61/18, ECOWAS Court of Justice, judgement, 6 July 2020 (*Amnesty Togo v Togo*) <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2020/07/JUD-ECW-CCJ-JUD-09-20-AMNESTY-INTERNATIONAL-TOGO-7-ORS-V.-REPUBLIC-OF-TOGO-of-6-july-2020.pdf> (accessed 8 November 2023).

<sup>222</sup> W Mutunga 'The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme court's decisions' (2015) 1 *Speculum Juris* 6 & A Sjögren, GR Murunga & D Okello 'Towards a new constitutional order in Kenya: An introduction' in GR Murunga, D Okello & A Sjögren (eds) *Kenya: The struggle for a new constitutional order* (2014) 6-7.

<sup>223</sup> Constitution of Kenya <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010> (accessed 8 November 2023).

<sup>224</sup> *Royal Media Services Limited & 2 Others v Attorney General & 8 Others* [2014] eKLR, Court of Appeal Civil Appeal No 4 of 2014 <http://kenyalaw.org/caselaw/cases/view/96676> (accessed 8 November 2023); *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR Supreme Court Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated) <http://kenyalaw.org/caselaw/cases/view/101689/> (accessed 8 November 2023) & *Nation Media Group Limited & 6 Others v Attorney General & 9 Others* [2016] eKLR, High Court Judicial Review Miscellaneous App 30 & 31 of 2014 <http://kenyalaw.org/caselaw/cases/view/122358/> (accessed 15 July 2021). Although unsuccessful at the High Court *Bloggers Association of Kenya (BAKE) v Attorney General & 3 Others; Article 19 East Africa & Another* (Interested Parties) [2020] eKLR, Petition 206 of 2019 <http://kenyalaw.org/caselaw/cases/view/191276/> (accessed 8 November 2023) is a legal challenge of the Computer Misuse and Cybercrimes Act, 2018. Also see SK Ndanyi 'Film censorship and identity in Kenya' (2021) 42(2) *Ufahamu: A Journal of African Studies* 26-27 & LL Wanyama 'Media control in Kenya: The state of

the media can also be seen in grey research.<sup>225</sup> The assessment of the legal framework by this thesis further denotes a co-regulatory approach to media regulation that disproportionately focuses on regulating traditional media over online media while also focusing on regulatory actors over substance.

Given the influence of internet intermediaries, especially social media companies, in influencing media rights and public participation and their failure to effectively self-regulate, researchers have argued for enhancing their accountability and transparency.<sup>226</sup> The Computer Misuse and Cybercrimes Act adopted by Kenya would have been ideal legislation to address digital harms. However, contentious provisions, including on disinformation and misinformation, may unlawfully and unjustifiably compromise media rights. Since neither this law nor other laws and policies effectively regulate social media, this thesis confronts this regulatory and literature gap by exploring whether there is a need for social media regulation in Kenya and if so, the framework for such regulation. Further, it evaluates whether regulatory options should be centred at national, regional and/or international levels given the borderless nature of the internet. It assesses what lessons Kenya can draw lessons in shaping an online and social media regulatory framework from efforts in other jurisdictions, including the liberal approach of the USA,<sup>227</sup> the regional and conditional liability approach of the EU,<sup>228</sup> and provisions in the laws of select African countries.<sup>229</sup>

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broadcasting under the new Kenya Information and Communication Act of 2013' (2015) 33 *New Media and Mass Communication* 17.

<sup>225</sup> MCK 'Media sector legislative review' (2020) 41, 42 & 44 [https://mediacouncil.or.ke/sites/default/files/downloads/MEDIA%20SECTOR%20LEGISLATIVE%20REVIEW%202021\\_1.pdf](https://mediacouncil.or.ke/sites/default/files/downloads/MEDIA%20SECTOR%20LEGISLATIVE%20REVIEW%202021_1.pdf) (accessed 8 November 2023).

<sup>226</sup> CRSM & TIFA Research 'National 2022 report on disinformation & the role of big tech in Kenya' 11 [https://accountablebigtech.com/wp-content/uploads/2023/01/Public-Opinion-Research-on-Disinformation-Big-Tech-Harms-DISSEMINATED-REPORT\\_Final-1.pdf](https://accountablebigtech.com/wp-content/uploads/2023/01/Public-Opinion-Research-on-Disinformation-Big-Tech-Harms-DISSEMINATED-REPORT_Final-1.pdf) (accessed 8 November 2023); Kaye (n 22) 10-12; Klonick (n 22) 1602-1603; Munn (n 32) 2; Levy (n 136) 6 & UNESCO (n 27) 1-2.

<sup>227</sup> Brannon & Holmes (n 173) & Goldman (n 173).

<sup>228</sup> Digital Services Act <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0825&from=en> (accessed 8 November 2023) & A Satariano 'E.U. takes aim at big tech's power with landmark Digital Act' *The New York Times* 24 March 2022 <https://www.nytimes.com/2022/03/24/technology/eu-regulation-apple-meta-google.html> (accessed 8 November 2023).

<sup>229</sup> For example, Ethiopia's Proclamation No. 1185 /2020 Hate Speech and Disinformation Prevention and Suppression Proclamation <https://www.accessnow.org/cms/assets/uploads/2020/05/Hate-Speech-and-Disinformation-Prevention-and-Suppression-Proclamation.pdf> (accessed 8 November 2023); South Africa's Electronic Communications and Transaction Act (25 of 2002) [https://www.internet.org.za/ect\\_act.html](https://www.internet.org.za/ect_act.html) (accessed 8 November 2023); Uganda's Electronic Transactions Act (2011) <https://ulii.org/akn/ug/act/2011/8/eng%402011-03-18> (accessed 8 November 2023) & Zimbabwe's Criminal Law (Codification and Reform) Act

Building upon the above literature review, this research situates its contribution to the effective protection of media freedom in the digital age through a contextualised human rights-based approach to ensure that offline and online media can effectively play their normative functions in the public sphere. The study assumes that an enabling media ecosystem will enrich electoral information integrity and electoral discourse and enable the electorate to exercise their right to meaningful political participation in elections guided by accurate, credible and relevant information. The study acknowledges that the internet plays a crucial role in defining modern media and examines the extent to which the democratising potential of the internet is realised in the Kenyan public sphere using the political participation of the electorate during elections as the frame of reference. The study uniquely explores the influence of the redefined media landscape of the digital age in enhancing plurality of voice and public participation in democratic development in Kenya. The thesis argues that an effectively protected media space unveils abounding opportunities for realising meaningful political participation of the electorate and the exercise of the people's sovereignty in the public sphere as guaranteed in Kenya's Constitution. Although the envisioned Habermas public sphere is chimerical, stakeholders should aspire to nurture a milieu for meaningful public discourse with an enabling environment for media to act as the conduit. Addressing the challenges of the political economy of the media is critical to realising this public sphere. In the complex modern-day media landscape of diverse actors, this study explores a human-rights-based approach to media protection to enhance media performance in elections towards promoting meaningful political participation of the electorate.

## **11 Chapter outline**

### **Chapter one: Introduction**

The first chapter provides a synopsis of the thesis and includes the background, problem statement, research questions and objectives, methodology, scope and limitations, theoretical framework and thesis structure.

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[https://www.veritaszim.net/sites/veritas\\_d/files/Cyber%20%26%20Data%20Protection%20Act%20Cap1207%20No%205%20of%202021%20gaz%202022-03-11.pdf](https://www.veritaszim.net/sites/veritas_d/files/Cyber%20%26%20Data%20Protection%20Act%20Cap1207%20No%205%20of%202021%20gaz%202022-03-11.pdf) (accessed 8 November 2023).



## **Chapter two: A retrospective and contemporary assessment of media performance in Kenya's electoral continuum and its impact on political participation in the Kenyan public sphere**

This chapter traces the evolution of media in Kenya, examining the performance of its normative functions using political participation and elections as the frame of reference. It discusses the nascent beginnings of Kenyan media in the pre-independence days, largely influenced by missionaries and the settler community, with some Asian and African representation. It examines the role played by the Kenyan media in advocating for multiparty democracy from post-independence to the 1974, 1979, 1983, 1992 and 1997 elections. It also explores media liberalisation triggered by the increased integration of digital technologies in media, enhanced political participation, and emerging challenges from the 2002 to the 2022 general elections. Recognising the impact of the market economy and politics in Kenya's media culture, each part acknowledges the influence of the incumbency and summarily explores the prevailing legal framework. It provides a segue into the discussion in the next two chapters on the regulatory framework for media at international and national levels that influence media rights and performance.

## **Chapter three: The international legal framework for the protection of media freedom and political participation in the digital age**

Chapter three examines the framework for protecting media rights and the right to political participation under international law. In doing so, it is guided by scholarly discussion and international law. It also discusses selected decisions that have interpreted laws on media rights and political participation and have influenced the implementation of these rights at the national level. This chapter assesses whether the existing regulatory framework is sufficient to address the opportunities and challenges of the digital age to protect media rights and political participation and promote a functioning public sphere. Further, it discusses the role of civil society in the development and enforcement of international law.

## **Chapter four: Kenya’s legal and policy framework on media freedom and political participation in the digital age**

Chapter four first examines the place of international law in Kenya and the tension between national and international law. The discussion then delves into the constitutional and statutory protections of media rights and relevant jurisprudence. The chapter analyses the effectiveness of these laws through a limitation of rights prism. Through this frame, the chapter investigates whether the legislative dispensation is geared towards restricting or advancing media freedom. Contemporaneously, it poses and answers the question of whether media regulation is enabling or restrictive. It also discusses the interdependent laws, including access to information and data protection and their impact on media freedom and political participation. The chapter further canvasses the normative framework on political participation in Kenya, highlighting how electoral laws also incorporate protections for media freedom.

## **Chapter five: A framework for social media accountability for the protection of media freedom and meaningful political participation in Kenya**

Chapter five examines the push for equitable social media accountability to protect media rights and promote meaningful political participation of the electorate in Kenya. It explores the effectiveness of self-regulation by assessing social media policies on illegal and harmful online content, election integrity, and transparency and their implementation by Facebook, YouTube, Twitter, and TikTok. Also discussed is the inconsistent implementation of these policies, focusing on the Kenyan experience in the 2017 and 2022 elections. The chapter briefly assesses co-regulation approaches by the US, the EU, and selected African countries. Rights-based interventions for social media accountability are further explored.

## **Chapter six: Conclusion**

The concluding chapter synthesises the discussion in the study and summarises the answers to the research questions. It also frames the proposed human rights-based approach to media protection in the digital age for meaningful participation of the electorate in Kenya.

# **CHAPTER TWO: A RETROSPECTIVE AND CONTEMPORARY ASSESSMENT OF MEDIA PERFORMANCE IN KENYA'S ELECTORAL CONTINUUM AND ITS IMPACT ON POLITICAL PARTICIPATION IN THE KENYAN PUBLIC SPHERE**

## **1 Introduction**

This chapter explores how historical and contemporary developments in the socio-economic and political context have influenced the performance of Kenyan media and shaped the Kenyan public sphere. It situates this assessment in the electoral cycle using it as a frame of reference for the media's influence on meaningful political participation of the electorate and free and fair elections. In doing so, this chapter is divided into five parts. Part one is this introduction. Part two covers the nascent beginnings of Kenyan media in the pre-independence days, which was largely influenced by missionaries and the settler community, with patchy Asian and African representation, which ebbed and flowed as the country progressed towards independence. Part three examines the role played by the Kenyan media in advocating for multiparty democracy, particularly during the 1974, 1979, 1983, 1992 and 1997 elections. Part four explores another episode of media liberalisation in Kenya with the increased integration of digital technologies in media and enhanced political participation from the 2002 to 2022 general elections. This is the temporal thrust of the chapter. Given the intertwining of market economy and politics in Kenya's media culture, each part acknowledges the influence of incumbency, politics and economic interests and summarily explores the prevailing legal and policy framework.

## **2 The conception of Kenya's media**

### **2.1 Pre-independence: The press and broadcasting sectors**

Four key players, motivated by different interests, established, defined and shaped the press and broadcast landscape of pre-independence Kenya: missionaries, settler community, Asians, and elite Africans. The missionaries from Europe and North America established periodic

publications in the late 1800s to spread Christianity in Africa.<sup>1</sup> The 1800s also saw the emergence of the colonial press, whose objectives aligned with the imperialistic agenda in Africa.<sup>2</sup> The publications centred around the continued domination of the colonial administration and the advancement of their interests and those of the settler community. The settler press and broadcast media also provided the linkage between the settler community and their homeland by bringing them news from their native country. The imperialists established and owned the media and curated content for the settler audience.<sup>3</sup>

The *East Africa and Uganda Mail* (EAUM) was the first newspaper established in Kenya in 1899 and operated up until 1904.<sup>4</sup> On one hand, the newspaper sought to play its watchdog function by criticising the policies and practices of the colonial government. However, the ownership of the newspaper was cognizant of the economic importance of currying favour with the administration to advance its commercial prospects, arguably setting the stage for the political economy dynamics that have shaped and continue to influence media in Kenya.<sup>5</sup>

In 1901, the entry of the Asian community into the newspaper industry in Kenya was heralded by Alibhai Jeevanjee, an Indian businessperson, with the establishment of *The African Standard*.<sup>6</sup> This remains a defining moment in the press history in Kenya. The newspaper became a fixture in the national press nomenclature and is still in existence in 2023, albeit having been renamed and changed ownership severally.<sup>7</sup> Taking up the baton from its predecessor, *The East African Standard* fell right in step and concerned itself with providing a platform for the publicity of the colonial administration and settler interests. A key proponent of the imperialist

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<sup>1</sup> W Uganu 'Kenya's difficult political transitions ethnicity and the role of media' in LL Mukhongo & JW Machari (eds) *Political influence of the media in developing countries* (2016) 12. Some of the publications by the missionaries included Taveta Chronicle.

<sup>2</sup> J Abuoga & A Mutere *The history of the press in Kenya* (1988) 2-15; R Ainslie *The press in Africa: Communications past and present* (1966) 99 & P Mwaura *Communications policy in Kenya* (1980) 60.

<sup>3</sup> As above.

<sup>4</sup> D Galava 'The role of traditional media' in N Cheeseman, K Kanyiga & G Lynch (eds) *The Oxford handbook of Kenyan politics* (2020) 285.

<sup>5</sup> As above.

<sup>6</sup> Abuoga & Mutere (n 2) 7-10; F Barton *The press of Africa; Persecution and perseverance* (1979); MO Mak'Ochieng 'The making of an African public sphere: The performance of the Kenyan daily press during the change to multi-party politics' PhD thesis, Faculty of Human Sciences, University of Natal- Durban, 2000 at 111-112 <https://ukzn-dspace.ukzn.ac.za/handle/10413/5609> (accessed 8 November 2023) & P Ochieng *I accuse the press* (1992) 193.

<sup>7</sup> The proprietors of *The African Standard* sold it to businessmen AG Anderson and F Mayer in 1905, who renamed it *The East African Standard*. Lonrho PLC owned the paper from 1963 to 1995 during which they renamed the paper *The Standard* in 1977. The conglomerate later sold the paper to late former President Daniel Arap Moi and Joshua Kulei. As of 2023, the paper is still called *The Standard*.

agenda, the paper ignored the plight of the indigenous Africans in Kenya. Like its forebearer, advocacy for social or political change aimed to benefit the settler community, but with a careful balance, not appearing overly antagonising towards the state.<sup>8</sup> The portrayal of Africans was in a negative, racist and patronising light within the context of labour and crime.<sup>9</sup> The paper opposed the liberation struggle and vilified the crop of African leaders and groups engaged in the pursuit of the independence endeavour.<sup>10</sup> Trumpeting settler interests remained the focus of *The East African Standard* up until Kenya gained its independence in 1963.<sup>11</sup> Similarly, the dalliance between media and state continued, with researchers positing that this entanglement both enabled and constrained its development.<sup>12</sup>

The ingress of the Asian community in the media industry also provided the opportunity for the articulation of the interests of the African community.<sup>13</sup> This manifested with the establishment of *The East African Chronicle* in 1919 by Mr Desai, another Indian businessperson, to voice the demands of the East African Indian National Congress (EAINC).<sup>14</sup> Through this paper, the Asian community found a platform to challenge the policies of the colonial government as it pertained to the subjugation, social injustices, and economic exploitation of the Asian and African communities in Kenya, a first of its kind.<sup>15</sup> It was posited that the inclusion of the plight of Africans in the publication was initially motivated by political expediency.<sup>16</sup> An honest championing of the plight of Africans only gained momentum under the editorship of Pio Gama Pinto in 1953.<sup>17</sup>

The 1920s saw the emergence of the African press in the form of ethnocentric publications.<sup>18</sup> Most notable of which was *Muigwithania* (The Arbiter/the Reconciler), a journal penned in the Kikuyu language and focused on the Kikuyu culture under the editorship of Jomo

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<sup>8</sup> Galava (n 4) 285; Barton (n 6); Abuoga & Mutere (n 2) 10-12 & Mak'Ochieng (n 6) 111-112 & Ochieng (n 6) 193.

<sup>9</sup> Galava (n 4) 285 & Mwaura (n 2) 11 & 60.

<sup>10</sup> Barton (n 6) 71 & Galava (n 4) 285-286.

<sup>11</sup> Abuoga & Mutere (n 2) 101.

<sup>12</sup> G Ogola 'The political economy of the media in Kenya: From Kenyatta's nation-building press to Kibaki's local-language FM radio' (2011) 57 (3) *Africa Today* 78.

<sup>13</sup> Mak'Ochieng (n 6) 112.

<sup>14</sup> As above

<sup>15</sup> As above.

<sup>16</sup> Mwaura (n 2) 60.

<sup>17</sup> Ainslie (n 2) 107 & JM Gachie 'The role of the media in the democratisation process in Kenya' Masters dissertation, Centre for Journalism Studies, University of Wales, College of Cardiff, 1992.

<sup>18</sup> DR Peterson 'Colonial rule and the rise of African politics' in N Cheeseman, K Kanyiga & G Lynch (eds) *The Oxford handbook of Kenyan politics* (2020) 30-34 & M Ali *Globalization and the Kenya media* (2009) 21 -35.

Kenyatta and Harry Thuku of the Kenya Central Association (KCA) political party.<sup>19</sup> Like other indigenous publications that mushroomed afterwards, these African publications soon became a vehicle for political mobilisation and agitation for independence.<sup>20</sup>

Africans had previously been starved of an arena to express and articulate their struggles against exploitation, abuse, and land alienation.<sup>21</sup> Even with the lopsided support of the Asian press, there was a gnawing need for an indigenous platform that spoke to the demands of the African populations. Contemporaneously, these native publications offered a remedial to the cultural amnesia and assault engendered by Western influence.<sup>22</sup> Predictably, the cautious disregard of the colonial government for these publications mutated into hostility. The colonial administration employed the carrot and stick method to counter the blossoming political awakening motivated by the African press. Counter information was facilitated by vernacular language publications, such as the weekly *Baraza* (Council), directed to African audiences.<sup>23</sup> These publications sought to explain and cast the policies of the administration in a positive light in the eyes of the indigenous populations; in other words, for propaganda and indoctrination.<sup>24</sup> The stick method was manifest in the proscription of African publications in the wake of the 1952 State of Emergency. Africans were left with the colonial *Baraza* and Asian-owned *Jicho* (The Eye) as the only local language news publications.<sup>25</sup> While the assault by the colonial administration effectively crippled the pre-independence African press movement, its continuity was also hamstrung by poor financial, technical and human resources that prevented it from realising its true potential in the liberation movement.<sup>26</sup>

The examination of the early African press would be incomplete without the mention of the *Nation*, a long-running newspaper that traces its nascency to the precolonial period. Established in 1960 by His Highness Aga Khan, the owner of the newspaper was alive to the

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<sup>19</sup> Abuoga & Mutere (n 2) 15 & J Widner *The rise of a party-state in Kenya: From Harambee to Nyayo* (1992) 51,

<sup>20</sup> Abuoga & Mutere (n 2) 16; D Wilcox *Mass media in black Africa: Philosophy and control* (1975) 3-5; Peterson (n 18) 30-34; WA Hachten *The muffled drums: The news media in Africa* (1971) 201-202 & Ugangu (n 1) 13.

<sup>21</sup> G Mytton *Mass communication in Africa* (1983) 44.

<sup>22</sup> As above.

<sup>23</sup> *Baraza* is a Kiswahili word for platform. It was established in 1939 and published under the Kenya Vernacular Press Company.

<sup>24</sup> Abuoga & Mutere (n 2) 22; Mak'Ochieng (n 6) 116 & Ochieng (n 6) 193.

<sup>25</sup> Abuoga & Mutere (n 2) 22-23 & Mwaura (n 2) 61.

<sup>26</sup> Mwaura (n 2) 61.

changing political tides.<sup>27</sup> This informed its positioning as an advocacy space for the impending independence by the incoming Kenyan leadership and Kenyan populace. This was reflected in the newspapers developed under the *Nation*, including *Taifa Leo* (the first Swahili daily), *Daily Nation* and *Sunday Nation*.<sup>28</sup> Admittedly, this was a departure from the then-media culture that had served primarily as a megaphone for the colonial administration and settler interests. However, while it cannot be discounted that the Aga Khan asserted that this was an instrument for mobilising the indigenous communities towards nation-building, it was, contemporaneously, a tactful strategic business decision given the twilight of colonialism in Kenya.<sup>29</sup>

Turning to the broadcasting milieu, the purpose and aim of the pre-independence broadcasting industry mirrored those of the press sector inasmuch as it sought to amplify the imperialistic agenda.<sup>30</sup> Therefore, the content was similarly influenced and curated for the European audience and tailored to advance their interests. World War II inspired content targeting the African and Asian communities, given that they had relatives who were participating in the war. However, the information still served to advance the imperialistic agenda.<sup>31</sup> The European-centred driving force behind the introduction of radio through the East African Broadcasting Corporation (EABC) in 1928 was still relevant in 1959 with the establishment of the Kenya Broadcasting Corporation (KBC) that introduced television to the pre-independence Kenyan audience.<sup>32</sup> The birth of the broadcasting industry, particularly television, came during a delicate time in Kenya's history. Even with the drums of independence sounding, it was imperative for the colonial government that the medium would not be a megaphone for anti-European interests if not political, at least economic interests.<sup>33</sup>

This pre-independence public sphere can be analogised with the inadequacies of Habermas' original conception of the public sphere. While the idyllic liberal public sphere was characterised as accessible to all and facilitating rational-critical discourse for the common good,

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<sup>27</sup> G Loughran *Birth of a nation* (2010) & Galava (n 4) 286. Also see NMG 'History' <https://www.nationmedia.com/who-we-are/history/> (accessed 8 November 2023).

<sup>28</sup> Abuoga & Mutere (n 2) 23; Ainslie (n 2) 105; Hachten (n 20) 212; Mwaura (n 2) 65 & Ochieng (n 6) 194.

<sup>29</sup> Galava (n 4) 286; Ogola (n 12) 81 & R Winsbury 'The print journalist, UK and Africa' in H Tumber (ed) *Media, power, professionals and policies* (2000) 252.

<sup>30</sup> C Heath 'Broadcasting in Kenya: Policy and politics, 1928-1984' PhD thesis, University of Illinois at Urbana-Champaign, 1986 at 51.

<sup>31</sup> As above.

<sup>32</sup> Heath (n 30) 161.

<sup>33</sup> As above.

realistically, minority groups segregated by gender, race and class could not equally participate in the bourgeois public sphere. Similarly, in Kenya, the emerging public sphere was exclusionary, with dominant voices based on race and class hierarchies. Rational-critical discourse may have very well occurred but in the context of advancing imperial rights. The invisibility, ‘otherism’, commodification and vilification of the African population precluded them from being recognised as valuable voices in this public sphere, necessitating these populations to create their own spaces. Otherwise termed as subaltern counter-publics.<sup>34</sup> Further, where the sphere developed outside the dimensions of imperialists with the entry of Asian and African representation, class and literacy requirements excluded the participation of a large segment of the African population.

## **2.2 Kenyan media performance in the struggle for multiparty democracy and beyond: Post-independence to the 1997 elections**

Drawing inspiration from the iconic ‘Not yet Uhuru’<sup>35</sup> phrase to depict this period, this section explores the growth of a relatively resilient Kenyan media in the post-independence epoch in the face of an indigenous regime that actively resisted the development of an independent and impartial media. It assesses the impact of the socio-political milieu in enabling and constraining the media’s role in influencing the evolving public sphere in post-independent Kenya.

The evolution of post-independence media culture in Kenya was heavily influenced by the political landscape. Unfortunately, the metamorphosis from a colonial state to an independent state did not translate to or inspire the development of strong institutions tasked with providing checks and balances on the government.<sup>36</sup> The political ideologies that were espoused by the Kenyan government following independence shared a common pro-government thread that was at variance with the performance of the normative roles of the media and the accountability

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<sup>34</sup> N Fraser ‘Rethinking the public sphere: A contribution to the critique of actually existing democracy’ (1990) 25/26 *Social Text* 66-67.

<sup>35</sup> The phrase is traced to the title of Jaramogi Oginga Odinga’s (Kenya’s first vice-president) autobiography. Its full English translation is Not yet free.

<sup>36</sup> H Okoth-Ogendo ‘The politics of constitutional change in Kenya since independence, 1963-69’ (1972) 71 *African Affairs* 12-13 & H Okoth-Ogendo ‘Constitutions without constitutionalism: Reflections on an African political phenomenon’ in D Greenberg and others (eds) *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993) 65-67.



function of the public sphere.<sup>37</sup> Many post-independence African governments, including Kenya, embraced and reified the developmental theory of the media.<sup>38</sup> This ideology justified the restriction of fundamental human rights and freedoms, such as freedom of expression and media freedom, to achieve national development goals in developing countries.

The Kenyan government touted nation-building, national security and national unity as key focus areas for the nascent state and underscored the media's role in realising these goals.<sup>39</sup> The dissonance with normative media functions emerged from the government's insistence that these objectives could only be achieved when the media reports the state's positive achievements and avoids critical and opposing views.<sup>40</sup> The media was expected to positively portray government institutions, policies and programmes.<sup>41</sup>

Increasingly, the government disparaged the concept of a free, independent and impartial media, painting it as a Western concept that required redefinition for the fragile, newly independent African state.<sup>42</sup> Furthermore, the government infantilised the public, arguing that it was unprepared for media pluralism and advocacy, given widespread illiteracy and lack of political consciousness.<sup>43</sup> The government postulated that diverse information sources would confuse the public and were an antithesis of nation-building and development.<sup>44</sup> Assuredly, it was an approach steeped in paternalism as the state sought to control information. Atieno-Odhiambo aptly defined the emergent political culture as an ideology of order.<sup>45</sup> Towards creating a hegemonic state and political order, the Kenya government abridged human rights and fundamental freedoms, including media rights and the right to political participation.

The independence leaders were quick to forget that the fight against imperialism was aimed at enhancing political participation and realisation of the human rights and fundamental

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<sup>37</sup> D McQuail *Mass communication theory: An introduction 3rd edn* (1994) 127-133; E Skogerbo 'Normative theories in media research: Four theories of the press revisited' in H Ronning & K Lundby (eds) *Media and communication: Reading in methodology and culture* (1991) 133-135; L Bougalt *Mass Media in sub-Saharan Africa* (1995) 1-5; Ochieng (n 6) 11-112 & PAV Ansah 'In search of a role for the African media in the democratic process' (1988) 2(2) *Africa Media Review* 6-9.

<sup>38</sup> Okoth-Ogendo (n 36) 12-13 & Ochieng (n 6).

<sup>39</sup> Ogola (12) 80-81.

<sup>40</sup> Galava (n 4) 290-291; Mak'Ochieng (n 6) 67-72 & Ogola (12) 81.

<sup>41</sup> Galava (n 4) 290-291 & Ogola (12) 81.

<sup>42</sup> T Mboya *The challenge of nationhood* (1970) 140.

<sup>43</sup> Ansah (n 37) 11 & Hachten (n 20) 201-202.

<sup>44</sup> As above

<sup>45</sup> ES Atieno-Odhiambo 'Democracy and the ideology of order' in MG Schatzberg *The political economy of Kenya* (1988) 177-201.

freedoms of the African people.<sup>46</sup> Ironically, these leaders were in step with the colonialists in how they restricted the rights of Africans. If indeed the independent government was consciously working towards nation-building and national unity, they would have tempered this kind of media interference. However, the post-independence era, like in many other African states, saw the emergence of Kenyan political elites who contributed to the decline of democracy and the privatisation and exploitation of the state for their personal accumulation of wealth.<sup>47</sup>

The 1960s, 1970s, 1980s and 1990s witnessed the continued assault on autonomous expression and the independence and impartiality of the media. The degrees of media interference varied during the regimes of Jomo Kenyatta (1963-1964 as Prime Minister and 1964 to 1978 as president) and Daniel Arap Moi (1978-2002), the first and second presidents of independent Kenya. Presidential authoritarianism started taking shape under Jomo Kenyatta.<sup>48</sup> In line with the *Nyayo* philosophy (following in his footsteps), Moi embraced and finessed this ideology.<sup>49</sup> Authoritarianism was a vestige of colonial times that was passed down to the rulers of independent African states.<sup>50</sup> The newly independent African states inherited authoritarian governance structures, dependent and underdeveloped economies, and divided populations. This political culture was enabled and sustained by the persistent undemocratic culture and disregard for human rights, ethnic division, weak national coalitions, patronage politics, rampant corruption, and impunity.<sup>51</sup>

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<sup>46</sup> Ansah (n 37) 14; Mak'Ochieng (n 6) 67 & PAV Ansah 'The right to communicate: Implications for development' (1992) 1 *Media Development* 49-52.

<sup>47</sup> Okoth-Ogendo (n 36) 12-13.

<sup>48</sup> Prof Anyang Nyong'o writes that: 'Presidential authoritarianism is born when political power is so concentrated in the office of the president that no major decision is taken within the bureaucratic or political process without reference to this office, or when the legitimacy of bureaucratic decisions is derived from their claim to have the blessing or backing of the president.' See PA Nyong'o 'State and society in Kenya: The disintegration of the nationalist coalitions and the rise of presidential authoritarianism 1963-78' (1989) 88 *African Affairs* 231 & H Goulbourne 'The state development and the need for participatory democracy' in PA Nyong'o (ed) *Popular struggles for democracy in Africa* (1987) 1-25.

<sup>49</sup> Atieno-Odhiambo (n 45) 177-201; JD Barkan & M Chege 'Decentralising the state: District focus and the politics of reallocation in Kenya' (1989) 27 *The Journal of Modern African Studies* 431-453 & JE Nyang'oro 'The quest for pluralist democracy in Kenya' (1990) 7(3) *Transafrica Forum* 73-82.

<sup>50</sup> D Branch & N Cheeseman 'The politics of control in Kenya: Understanding the bureaucratic-executive state, 1952-78' (2006) 33 *Review of African Political Economy* 10-11; ES Atieno-Odhiambo 'Hegemonic enterprises and instrumentalities of survival: Ethnicity and democracy in Kenya' (2002) 61(2) *African Studies* 223; JE Nyang'oro 'The state of politics in Africa: The corporatist factor' (1989) 24 (1) *Studies in comparative international development* 5-19 & WO Oyugi 'Ethnicity in the electoral process: The 1992 general elections in Kenya' (1997) 2(1) *African Journal of Political Science* 42.

<sup>51</sup> L Diamond 'Introduction: Roots of failure, seeds of hope.' L Diamond, J Linz & SM Lipset (eds) *Democracy in developing countries* (1988) 2-7.

### 2.2.1 Return to multipartyism

During the 1992 general elections that signified the reintroduction of multipartyism, the unfair balance in reporting in broadcast media was stark.<sup>52</sup> The state broadcaster, KBC, gave the ruling party, Kenya African National Union (KANU), and the incumbent more coverage featuring positive stories. Comparatively, when other political parties were featured, it was in a negative light.<sup>53</sup> Reporting in the press was relatively more balanced and diverse, but it was sometimes encumbered by sensationalist reporting as opposed to investigative reporting and a degree of self-censorship.<sup>54</sup>

The tendency for media to self-censor, even with the return of multipartyism, was informed by the metamorphosis of the political culture post-independence. The press sector had more diverse voices during this period as compared to broadcast media.<sup>55</sup> The broadcast media was largely dominated by the state, which controlled television and radio through KBC. The first privately owned television was Kenya Television Network (KTN), established in 1990. Although it was more critical than KBC, pundits faulted it for self-censorship due to political interference.<sup>56</sup> Its spatial licence only covered the Nairobi Metropolitan during the 1992 and 1997 elections.<sup>57</sup> However, its positioning was strengthened when the largely pro-government Standard Newspaper Group acquired it in late 1997.<sup>58</sup> Many of the stories were also favourable to the government. While the ownership of KTN was unclear for years after its establishment, it was believed that the proprietors were KANU supporters, including President Moi and his close allies Nicholas Biwott and Abraham Kiptanui.<sup>59</sup>

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<sup>52</sup> B Andreassen, G Geisler & A Tostensen 'A hobbled democracy: The Kenya general elections 1992: Report No 5' (1993) 18-19 [https://open.cmi.no/cmi-xmlui/bitstream/handle/11250/2436021/R1993.5%20Bard.A%2c%20Gisela%20og%20Arne-07182007\\_4.pdf?sequence=2&isAllowed=y](https://open.cmi.no/cmi-xmlui/bitstream/handle/11250/2436021/R1993.5%20Bard.A%2c%20Gisela%20og%20Arne-07182007_4.pdf?sequence=2&isAllowed=y) (accessed 8 November 2023).

<sup>53</sup> As above.

<sup>54</sup> As above.

<sup>55</sup> KHRC 'Shackled messengers - the media in multiparty Kenya' (1997) 28.

<sup>56</sup> CW Heath 'Structural changes in Kenya's broadcasting system: A manifestation of presidential authoritarianism' (1992) 37 *Gazette* 44-48 & *Kenya Development Plan 1989-1993* (1989a).

<sup>57</sup> US Dept. of State 'Kenya country report on human rights practices for 1998' (26 February 1999) [https://1997-2001.state.gov/global/human\\_rights/1998\\_hrp\\_report/kenya.html](https://1997-2001.state.gov/global/human_rights/1998_hrp_report/kenya.html) (accessed 8 November 2023).

<sup>58</sup> J Kadhi & M Rutten 'The Kenyan media in the 1997 general elections: A look at the watchdogs' in M Rutten, A Mazrui & F Grignon *Out for the count: The 1997 general elections and prospects for democracy in Kenya* (2001) 249.

<sup>59</sup> Kadhi & Rutten (n 58) 246-247 & 249 & KHRC (n 55) 28.

The press sector, therefore, offered more opportunities for diverse opinions despite the harsh political climate.<sup>60</sup> Political interference greatly hampered the development of an impartial and independent press in Kenya. Journalists and editors who published news that countered or criticised state rhetoric or action were often victims of threats, harassment, intimidation and even arrests and detention.<sup>61</sup> Summary dismissals of such editors and journalists were also witnessed. The state would further conscript or impound impugned publications, often on the justification that they were a threat to public order and national security.<sup>62</sup>

The two leading dailies, *Nation* and *The Standard*, often suffered the brunt of political attacks and vitriol when they engaged in investigative and critical reporting.<sup>63</sup> During different periods in time, their editorial board suffered from patronage links with politicians, evidencing the long-running political economy dynamics of Kenyan media. Further, it was business suicide to overtly oppose the government, and therefore, a careful balance in their reporting was critical to protecting their economic interests. The government often decried their foreign ownership as profit-oriented and antithetical to national interest.<sup>64</sup> The government tried to counter the influence of these dailies by the establishment of the *Kenya Times*—essentially a party newspaper for KANU.<sup>65</sup> It quickly became clear that this was a propaganda tool for the government to advertise its achievements and control the narrative, and as such, it was not attractive to public audiences. Further, organisational and financial challenges bedevilled the newspaper.<sup>66</sup>

The animosity between the government and the two leading dailies and the more vocal political magazines and alternative press ramped up as the agitation for multipartyism gained momentum in the late 1980s.<sup>67</sup> This animus was expected, given that the publications

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<sup>60</sup> A Tostensen & J Scolt (eds) *Kenya: Country study and Norwegian aid review* (1987) 118; HRW *Kenya: Taking liberties* (1991) 185-216; & Ochieng (n 6) 7-16.

<sup>61</sup> As above.

<sup>62</sup> As above.

<sup>63</sup> Mak'Ochieng (n 6) 132-133.

<sup>64</sup> Mak'Ochieng (n 6) 132-133.

<sup>65</sup> The Kenya Times was previously known as the Nairobi Times and was owned by Hilary Ng'weno, who also owned the Weekly Review, a periodical political magazine established in 1975. He sold it to the government in 1983 following financial challenges. The Kenya Times was part of a tripartite publication under the Kenyan Times Group that also included Sunday Times and Taifa Leo (Swahili for Kenya Today).

<sup>66</sup> Mak'Ochieng (n 6) 132-133.

<sup>67</sup> G Imanyara *Freedom of the press in Kenya 1993* (1993) 1-5 & PM Nyamora 'The role of alternative press in mobilization for political change in Kenya 1982-1992: Society magazine as a case study' Master of Arts thesis, School of Mass Communications College of Arts and Sciences, University of South Florida, 2007 at 124.

increasingly featured stories advocating for multipartyism. Alternative press such as *Society*, *Finance*, and *Nairobi Law Monthly* magazines particularly attracted the ire of the government for their bold and vocal criticisms even in the face of an inconsistently valiant mainstream media.<sup>68</sup> Par for the course, the government responded by intimidation, threats, and force, with journalists constantly harassed, assaulted, arrested, detained, fired, and their equipment confiscated.<sup>69</sup>

In spite of the resistance and hostility from the government, the advocacy by media, Civil Society Organisations (CSOs), students, clergy, and the international community influenced the unprecedented liberalisation of the Kenyan economy and media in the leadup to the 1992 multiparty elections.<sup>70</sup> Kenyans welcomed the mushrooming of publications, including pamphlets, newspapers and weeklies, mostly by the opposition, that daringly wrote on the country's critical issues.<sup>71</sup> The involvement of the opposition and government in the ownership of these publications meant that some of them eschewed the ethics of journalism and impartially touted the interests of one group over the other. However, publications that were thought to be critical of the government, such as *The Star* and *The Post on Sunday*, were harassed by the government and subject to arbitrary denial of licenses and libel suits.<sup>72</sup> However, a common trend witnessed with the proliferation of these publications before the 1992 and 1997 elections was that many died out after the elections, given the reduced interest in politics and the attendant reduction in sales and loss of advertisers.<sup>73</sup>

While post-1992 saw new entrants in the broadcasting industry, the favouritism in the issuance of licences was evident. Allocations of licences were arbitrary and biased toward pro-government media.<sup>74</sup> In some cases where licences were given to applicants who were perceived to lean towards the opposition, restrictions on geographical and content coverage limited their

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<sup>68</sup> As above.

<sup>69</sup> HRW (n 60) 200 & Mak'Ochieng (n 6) 135 -140.

<sup>70</sup> M Ali (n 18) 4-7.

<sup>71</sup> W Waruru 'The press in Kenya' (May-June 1996) 157 *The Courier* 26. Most notably were newspapers such as the *People* (first a weekly then daily newspaper) that was owned by Kenneth Matiba, a 1992 opposition presidential candidate and wealthy business person. Another was the *Star* biweekly, that was popular in Central Province for its favorable articles on Mwai Kibaki.

<sup>72</sup> Kadhi & Rutten (n 58) 247-248.

<sup>73</sup> Kadhi & Rutten (n 58) 245.

<sup>74</sup> CPJ 'Attacks on the press in 1997 - Kenya' (1998) <https://www.refworld.org/docid/47c5653ec.html> (accessed 8 November 2023) & US Department of State 'Kenya report on human rights practices for 1997' (1998) [https://1997-2001.state.gov/www/global/human\\_rights/1997\\_hrp\\_report/kenya.html](https://1997-2001.state.gov/www/global/human_rights/1997_hrp_report/kenya.html) (accessed 8 November 2023).

influence.<sup>75</sup> For example, the application for a broadcasting license by the Nation Media Group (NMG) was left pending from 1991 because it was deemed to be pro-opposition. An attempt to sidestep these bottlenecks by purchasing a majority share in the East African Television Network (EATN) was foiled after the government withdrew the frequency after the purchase. Pushback against this action finally led to the licensing of NMG, but spatially limited to Nairobi.<sup>76</sup> Similarly, the delay in granting a broadcasting license to Royal Media Services (RMS) from 1991 to 1997 was premised on the perception that its owner, Samuel Kamau Macharia, was seen to be pro-opposition. However, this tune changed when he appeared to support the ruling party, earning him a radio and television licence in April 1997.<sup>77</sup>

The importance of the broadcast industry as a source of local news content cannot be gainsaid, given the socio-economic and political setup at the time. With the country still grappling with illiteracy and poverty, radio and television were a crucial medium to communicate with the general public.<sup>78</sup> Even with a growing press sector that endeavoured to offer a diversity of views to the Kenyan public, the reality was that this was an elitist medium, given these publications were not accessible to the majority of Kenyans. Not only did less than 1% of Kenyans buy newspapers, but the additional language barrier of the mostly English publications secluded illiterate readers mostly based in rural areas.<sup>79</sup> The radio was, therefore, the most popular medium for communication.<sup>80</sup> This scenario certainly favoured President Moi and the ruling party. KBC was the best-placed station to relay to the Kenyan public local news and shape and frame the agenda during elections. It was, however, an apologetic government mouthpiece with enviable nationwide coverage during the 1992 and 1997 elections.<sup>81</sup>

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<sup>75</sup> KHRC, Article 19 & Media Monitoring *Elections' 97. Media monitoring in Kenya, August 1997* (1997) 5-6 & Kadhi & Rutten (n 58) 260-261.

<sup>76</sup> Kadhi & Rutten (n 58) 249.

<sup>77</sup> KHRC (n 55) 27-29 & Kadhi & Rutten (n 58) 271.

<sup>78</sup> KHRC, Article 19 & Media Monitoring (n 75) 6.

<sup>79</sup> HRW 'Kenya's unfinished democracy: A human rights agenda for the new government' (2002) 17.

<sup>80</sup> Kadhi & Rutten (n 58) 245.

<sup>81</sup> KHRC, Article 19 & Media Monitoring (n 75) & Kadhi & Rutten (n 58) 261.

## 2.2.2 A closer examination of the instrumentalization of the law against the media in post-independence Kenya

The law was another popular tool in the arsenal of state restrictions on media rights. The legitimisation of the infringement of human rights and fundamental freedoms was also inherited from the colonial government, and the government expertly wielded it to curtail media rights. To some extent, the post-independence laws and policies provided for political and media pluralism on paper. For example, the KBC Ordinance No. 24 of 1961 tasked the public broadcaster with independent, impartial, and balanced reporting.<sup>82</sup> However, the authoritarian nature of the state, limited resource capacity, and political interference severely constrained the public broadcaster's ability to espouse journalistic ethics and ensure independent and impartial reporting.<sup>83</sup> The 1963 election policy adopted by the broadcaster gave effect to this ordinance by according airtime to all political parties.<sup>84</sup> However, the space accorded to political pluralism and the diversity of voices diminished with the growth of political intolerance, presidentialism and the nation-building project. Come the 1966 'Little General Election', not only were political parties denied airtime, but they were actively suppressed.<sup>85</sup>

Arguably, the 1982 amendment of section 2A of the Constitution that made Kenya a *de jure* one-party state set the stage for the continued legal and administrative assault on media rights and political participation.<sup>86</sup> Notably, legislation, including the Books and Newspapers Act, the Penal Code, the Defamation Act, the Public Security Act, the Public Order Act, and the Official Secrets Act, were notoriously used to curtail media freedom. These laws covered areas such as the protection of national interest or security, protection of individual reputations, and

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<sup>82</sup> SP Owaka 'The role of corporate communications in the restructuring of public service broadcasting: A case study of the Kenya Broadcasting Corporation' Master of Arts Degree in Communications Studies, University of Nairobi, School of Journalism and Mass Communication, 2007 at 6 [http://erepository.uonbi.ac.ke/bitstream/handle/11295/96323/Owaka\\_The%20Role%20of%20Corporate%20Communications%20in%20the%20Restructuring%20of%20Public%20Service%20Broadcasting-%20a%20Case%20Study%20of%20the%20Kenya%20Broadcasting%20Corporation.pdf;sequence=1](http://erepository.uonbi.ac.ke/bitstream/handle/11295/96323/Owaka_The%20Role%20of%20Corporate%20Communications%20in%20the%20Restructuring%20of%20Public%20Service%20Broadcasting-%20a%20Case%20Study%20of%20the%20Kenya%20Broadcasting%20Corporation.pdf;sequence=1) (accessed 8 November 2023).

<sup>83</sup> C Heath 'Restructuring Kenya's broadcasting system' Paper presented at the African Studies Association General Meeting in Baltimore, Maryland, USA, 1990 at 109.

<sup>84</sup> Mak'Ochieng (n 6) 105.

<sup>85</sup> Kenya held the 'little general election' of 1966 after the formation of Kenya People's Union by Jaramogi Oginga Odinga and Bildad Kaggia after they resigned from KANU. Their hope to leverage the defection of MPs from KANU for membership was sabotaged after a legislative amendment was passed requiring MPs who left the parties in which they were initially elected under to stand for reelection. See G Bennet 'Kenya's Little General Election' (1966) 22 *The World Today* 336-343 & Mak'Ochieng (n 6) 108.

<sup>86</sup> COE 'Final report of The Committee of Experts on Constitutional Review' (2010) 18-19.

media registration. While undeniably, the laws pursued legitimate aims; the laws had wide discretionary powers that the government abused.

The Books and Newspapers Act<sup>87</sup> made provisions for the registration of publications, which were also required to execute a KES 10 000 bond.<sup>88</sup> The bond served as security in the event the publication broke the law.<sup>89</sup> Publishers were also required to submit daily and annual returns to the Registrar of Newspapers.<sup>90</sup> Additionally, printers were to register and execute a bond. Change of printers necessitated re-registration.<sup>91</sup> The restrictive effect of this law was seen in the reluctance of printers to publish certain publications for fear of repercussions. The Registrar would also sometimes frustrate publications by refusing to accept their annual returns.<sup>92</sup>

Under section 52 of the Penal Code, the Minister of Home Affairs was empowered to ban past and future publications on the grounds of national security, public safety, public order, public morality and public health. This prohibition was to meet the test of reasonableness and justifiability in a just society. Any operations related to a banned publication attracted an imprisonment term of not more than three years.<sup>93</sup> Divorced from the context, the limitation met the test of reasonableness and legitimate aim. However, the harshness of the imprisonment penalty defeated the test of proportionality. Further, given the political milieu and the underlying motivation for the law, it gave room for the curtailment of media rights. Pursuant to this provision, magazines such as *Beyond*, *Financial Review* and *Nairobi Law Monthly* were arbitrarily banned in the late 1980s. *Beyond*, a monthly magazine owned by the National Council of Churches of Kenya (NCCCK), was targeted because of an election issue on government perpetrated election fraud during the 1988 general elections following the introduction of the queue voting system (known in Swahili as the *mlolongo* system).<sup>94</sup> The magazine was subsequently banned, and the editor, Bedan Mbugua, was arrested, charged and convicted for six

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<sup>87</sup> Cap III, Laws of Kenya <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20111> (accessed 8 November 2023).

<sup>88</sup> Sec II Books and Newspapers Act.

<sup>89</sup> A Okoth-Owiro 'The law and the mass media in Kenya (1990) 4(1) *Africa Media Review* 20.

<sup>90</sup> Section 8 Books and Newspapers Act.

<sup>91</sup> Okoth-Owiro (n 89) 20.

<sup>92</sup> HRW (n 60) 185-186 & Mak'Ochieng (n 6) 141.

<sup>93</sup> Okoth-Owiro (n 89) 20.

<sup>94</sup> Mak'Ochieng (n 6) 197 & Oyugi (n 50) 46.



months under the Books and Newspapers Act for failure to file annual returns. He was acquitted on appeal following international pressure.<sup>95</sup>

Section 56 of the Penal Code further criminalised sedition.<sup>96</sup> In 1990 and 1991, the editor of the *Nairobi Law Monthly*, Gitobu Imanyara, similarly suffered harassment due to publications advocating for multiparty rule, democracy and good governance.<sup>97</sup> He was detained under the Preventive Detention Act and was later charged and detained under section 56 of the Penal Code for sedition as well as for offences under the Books and Newspapers Act. During this time, he was subjected to torture. The publication was later proscribed, but Imanyara successfully challenged this ban.<sup>98</sup>

The government and politicians also regularly exploited the Defamation Act and section 197 of the Penal Code to restrict media freedom.<sup>99</sup> Through the Statute Law (Miscellaneous Amendments) Bill 1992, Parliament amended the Defamation Act to include stricter penalties for libel and defamation. Convicted persons would pay damages of between KES 400 000 (if the impugned content was for an offence that attracted an imprisonment term of not more than three years) and KES 1 000 000 (if the impugned content was for an offence that attracted a death penalty).<sup>100</sup> The payment of such hefty sums would severely hamper or cripple the operations of media houses, especially the smaller ones. Strategically, the amendment was enacted before the 1992 multiparty elections to restrain media criticism.<sup>101</sup> Increasingly, libel laws became a useful tool in the arsenal against media rights. The threat they posed manifested in increased self-censorship by the media and the bankrupting of small independent media outlets.<sup>102</sup> For example, the *People Daily* and *Nation* newspaper were targeted for their investigative reports, especially

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<sup>95</sup> Mak'Ochieng (n 6) 143

<sup>96</sup> The Act defined seditious intention as: an intention: (a) to overthrow by unlawful means the Government of Kenya as by law established; or (b) to bring into hatred or contempt or to excite disaffection against the person of the President or the Government of Kenya as by law established; or (c) to excite the inhabitants of Kenya to attempt to procure the alteration, otherwise than by lawful means, of any matter or thing in Kenya as by law established; or (d) to bring into hatred or contempt or to excite disaffection against the administration of justice in Kenya; or (e) to rouse discontent or disaffection among the inhabitants of Kenya; or (f) to promote feelings of ill-will or hostility between different sections or classes of the population of Kenya.

<sup>97</sup> DW Throup 'Daniel Arap Moi and one-party rule (1978-1971)' in N Cheeseman, K Kanyiga & G Lynch *The Oxford handbook of Kenyan politics* (2020) 65; HRW (n 60) 210-211 & Mak'Ochieng (n 6) 144-145.

<sup>98</sup> HRW (n 60) 210-211 & Mak'Ochieng (n 6) 144-145.

<sup>99</sup> Okoth-Owiro (n 89) 21.

<sup>100</sup> Section 16A Defamation Act.

<sup>101</sup> Mak'Ochieng (n 6) 148.

<sup>102</sup> HRW (n 79) 17-18.

on corruption by public officials, and at times slapped with hefty compensatory damages. In at least two cases, the courts awarded libel damages of KES 10 and KES 20 million against *People Daily*.<sup>103</sup> The absence of an independent and impartial judiciary favoured these media assaults. Some judicial officers defended these awards as incentives for responsible journalism.<sup>104</sup>

The Official Secrets Act, while ostensibly enacted to protect state secrets that may compromise national security in the hands of hostile enemies, was also used to limit access to information. Unauthorised access to prohibited places and prohibited information attracted a disproportionate penalty of an imprisonment term of not more than 14 years.<sup>105</sup> Such laws forged the endemic culture of secrecy in public institutions. The ability of journalists to fact-check and seek clarification before publications was further curtailed by this law and culture, leaving them vulnerable to defamation and libel lawsuits.<sup>106</sup>

The Parliamentary Standing Orders also enabled censorship by authorising the suspension of a journalist from covering parliamentary procedures for violation of the Standing Orders or other rules of Parliament, misreporting on parliamentary procedures, or failing to publish a satisfactory correction.<sup>107</sup>

A little over a month before the December 1997 elections, the state, under the aegis of the Inter-Parties Parliamentary Group (IPPG), passed legislative reforms on oppressive laws that curtailed the enjoyment of human rights.<sup>108</sup> The revisions repealed sections of several laws, including the Public Order Act to remove the licence requirement for public assemblies; the Penal Code to decriminalise sedition; the Films and Stage Plays Act to remove the licensing requirement to perform a stage play; and the Preservation of Public Security Act to outlaw

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<sup>103</sup> IFEX ‘Court sets aside award to presidential aide in libel suit against newspaper’ <https://ifex.org/court-sets-aside-award-to-presidential-aide-in-libel-suit-against-newspaper/> (accessed 8 November 2023) & *Kipyator Nicholas Kiprono Biwott v George Mbuguss & Kalamka Ltd* [2002], Civil case 2143 of 99[1] eKLR <http://kenyalaw.org/caselaw/cases/view/1855> (accessed 8 November 2023).

<sup>104</sup> See *Biwott v Mbuguss & Kalamka Ltd* above & HRW (n 79) 17.

<sup>105</sup> Sec 3 Official Secrets Act & Okoth-Owiro (n 89) 21.

<sup>106</sup> HRW (n 79) 17.

<sup>107</sup> Standing Order 170: Any newspaper whose representative infringes these Standing Orders or any rules made by the Speaker for the regulation of the admittance of strangers, or persistently misreports the proceedings of the House or refuses on request from the clerk to correct any wrong report thereof to the satisfaction of Mr. Speaker, may be excluded from representation in the press gallery for such term as the House shall direct.

<sup>108</sup> CKRC ‘Final report of the Constitution of Kenya Review Commission’ (2005) 41-42 & J Cottrell & YP Ghai ‘Constitution making and democratization in Kenya (2000–2005)’ (2007) 14 *Democratisation* 5.

detention without trial.<sup>109</sup> Other reforms required the enhancement of the independence of the Electoral Management Body (EMB) and an amendment of the KBC Act to ensure the state broadcaster provides fair and balanced by allowing access to opposition candidates.<sup>110</sup> The reforms came too close to the elections to have any meaningful impact, and the implementation of these reforms was dismal.<sup>111</sup> While there was a slight increase in coverage of the opposition, it was largely in a negative light, with the government receiving more airtime that touted its achievements.<sup>112</sup>

Come the new millennium, the introduction of the contentious Media Law, 2002 was viewed as a particular threat to small media houses. The law increased the libel insurance bond paid by publishers from KES 10 000 to a whopping KES 1 000 000. It further penalised sellers of unregistered publications, making them liable to a fine of up to KES 20 000, imprisonment for up to six months, or both.<sup>113</sup> Failure to deposit the bond attracted a penalty of fines of KES 1 million, or an imprisonment term of three years, or both. President Moi signed the law in June 2002.<sup>114</sup>

### 2.2.3 Media performance 1974-1997 elections

In light of the opportunities and challenges facing the media during the Jomo Kenyatta and Moi regime, it is debatable whether the media could effectively undertake its roles as a watchdog, public educator, debate forum and campaign platform. A look at the elections during this epoch— 1974, 1979, 1983, 1988, 1992 and 1997 elections—the Kenyan media was accused of falling into the trap of overfocusing on the ‘game of strategy’ instead of analysing the elections’

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<sup>109</sup> CO Oyaya & N Poku *The making of the Constitution of Kenya: A century of struggle and the future of constitutionalism* (2018) & HRW (n 79) 3.

<sup>110</sup> KG Adar & IM Munyae ‘Human rights abuse in Kenya under Daniel arap Moi, 1978’ (2001) 5 *African Studies Quarterly* 1-14 & J Barkan & N Ngethe ‘Kenya tries again’ (1998) 9 *Journal of Democracy* 32-48.

<sup>111</sup> CPJ (n 74).

<sup>112</sup> KHRC, Article 19 & Media Monitoring (n 75) & Kadhi & Rutten (n 58) 261. Case in point, KBC television and radio gave the president and KANU 91% and 83% respectively of airtime compared to 3% and 4% respectively for the opposition during the 1997 elections. The other player, KTN, although seen to provide more balanced coverage, was perceived to be sympathetic to government.

<sup>113</sup> HRW (n 79) 18-19 & CPJ ‘Attacks on the press in 2002 – Kenya’ (February 2003) <https://www.refworld.org/docid/47c5666ec.html> (accessed 8 November 2023).

<sup>114</sup> CPJ (n 113).

substance.<sup>115</sup> This is despite the fact that in each successive election, the media was dealing with a more educated audience. The game of strategy manifests in focusing more on the personality of the politician and the strategy employed by the politician to win the elections. It is a truism that politicians lie. Therefore, with the media focusing on the game, there is a likelihood of regurgitating these lies to the electorate. However, election news has to feature the game in one way or another. This becomes perilous in the absence of a counterbalance that analyses the substance of the elections.

During the Moi era, the news framing by the state broadcaster was already skewed in favour of the president and the KANU ruling party, and it continued propagating the perception that Moi was the favoured candidate.<sup>116</sup> In this case, an honest analysis of the news commentaries and the leadership qualities, policy positions, and manifestos of the candidates was minimal, if any, by the state broadcaster. The social, economic and political context necessitated questions on the realisation of socio-economic rights such as the right to housing, health, education, and work, as well as the dismal human rights record under the Moi administration. The dynamics of ethnicity and elections, especially the link between state power and ethnicity, the influence of ethnicity on voter and political behaviour, and ethnic clashes were central issues of public interest during the 1992 and 1997 elections.<sup>117</sup> This was an agenda that was better explored by private and alternative media.<sup>118</sup>

In 1997, mainstream media, such as *The East African Standard* and *Sunday Nation*, to some extent, tried to engage with the substance of the elections.<sup>119</sup> However, the media could have framed the agenda better to guide the Kenyan electorate. Sensationalistic pieces by both mainstream and alternative media and inaccurate reporting, especially by alternative media, also

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<sup>115</sup> DE Alger 'The media in elections: Evidence on the role and impact' in DA Graber (ed) *Media power in politics* (1990) & Kadhi & Rutten (n 58) 253.

<sup>116</sup> Kadhi & Rutten (n 58) 256.

<sup>117</sup> Atieno-Odhiambo (n 45); M Apollos 'Ethnicity, violence and democracy' (2001) 26 *Development* 99-144; M Bratton & SM Kimenyi 'Voting in Kenya. Putting ethnicity in perspective' (2008) 95 *Afrobarometer Working Papers* 4 <https://afrobarometer.org/sites/default/files/publications/Working%20paper/AfropaperNo95.pdf> (accessed 8 November 2023); S Orvis 'Moral ethnicity and political tribalism in Kenya's 'virtual democracy' (2001) 29 *African Issues* 8-13 & Oyugi (n 50) 42.

<sup>118</sup> IED, CJPC & NCKK 'Report on the 1997 general elections in Kenya, 29th-30th December 1997 (1998) 64, 123 & 268 [https://www.academia.edu/6140898/REPORT\\_ON\\_THE\\_1997\\_GENERAL\\_ELECTIONS\\_IN\\_KENYA\\_29\\_30\\_December\\_Institute\\_for\\_Education\\_in\\_Democracy\\_Catholic\\_Justice\\_and\\_Peace\\_Commission\\_National\\_Council\\_of\\_Churches\\_of\\_Kenya](https://www.academia.edu/6140898/REPORT_ON_THE_1997_GENERAL_ELECTIONS_IN_KENYA_29_30_December_Institute_for_Education_in_Democracy_Catholic_Justice_and_Peace_Commission_National_Council_of_Churches_of_Kenya) (accessed 8 November 2023).

<sup>119</sup> Kadhi & Rutten (n 58) 255.

tainted media performance during the 1997 elections.<sup>120</sup> It should be noted that media monitoring by the Kenya Human Rights Commission (KHRC) and ARTICLE 19, to some extent, revealed media biases.<sup>121</sup>

Post-election periods also proved perilous to the media with increased reports of harassment, attacks and destruction of printing facilities.<sup>122</sup> While the sustenance of the KANU regime and President Moi's rule was enabled by varied factors, including vote manipulation, ethnic voting, fractured opposition, and politically instigated violence, the absence of strong oversight mechanisms, including the judiciary, legislation, and, to some extent, the media, was to the regime's benefit.<sup>123</sup> Admittedly, Kenya's media's vibrancy was admirable compared to others in the region. However, it was trudging under the heavy weight of a monopolised state broadcaster, state interference, owner interference, compromised editors, corrupt journalists, harassment, assault, arbitrary detention and imprisonment of journalists, media restrictions, and destruction of printing facilities. Cumulatively, these factors compromised the ability of the media to play its institutional functions. The concomitant development of the Kenyan public sphere was also greatly hindered, thereby restricting the space for honest and meaningful public debate and nurturing an informed public. An empowered and critically conscious public that was well informed to hold the government accountable seemed at odds with the interests of both the colonial government and subsequent post-independence leadership.

### **3 The inchoate project of media liberalisation and the Kenyan public sphere**

#### **3.1 The Kibaki era: 2002 and 2007 elections**

The 2002 elections were a defining moment in the history of Kenya with a regime change in play. These elections ended the uninterrupted rule of the KANU ruling party and President Moi after 39 and 24 years, respectively. The change of guard ushered in a new administration under the National Rainbow Coalition (NARC), with Emilio Mwai Kibaki as the new president. The tide of change was strong, with hopes for greater respect for democracy and human rights, including media rights and political participation. The liberalisation of the media had continued

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<sup>120</sup> Kadhi & Rutten (n 58) 254-257 & 264-265.

<sup>121</sup> Kadhi & Rutten (n 58) 269.

<sup>122</sup> KHRC 'The state of human rights in Kenya: A year of political harassment' (1993) 29-30.

<sup>123</sup> HRW (n 79) 5-6.

in a gradual upward trend since 1997, with the media industry performing in a more liberalised environment than in any other election.<sup>124</sup> This was despite the existence of restrictive media laws, state interference, and political economy dynamics that still engendered self-censorship within the media.<sup>125</sup>

Prior to the 2002 elections, the EMB, the Electoral Commission of Kenya (ECK), released media guidelines on election coverage after a consultative process with political parties.<sup>126</sup> With their promulgation on 12 December, a few days shy of the election, they did not have a meaningful impact but represented a positive step on the part of the ECK. Among others, the guidelines, which were directed at KBC and KTN, required electronic media to ensure fair and balanced coverage during the elections. Interestingly, the guidelines accorded newspapers the choice to adopt partisan reporting, but they were obligated to avoid publications that may incite hatred or violence.<sup>127</sup>

With five radio channels and one TV channel that catered to over 95% of Kenyans, KBC, the state broadcaster, still boasted majority influence in the broadcasting industry.<sup>128</sup> However, KTN, owned by The Standard Group, held the top position as the most-watched station with 44% viewership, followed by KBC and Nation TV at 34% and 16%, respectively.<sup>129</sup> A media monitoring survey by the European Union Election Observation Mission (EU EOM) found that the state broadcaster gave more airtime to the ruling party, as usual. However, it reduced its negative coverage of the opposition. KTN and Nation TV, while more balanced in their coverage, gave more airtime to the NARC opposition party.<sup>130</sup>

The 2002 media landscape was also unique inasmuch as the public witnessed new ways of engagement with the electorate that were more reflective of an inclusive public sphere. Media houses undertook some form of parallel vote tallying to counteract possible rigging by KANU.<sup>131</sup> The Nation TV aired a live broadcast called 'Face of the People' where political candidates

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<sup>124</sup> EU EOM 'Kenya 2002: Final report on the general elections' (2003) 5.

<sup>125</sup> EU EOM (n 124) 5.

<sup>126</sup> EU EOM (n 124) 26.

<sup>127</sup> As above.

<sup>128</sup> EU EOM (n 124) 25.

<sup>129</sup> EU EOM (n 124) 25-26.

<sup>130</sup> EU EOM (n 124) 27-30.

<sup>131</sup> C Odhiambo-Mbai 'The rise and fall of the autocratic state in Kenya' in WO Oyugi, P Wanyande & C Odhiambo-Mbai (eds) *The politics of transition: From KANU to NARC* (2003) 89

answered questions from an audience.<sup>132</sup> There was also an unsuccessful attempt to hold a presidential debate. Importantly, for the subject of this thesis, the 2002 election was also a harbinger of the place of technology in media, with both *Nation* and *East African Standard* using websites to publish breaking news. Statistics from Nation Media Group revealed that the online *Daily Nation* edition received more than 1 million hits per day.<sup>133</sup>

The adoption of new media technologies was also witnessed in the campaign arena, with political parties and candidates setting up websites. The websites channelled campaign information to the electorate, especially youth, elites, and diaspora voters, who largely constituted the online audience.<sup>134</sup> While providing an alternative platform for information, the websites were informative, not dialogic. They did not open up room for greater public debate as they served as unidirectional sources of information from politicians to the electorate.

There was an undeniable expansion in media rights during the first term of Mwai Kibaki's presidency.<sup>135</sup> His presidential win resonated with the media, who had been active participants in the pro-democracy struggle. It also provided career change opportunities for some media practitioners who took up government positions.<sup>136</sup> The role of the media in enabling the regime change and their ingress into government was conflicting in the context of media roles. This closer proximity to power triggered a slow descent of the Kenyan media of the pro-democracy days known to be a relatively valiant and fearless challenger, documenter and exposé of human rights violations and abuses, morphing into a complacent, sometimes vibrant relic of its past self.<sup>137</sup> The liberalisation of the media space was advantageous for the market model of the media and witnessed an increase in commercial radio stations, including vernacular

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<sup>132</sup> CPJ (n 113).

<sup>133</sup> As above.

<sup>134</sup> G Nyabuga & OF Mudhai "Misclick" on democracy: New media use by key political parties in Kenya's disputed December 2007 presidential election' in OF Mudhai, WJ Tetey & F Banda *African media and the digital public sphere* (2009) 47-49.

<sup>135</sup> B Rambaud 'Caught between information and condemnation: The Kenyan media in the electoral campaigns of December 2007' (2008) 38 *The East African Review* 57-58.

<sup>136</sup> C Onyango-Obbo 'Is it the end, or a second life for Kenya media?' *The Nation* 26 July 2013 <https://nation.africa/kenya/news/is-it-the-end-or-a-second-life-for-kenya-media--878482> (accessed 8 November 2023).

<sup>137</sup> P Gathara 'Broken news: Kenyan media's election coverage betrayed Kenyans' *The Elephant* 14 September 2017 <https://www.theelephant.info/features/2017/09/14/broken-news-kenyan-medias-election-coverage-betrayed-kenyans/> (accessed 8 November 2023) & M Wrong 'To be prudent is to be partial' *The New York Times* 14 March 2013 <https://archive.nytimes.com/latitude.blogs.nytimes.com/2013/03/14/erring-on-the-side-of-caution-kenyas-media-undercovered-the-election/> (accessed 8 November 2023).

radio stations.<sup>138</sup> However, the liberalisation of the media and plurality of viewpoints did not necessarily translate to increased democratisation power of the public. New entrants in the media industry included politicians who appropriated the media as a megaphone for their own political ideologies to the voters.<sup>139</sup>

However, the familiar inconvenience of free and critical media to the political elite resurfaced, calling into question the new government's commitment to media rights. Two incidents stand out during this period. The Standard Group suffered a government-orchestrated raid and property destruction for their critical publications.<sup>140</sup> The government also openly called for public departments to channel ads to government-friendly media houses. Secondly, a standoff occurred between the First Lady, Lucy Kibaki, and Nation Media staff. She berated them for an unfavourable news story about her and demanded the arrest of the persons involved in developing the story. The incident culminated in her slapping a journalist who was recording the confrontation.<sup>141</sup>

However, the growth and increased diversification of the media landscape during Kibaki's first term were not accompanied by a concerted effort to develop a solid legal framework that would have reinforced media freedom.<sup>142</sup> Consequently, the absence of constitutional and legislative protection often influenced editorial decisions in the face of oppressive laws that could be used to retaliate against the media.<sup>143</sup> Media freedom was not expressly provided in the Kenyan Constitution until 2010. Hitherto, it was subsumed under the protection of freedom of expression.<sup>144</sup> It was only in 2007, an election year, that the parliament passed the Media Act. An Act which later attracted considerable litigation for violation of media rights and inconsistency with international laws and standards.<sup>145</sup> Further, the self-regulatory Media Council of Kenya

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<sup>138</sup> TF Simiyu 'Media ownership and the coverage of the 2013 general election in Kenya: Democracy at the crossroads' (2014) 8(1) *Global Media Journal* 115-116

<sup>139</sup> As above.

<sup>140</sup> Rambaud (n 135) 58.

<sup>141</sup> M Gaitho 'The day I came face to face with Mama Lucy fury' *Daily Nation* 27 April 2016 <https://nation.africa/kenya/news/the-day-i-came-face-to-face-with-mama-lucy-fury-1193534> (accessed 8 November 2023).

<sup>142</sup> EU EOM 'Kenya final report general elections 27 December 2007' (2008) 23.

<sup>143</sup> G Ogola 'Media at cross-roads: Reflections on the Kenyan news media and the coverage of the 2007 political crisis' (2009) 39 *Africa Insight* 69.

<sup>144</sup> Sec 79 (1) of the pre-2010 Constitution.

<sup>145</sup> EU EOM (n 142) 23.



(MCK) was undergoing a transformation to a self-regulatory statutory body that coincided with the election campaign period. This resulted in a regulatory gap.<sup>146</sup>

### 3.2 2007 elections: The paradigm-shifting digital disruption in media and elections

Nanjala Nyabola describes the 2007 election period as the backdrop for creating ‘the conditions for Kenya’s most seismic social and digital change.’<sup>147</sup> This shift that saw the increased influence of digital technologies in political participation in Kenya was unfortunately forged from violence as opposed to a natural progression. The 2007 election period left an indelible mark in Kenya’s history and has spurred widespread research. While the voting process on 28 December was largely uncontentious, the turning point of the election emerged during the counting process when the incumbent President, Mwai Kibaki, suddenly took a suspicious lead against his challenger Raila Odinga, who had hitherto been maintaining a consistent and seemingly unbeatable lead.<sup>148</sup> What followed was a chaotic dissent into confusion and violence as accusations of voter fraud were traded by opposition politicians and some election officials, including four commissioners of the Electoral Commission of Kenya.<sup>149</sup> All this was captured by mainstream media (TV and radio) before they were removed from the Kenyatta International Convention Centre (KICC) tallying centre in Nairobi.

On 29 December, mainstream media broadcasted the swearing-in of President Kibaki in a hurried late-night ceremony attended by a select few representatives.<sup>150</sup> The clandestine nature of the inauguration can be juxtaposed against the massive thronging crowds that filled Uhuru Park, which had ushered out the Moi regime and began Kibaki’s presidency just five years before.<sup>151</sup> Aggrieved by the alleged stolen victory, opposition candidate Odinga called for protests that

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<sup>146</sup> As above.

<sup>147</sup> N Nyabola *Digital democracy, analogue politics: How the internet era is transforming politics in Kenya* (2018) 23.

<sup>148</sup> EU EOM (n 142) 1 & KNCHR ‘On the brink of the precipice: A human rights account of Kenya’s post 2007 election violence’ (2008) 12-13 [https://www.knchr.org/portals/0/reports/knchr\\_report\\_on\\_the\\_brink\\_of\\_the\\_precipe.pdf](https://www.knchr.org/portals/0/reports/knchr_report_on_the_brink_of_the_precipe.pdf) (accessed 8 November 2023).

<sup>149</sup> IREC ‘Report of the Independent Review Commission on the general elections held in Kenya on 27 December 2007’ (2008) [https://aceproject.org/regions-en/countries-and-territories/KE/reports/independent-review-commission-on-the-general-at\\_download/file](https://aceproject.org/regions-en/countries-and-territories/KE/reports/independent-review-commission-on-the-general-at_download/file) (accessed 8 November 2023) & KNCHR (n 148) 12-13.

<sup>150</sup> As above.

<sup>151</sup> N Cheeseman ‘The Kenyan elections of 2007: An introduction’ (2008) 2(2) *Journal of Eastern African Studies* 166.

began the dissent into Kenya's most lethal post-election violence. Over 1 000 people lost their lives, and more than 300 000 persons were displaced.<sup>152</sup> Following the outbreak of violence, it took about forty days for the country to return to a semblance of normalcy with the intervention of the international community.<sup>153</sup>

Faced with widespread violence, the Minister of Interior Security issued a ban against protests and live broadcasts on political issues on 30 December 2008.<sup>154</sup> This order was issued under the Public Service Act and section 88 of the Kenyan Communications Act under the guise of protecting public order and national security. Begrudgingly, local mainstream media largely complied with the ban. The media proscription was, in fact, unconstitutional and illegal, as was stated by the then Attorney General, Amos Wako.<sup>155</sup> The government later revoked the ban just after the Media Institute and Editors Guild filed a case seeking to challenge its legality.<sup>156</sup>

The live broadcast prohibition occasioned a domino effect in the information and communication landscape. While packaged as a preventive measure against escalating tension, the interdiction ironically resulted in the exact opposite. The ensuing information vacuum from institutional sources was a fertile breeding ground for rumours and misinformation. Studies have found that people often first consult reliable formal sources such as mainstream media when confronted with an information gap during a crisis.<sup>157</sup> If information is not forthcoming, timely, or satisfying, people turn to informal sources, close social networks and other alternative sources of information to fill these gaps, often leading to improvisation of news. Therefore, rumours

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<sup>152</sup> IREC (n 149) 3.

<sup>153</sup> GM Khadiagala 'Forty days and nights of peace-making in Kenya' (2008) 7 *Journal of African Elections* 5.

<sup>154</sup> CIPEV 'Report of the Commission of Inquiry into the Post-Election Violence (CIPEV)' (2008) 296 <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1004&context=tjrc-gov> (accessed 8 November 2023).

<sup>155</sup> CIPEV (n 154) 296 & F Brisset-Foucault 'The electoral campaign on television. Communication strategies and models of democracy' in J Lafargue (ed) *In the general elections in Kenya 2007* (2009) 143.

<sup>156</sup> CIPEV (n 154) 298.

<sup>157</sup> O Oh, M Agrawal & HR Rao 'Community intelligence and social media services: A rumor theoretic analysis of tweets during social crises' (2013) 37 (2) *MIS Quarterly* 409. Also see P Bordia 'Rumor interaction patterns on computer-mediated communication networks' (1996) unpublished Ph.D dissertation, Psychology Department, The Temple University, 1996; P Bordia & N DiFonzo 'Rumor as group problem solving: Development patterns in informal computer-mediated groups' (1999) 30(8) *Small Research Group* 8-28; P Bordia & N DiFonzo 'Problem solving in social interactions on the internet: Rumor as social cognition' (2004) 67(1) *Social Psychology Quarterly* 33-49 & T Shibutani *Improvised news: A sociological study of rumor* (1966).

emerge from society's collective need to fill information gaps, understand the situation, and reduce anxiety.<sup>158</sup> In 2007, Kenyans were faced with this scenario.

The 2007 media blackout gave room for the entry of other legitimate and illegitimate players to fill the information lacuna. The international media's decision to ignore the live broadcast ban meant that they were elevated as an alternative platform for news, albeit in some cases, a sensationalistic one.<sup>159</sup> With tensions mounting, ensuing media censorship and self-censorship, and Kenyans hungry for information to ameliorate social anxiety, they also turned to new media as another alternative platform for information.<sup>160</sup> Local language radio stations, mainstream media (national and international), and new media, therefore, were key informational channels in the public sphere informing public discourse and decision-making during the 2007 post-election period as discussed below.

### 3.2.1 Local language stations

While subaltern counter-publics like local language stations help create platforms for smaller groups to congregate and discuss specific group interests, the negative ethnicity and hate speech that contaminated discourse in these spaces made them non-egalitarian and non-democratic, and incongruous with the pursuit of a common public interest beyond the group interests. Hate speech was prevalent on vernacular radio stations and strongly influenced the escalation of violence in the localities of their audience.<sup>161</sup> The toxic combination of unprofessional radio personalities and poorly-moderated and unmoderated call-in messages served to spread vitriolic hate messages against other ethnic communities and calls for ethnic conflict and retaliation.<sup>162</sup>

The number of local language radio stations had grown with the expanded liberalisation of the airwaves following the 2002 elections.<sup>163</sup> As of 2007, there were five television stations and over 40 radio stations in Kenya. Radios were the most accessible medium for

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<sup>158</sup> As above.

<sup>159</sup> BBC 'The Kenyan 2007 elections and their aftermath: The role of media and communication' (April 2008) 14-15 [http://downloads.bbc.co.uk/worldservice/trust/pdf/kenya\\_policy\\_briefing\\_08.pdf](http://downloads.bbc.co.uk/worldservice/trust/pdf/kenya_policy_briefing_08.pdf) (accessed 8 November 2023).

<sup>160</sup> Nyabola (147) 27.

<sup>161</sup> Reliefweb 'Kenya: Spreading the word of hate' (22 January 2008) <https://reliefweb.int/report/kenya/kenya-spreading-word-hate> (accessed 8 November 2023).

<sup>162</sup> KNCHR (n 148) 122-123 & Reporters Without Borders, IMS & Article 19 'How far to go? Kenya's media caught in the turmoil of a failed election' (2008) 3-4.

<sup>163</sup> EU EOM (n 142) 22.

communication, with a 95% penetration rate.<sup>164</sup> Vernacular radio stations represented 27% of the radio market share against 33% of mainstream media. While these radio stations were initially created as commercial vehicles for entertainment, they soon morphed into platforms for public debate on segmented issues of public interest.<sup>165</sup> The recipe for disaster was not prepared from the plurality of vernacular language platforms but from their effectiveness as subaltern public spheres for facilitating and mediating public debate during the conflict. A glaring deficit of professionalism plagued these local language stations.<sup>166</sup> As commercial vehicles, the presenters in popular talk shows were hired for their commercial value as opposed to journalistic experience.<sup>167</sup> Multiple talk shows were presented by hosts who were not bound by any code of ethics for journalists, and untrained in conflict reporting, who were engaging with large audiences during an emotive national episode. The coverage of election issues was guided by the tribe and political affiliations of their audience as opposed to the rules of accurate and balanced election coverage.<sup>168</sup> More so, ownership of some of the local language stations was traced to politicians or their patrons.<sup>169</sup> The stations were vulnerable to political interference and were deployed as political tools during the 2007 conflict. Innate factors such as tribe and ethnicity ascribed to the structural model of vote choice<sup>170</sup> have long influenced Kenyan elections.<sup>171</sup> Vernacular media was used to exploit these partisan leanings before elections and increase polarisation in the aftermath of the elections. The absence of journalistic training and their close proximity to power made them complicit in advancing partial political agendas. Many local language stations became platforms for unbalanced and inflammatory rhetoric by presenters, politicians and call-in listeners in a context that was already conflict-sensitive.<sup>172</sup>

KASS FM, a Kalenjin local language radio station, was flagged for vitriolic hate speech and incitement to violence.<sup>173</sup> This culminated in the indictment of one of its presenters, Joshua

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<sup>164</sup> BBC (n 159) 4.

<sup>165</sup> As above

<sup>166</sup> As above

<sup>167</sup> Ogola (n 143) 69.

<sup>168</sup> EU EOM (n 142) 26.

<sup>169</sup> BBC (n 159) 4.

<sup>170</sup> PF Lazarsfeld, B Berelson & H Gaudet *The people's choice. How the voter makes up his mind in a presidential campaign* (1948). Also see C Close & EV Haute 'Emotions and vote choice: An analysis of the 2019 Belgian elections' (2020) 2(3) *Politics of the low countries* 354.

<sup>171</sup> Ogola (n 143) 67.

<sup>172</sup> CIPEV (n 154) 217.

<sup>173</sup> Reliefweb (n 161).

Sang, at the International Criminal Court (ICC) for contributing to crimes against humanity.<sup>174</sup> The case was eventually terminated for lack of evidence, but the not-so-invisible hand of witness tampering and political interference cannot be ignored in the collapse of the case.<sup>175</sup> Other local language radio stations, such as the Luo language *Nam Lolwe* and Lake Victoria, and Kikuyu vernacular radio stations, *Inooro* and *Kameme* were also identified as inciting violence during their programs.<sup>176</sup>

Other than ethno-regional considerations, the profit margin influenced the decisions of media houses. Coverage from certain quarters showed a biased leaning towards certain politicians. For example, research showed that while the RMS gave more positive coverage to the government in the 2007 pre-election and election phase on mainstream media, coverage on its local language stations depended on the regional and ethnic interests of its audience.<sup>177</sup> For example, *Ramogi Station*, whose main audience was the Luo community, focused on Raila Odinga and his political party, Orange Democratic Movement (ODM), while *Inooro* and *Kameme* broadcasted to a largely Kikuyu audience, focused on Mwai Kibaki.<sup>178</sup>

### 3.2.2 Mainstream media

The assessment of mainstream media's role in the 2007 election is mixed.<sup>179</sup> Prior to the election, mainstream media had made good strides in undertaking their institutional roles of watchdog, public educator and debate fora. In the lead-up to the elections, all three top media houses, NMG (Nation TV), Standard Group (KTN TV), and RMS (Citizen TV), had established election databases as part of their election monitoring initiatives that would have facilitated parallel vote tallying.<sup>180</sup> However, all these databases mysteriously crashed on election day, leaving the ECK

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<sup>174</sup> *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* ICC-01/09-01/11

[http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/08/CR2016\\_04384.pdf](http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/08/CR2016_04384.pdf) (accessed 8 November 2023).

<sup>175</sup> *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* ICC-01/09-01/11 para 464.

<sup>176</sup> CIPEV (n 154) 299.

<sup>177</sup> Rambaud (n 135) 68.

<sup>178</sup> Ogola (n 143) 66 & Rambaud (n 135) 71.

<sup>179</sup> BBC (n 159) 7. Noteworthy, in 2007, the media houses that dominated the market were: Nation Media Group (NMG) which owned Nation TV, Easy FM and the Daily Nation; Royal Media Services (RMS), which owned Citizen Television, Citizen Radio, Citizen Weekly and nine vernacular radio stations; Standard Group, which owned KTN Television and The Standard newspaper; and Radio Africa which owned Kiss FM, Classic and the Nairobi Star newspaper. Also see EU EOM (n 146) 22.

<sup>180</sup> BBC (n 159) 7.

as the sole conduit of election results.<sup>181</sup> They were also key players in public and voter education that influenced the voter turnout of 72%.<sup>182</sup> Nation, KTN and Citizen further set in place a system of election monitoring and parallel vote tallying by stationing journalists in polling stations across the country and feeding the results directly from these polling stations to the networks.<sup>183</sup>

Conversely, the influence of politics and ownership persisted, affecting editorial policies and reporting in mainstream media.<sup>184</sup> The realisation of principles of balanced reporting floundered under political and owner interference. Further, reports of editors doubling as strategists for politicians raised serious doubt about their ability to act as impartial, objective and neutral arbiters of truth.<sup>185</sup> The compromise of these journalistic ideals often has negative implications on public trust.<sup>186</sup> Similarly, the media struggled with meeting the standards of in-depth analysis of substance as opposed to event reporting. On one hand, it can be argued that this facilitates objective reporting.<sup>187</sup> However, public education is compromised when event reporting is not accompanied by balanced reporting.

The EU's monitoring exercise concluded that there was an 'absence of a satisfactory degree of equitable coverage on a number of radio and television stations', which violated the MCK's code of conduct for election coverage.<sup>188</sup> The advantage of incumbency was glaring, with the Party of National Unity (PNU), the ruling party and its coalition partners, receiving the most coverage on both public and private media as compared to the main opposition challenger Raila Odinga, his ODM party, and other political parties. Typically, the state broadcaster was biased towards PNU and its coalition partners, with 76% allocated coverage against 13% for

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<sup>181</sup> BBC (n 159) 9.

<sup>182</sup> IREC (149) 63-64.

<sup>183</sup> BBC (n 159) 9.

<sup>184</sup> BBC (n 159) 8-9.

<sup>185</sup> Ogola (n 143) 69.

<sup>186</sup> M Ojala 'Is the age of impartial journalism over? The neutrality principle and audience (dis)trust in mainstream news' (2021) 22(15) *Journalism Studies* 2044-2045. Also see T Flew & C McWater 'Trust in communication research: A systematic literature review of trust studies in leading communication journals' Paper presented to the School of Communication and Information symposium, Rutgers University, New Brunswick, 23 January 2020 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3523750](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3523750) (accessed 8 November 2023) & M Tully, EK Vraga & AB Smithson 'News media literacy, perceptions of bias, and interpretation of news' (2020) 21(2) *Journalism* 209-226.

<sup>187</sup> T Hanitzsch & others 'Mapping journalism cultures across nations: A comparative study of 18 countries (2011) 12(3) *Journalism Studies* 276.

<sup>188</sup> EU EOM (n 142) 24.

ODM and 13.5% for Orange Democratic Movement- Kenya (ODM-K).<sup>189</sup> While private media was more diverse in their coverage, PNU coalition partners still enjoyed the most radio, TV and newspaper coverage.<sup>190</sup> The visibility of PNU was further boosted by its heavy investment in paid advertisements that surpassed that of opposition parties and candidates.<sup>191</sup> Ideally, mainstream media should have countered the incumbency advantage by ensuring the voices of other parties and candidates are equitably heard.

Poor training of temporary correspondents who fed information to mainstream media also compromised impartial and accurate reporting. The majority of the content published by media houses was sourced by media correspondents who were not trained journalists and were often poorly remunerated.<sup>192</sup>

Adherence to journalistic principles of objectivity, neutrality, fairness and impartiality was also complicated by the prevailing context that motivated the media to play a more intervening role in restoring peace and order. The media was faced with an illegal live broadcast ban and increased accusations of fanning violence. While the media challenged the live broadcast ban that was ultimately rescinded, mainstream newspapers such as *Nation* and *The Standard* adopted ethnically ambiguous reporting that avoided identifying the ethnicity of victims and perpetrators in a bid to report responsibly.<sup>193</sup> This may have stemmed from reports of communities retaliating in the wake of reports of ethnic-based violence. This choice of framing can both be justified and criticised. The stark ethnic dimensions of the conflict could not be ignored in fact-based reporting. It had reared its ugly head during previous elections and had often been used by politicians to woo voters from particular regions. Historically, the perception of ‘our person’ holding an influential political office had been linked to regional socio-economic prosperity and reinforced negative ethnic and regional competition for power and representation.<sup>194</sup> Politicians had manipulated ethnic and regional exclusionary rhetoric to stir up tensions in 2007.<sup>195</sup> While the immediate claims of electoral fraud were the precipitating factors for the outbreak of the violence, underlying and long-simmering grievances such as the historical

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<sup>189</sup> EU EOM (n 142) 25.

<sup>190</sup> EU EOM (n 142) 26.

<sup>191</sup> As above

<sup>192</sup> BBC (n 159) 9-10.

<sup>193</sup> Ogola (n 143) 58

<sup>194</sup> Ogola (n 143) 67.

<sup>195</sup> Ogola (n 143) 59.

marginalisation of communities, especially those secluded from power, and unresolved historical injustices found fertile ground for resurgence in the wake of the 2007-2008 post-election conflict.<sup>196</sup>

Although the media is accountable to various forces, including society, employers and the market economy, truth and accuracy remain key principles of ethical journalism.<sup>197</sup> The social responsibility theory of media presupposes that media owes a responsibility to society to not only undertake objective reporting but transcend to interpretative and investigative reporting.<sup>198</sup> By adopting an ostrich policy of burying its head in the sand with ‘ethnically-ambiguous’ reporting, Kenyan media arguably contravened these principles and its social responsibility, a scenario Michela Wrong dubbed ‘a fabrication of reality’.<sup>199</sup> Further, with international media not bound by this script, Kenyans could just switch the channel for more refined details of the conflict.<sup>200</sup>

The intervening role of mainstream media played out through peace reporting. In an unprecedented coordinated action, mainstream newspapers (*Nation* and *Standard*) published the same headline across their front pages, ‘Save Our Beloved Country’.<sup>201</sup> Summarily, the piece called for dialogue between the partners, a restoration of peace and order, and a call for reconciliation and patriotism. Some criticised the piece as myopic.<sup>202</sup> It failed to reflect on the underlying causes of the violence beyond the electoral fraud and what future steps Kenya should undertake to stop the violence and prevent a recurrence.<sup>203</sup> It had a veneer of the ‘accept and move on’ rhetoric that featured in the wake of calls for accountability, arguably, another abdication of its watchdog function. However, an alternative view was that the media played its role as a public informer, became a peace ambassador, and adopted proactive journalism in advocating for peace at a time of conflict.<sup>204</sup> When faced with reporting during conflict, Kenyan

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<sup>196</sup> As above.

<sup>197</sup> McQuail (n 37) 127-133.

<sup>198</sup> PU Ineji, EA Nkanu & PE Oko ‘Social responsibility media theory and its implication for media professionalism in Nigeria’ (2021) 6 (1) *Journal of Media, Communication and Languages* 244.

<sup>199</sup> M Wrong ‘Don’t mention the war’ *New Statesman* 14 February 2008.

<sup>200</sup> BBC (n 159) 14-15.

<sup>201</sup> BBC (n 159) 8.

<sup>202</sup> Ogola (n 143) 67-68

<sup>203</sup> As above

<sup>204</sup> Rambaud (n 135) 98-99.



media fell into a rabbit hole of peace reporting and self-censorship, with disproportionate attention to investigative and analytical reporting.<sup>205</sup>

The concept of peace journalism is a widely canvassed subject.<sup>206</sup> Lynch defines it as ‘when editors and reporters make choices – about what to report, and how to report it – that create opportunities for society at large to consider and to value non-violent responses to conflict’.<sup>207</sup> The role of journalists as agenda shapers and framers and how it affects public access to information, public education, public debate and public decision-making comes to the fore with this description. Peace journalism stands on four tenets:<sup>208</sup>

- Conflict-oriented – It examines the background and context of the conflict, parties involved, their goals, contentious issues, outcomes, and the visible and invisible effects of the conflict. It aims at balanced reporting by presenting the views of all parties involved and humanising their experiences. It also calls for proactive reporting.
- Truth-oriented – It focuses on revealing the truth by exposing lies and coverups.
- People-oriented – It seeks to report on the actions of all parties involved in the conflict. It also seeks to share the stories of all persons, including the vulnerable and voiceless, such as women, elderly persons and children. It also aims at identifying the perpetrators and focusing on peace initiatives.
- Solution-oriented – It seeks to highlight peace initiatives and prevent further conflict. It focuses on the development of a peaceful culture and society and encourages resolution, reconstruction and reconciliation.

Admittedly, it is difficult for the media to espouse all four principles in their reporting. However, when the Kenyan media was faced with accusations of contributing to the escalation of violence through their reporting, it overly focused on solution-oriented peace reporting over conflict, truth and people-oriented reporting. The information vacuum created by this strategy

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<sup>205</sup> Reporters Without Borders, IMS & Article 19 (n 162) 5-6.

<sup>206</sup> J Galtung & J Lynch *Reporting conflict: New directions in peace journalism* (2010); J Lynch *A global standard for reporting conflict* (2014) & J Lynch & A McGoldrick *Peace journalism* (2005). Also see IS Seaga, J Lynch & RA Hackett (eds) *Expanding peace journalism. comparative and critical approaches* (2011) & RL Keeble, J Tulloch & F Zollmann (eds) *Peace journalism, war and conflict resolution* (2010).

<sup>207</sup> Lynch & McGoldrick (n 206) 5.

<sup>208</sup> Lynch (n 206) 41.

inspired the fervent search for alternative media platforms and provided the springboard for greater acceptance of online platforms as avenues for more open public discussion on the state of affairs in the country.

### 3.2.3 International media

International media's failure to adhere to the live broadcast ban made them a notable alternative news platform for resident Kenyans and the diasporic community. However, in what has been a common criticism of conflict reporting in Africa by international media, the reporting was sensationalistic and may have added to the tension.<sup>209</sup> With Kenyans turning to international media such as *BBC*, *CNN* and *Al Jazeera* to fill the information void left by local mainstream media, they were often confronted with explicit reporting of the conflict.<sup>210</sup> The framing of the conflict as an ethnic and tribalistic conflict by international media acutely contrasted with local mainstream media, who awkwardly avoided referring to the ethnicity of victims and perpetrators in their reporting. International media were accused of adopting inappropriate terminology in their conflict reporting with concepts such as ethnic cleansing and genocide.<sup>211</sup> Therefore, another alternative media source was ripe for the picking. In came new media as another avenue of information.

### 3.2.4 New media

The temporal scope of the 2007 elections fell at a time when Kenya was experiencing an uptake in the adoption of new media technologies for social and political discourse and engagement.<sup>212</sup> Censorship and self-censorship of local mainstream media, on the one hand, and sensationalistic reporting by international media, on the other hand, arguably enhanced the attraction of new media platforms as an alternative source of information.<sup>213</sup> The platforms' main audiences were the urban population and the diaspora community. Short Message Services (SMS), emails, internet blogs, websites, and, to a smaller extent, emerging social media platforms such as

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<sup>209</sup> BBC (n 159) 14-15.

<sup>210</sup> As above.

<sup>211</sup> As above.

<sup>212</sup> Cheeseman (n 151) 169.

<sup>213</sup> Nyabola (n 147) 49-50.

Facebook and Twitter, recently launched in 2006, served to both escalate and pacify tensions.<sup>214</sup> They also provided an alternative platform to access information with more immediacy, particularly information that was not beholden to political and economic chokeholds, as was sometimes the case with mainstream media.<sup>215</sup> The public dissatisfaction with the state and mainstream media narratives had been growing even with the diversification of mainstream media sources.<sup>216</sup> The gatekeeper capabilities of the government, advertisers, media owners, editors and mainstream media were tested when the agenda-setting function shifted to and was shared by the public.<sup>217</sup> Nyabola writes: ‘Unlike the traditional media archive that is curated by power and often for power, the new media archive is seen as a collaborative effort that democratises knowledge-making’.<sup>218</sup>

The democratising power of social media and its revolutionary effect on citizen journalism is seen in opening up new frontiers for public participation and human rights activism. By breaking barriers of access to information of public interest, new media may also enhance government accountability and transparency.<sup>219</sup> An undeniable power emanating from online media has led to a paradigmatic shift in social and political discourse and tangible offline influences.<sup>220</sup> Therefore, the 2007 election period was the backdrop for the formation of the Kenyan online/networked public sphere.

#### ***3.2.4.1 Long and short messaging***

Short Messaging Services (SMSs) were the most readily available means for information sharing for those with access to mobile phones, about 30% of the population.<sup>221</sup> The short texts that could be quickly constructed and shared with one or more individuals made them a potent source

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<sup>214</sup> M Makinen & MW Kuira ‘Social media and post-election crisis in Kenya’ (2008) *Information & Communication Technology – Africa* 13 & J Goldstein & J Rotich ‘Digitally networked technology in Kenya’s 2007–2008 post-election crisis’ (2008) *Berkman Center Research Publication* 3.

<sup>215</sup> OF Mudhai ‘Immediacy and openness in a digital Africa: Networked-convergent journalism in Kenya’ (2012) *Information & Communication Technology – Africa* 9.

<sup>216</sup> H Ndunde ‘From cyberspace to the public: Rumor, gossip and hearsay in the paradoxes of the 2007 general election in Kenya’ Paper presented at CODESRIA 12th General Assembly, Yaounde, 2008 at 2.

<sup>217</sup> S Allan *Online News* (2006) 169.

<sup>218</sup> Nyabola (n 147) 61.

<sup>219</sup> Makinen & Kuira (n 214) 13-14.

<sup>220</sup> Ndunde (216) 4.

<sup>221</sup> Statista ‘Number of mobile cellular subscriptions per 100 inhabitants in Kenya from 2000 to 2022’ <https://www.statista.com/statistics/509516/mobile-cellular-subscriptions-per-100-inhabitants-in-kenya/> (accessed 8 November 2023).

of dissemination of hate speech and other political messaging.<sup>222</sup> Common themes included ethnicity and its influence on power and voter choices.<sup>223</sup> Given the dynamics of exclusionary politics based on ethnicity that had been shaped post-independence, coupled with the politically orchestrated ethnic clashes of the 1992 and 1997 clashes, these conversations often took a negative tone.<sup>224</sup> The leadership capabilities of the two top presidential candidates, Raila Odinga and Mwai Kibaki were also discussed.<sup>225</sup> Through SMSs, the diaspora community also shared news with their friends and family in Kenya to fill information gaps.<sup>226</sup>

While it is uncontested that hate speech was circulated through SMS, it was also a tool for mobilisation, both for good and bad.<sup>227</sup> Many messages urged the recipients to share widely; this could be seen as a mobilisation tactic to audiences who share a commonality of purpose and intention. Authorities were, however, stymied on how to monitor or assess the impact of SMSs and other internet-based communications, such as emails, as a shaper of public opinion and action.<sup>228</sup> How a recipient interpreted and acted upon a message was not easily discernible.

The paternalistic government responses can also be faulted. The government fronted the suggestion of blocking SMS services but was convinced otherwise by Safaricom, Kenya's biggest network provider, to counter hateful messages by preaching peace through the same platform.<sup>229</sup> The government and other stakeholders used SMSs to temper hateful messages and preach peace. Fundraising through the popular SMS-based mobile money application, M-PESA, was organised via SMSs and blogs and channelled to humanitarian organisations such as Red Cross and individual victims.<sup>230</sup> The government, however, blocked bulk SMSs. Although the government threatened Kenyans with prosecution for hate speech and messages inciting

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<sup>222</sup> S Hirsch 'Putting hate speech in context: Observations on speech, power, and violence in Kenya' (2013) 2 <https://www.usmmm.org/m/pdfs/20100423-speech-power-violence-hirsch.pdf> (accessed 8 November 2023).

<sup>223</sup> MW Mungai "'Soft power', popular culture and the 2007 elections' K Kanyinga & D Okello *Tensions and reversals in democratic transitions* (2010) 226 & 229.

<sup>224</sup> Mungai (n 223) 226 & 229.

<sup>225</sup> Mungai (n 223) 234-235.

<sup>226</sup> Mungai (n 223) 226.

<sup>227</sup> Mungai (n 223) 221.

<sup>228</sup> As above.

<sup>229</sup> Goldstein & Rotich (n 214) 5.

<sup>230</sup> As above.

violence,<sup>231</sup> legal accountability was hampered by the absence of legal provisions for the admissibility of SMSs in evidence; also, Kenya did not have a hate speech law.<sup>232</sup>

Emails, and more so mass emails, also formed another communication form, particularly among the computer-literate urban elite.<sup>233</sup> Analysts found the content of emails circulated during the 2007 election period was more potent than SMSs.<sup>234</sup> Unlike SMSs, emails had more information, and often, the author took time to carefully word their message.<sup>235</sup> While pre-election emails were mainly propagandistic, seeking to support a candidate, post-election emails centred around the credibility of the election, who won or lost the election, and the state of the Kenyan democracy.<sup>236</sup> Cross-pollination of information across mediums, such as rumour to SMS to the internet sphere and vice versa, that was mutually reinforcing was also witnessed.<sup>237</sup>

#### ***3.2.4.2 The Kenyan blogosphere***

The diasporic Kenyan community is largely credited with giving life to public discourse on the Kenyan blogosphere and shaping the beginnings of online citizen journalism during the 2007-2008 post-election crisis.<sup>238</sup> The information gap elevated the role of citizen journalists from passive commenters or discussers of news disseminated by mainstream media to active participants in news gathering and sharing.<sup>239</sup> The growing crop of citizen journalists with digital devices and access to the internet filled this information gap with both accurate information and misinformation through the alternative spaces created by new media. The absence of bureaucratic red tape and interference from media owners and politicians saw bloggers challenge the gatekeeping function of mainstream media by bravely covering incidents that mainstream media concealed or ignored.<sup>240</sup> There were even reports of mainstream media using and sometimes appropriating blogs as their information sources, which amplified content from the

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<sup>231</sup> Mungai (n 223) 221.

<sup>232</sup> Ndunde (216) 4-5.

<sup>233</sup> Mungai (n 223) 237.

<sup>234</sup> Mungai (n 223) 238.

<sup>235</sup> Mungai (n 223) 237-238.

<sup>236</sup> As above.

<sup>237</sup> Mungai (n 223) 232-233.

<sup>238</sup> Makinen & Kuira (n 214) 13-15.

<sup>239</sup> E Zuckerman 'Citizen media and the 2007 Kenyan election crisis' in S Allan & E Thorsen (eds) *Citizen journalism: Global perspectives* (2009) 190-191.

<sup>240</sup> Goldstein & Rotich (n 214) 8 & Makinen & Kuira (n 214) 13-15.

blogosphere beyond connected audiences.<sup>241</sup> The Kenyan ‘networked public sphere’ concept was gradually reified in the 2007 zeitgeist. Its nascent beginnings failed to encapsulate the ideals of the public sphere as envisioned by Habermas. It was exclusionary in its makeup with the participation of connected, often elite populations. Where the discourse was driven by partisan perspectives grounded on ethnicity and tribalism or polluted by hate speech, it obstructed the aspects of rationality and critical thinking.

Previously apolitical blogs<sup>242</sup> and ethnically themed blogs<sup>243</sup> became vibrant platforms for political expression.<sup>244</sup> Others like *Mashada* eventually had to shut down when its founders were unable to regulate the torrent of virulent expression that inundated the blog space.<sup>245</sup> The closure of *Mashada* inspired one of its founders, David Kobia, to launch another website named ‘I Have No Tribe...I am Kenyan’.<sup>246</sup> As the name suggests, it sought to provide a platform for constructive inter-community engagement with an appreciation of a common national heritage that soon found an audience with former *Mashada* followers.

The innovative *Ushahidi* platform also emerged in the wake of the 2007-2008 post-election violence as a crowdsourcing application to monitor and map out violence and peace-making efforts through SMSs or web applications.<sup>247</sup> It was conceived, developed, administered, and largely publicised by bloggers.<sup>248</sup> The collaboration between citizen journalists submitting

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<sup>241</sup> Goldstein & Rotich (n 214) 8.

<sup>242</sup> For example, [www.kenyans.com](http://www.kenyans.com), [www.mashada.com](http://www.mashada.com), [africanbulletsandhney.com](http://africanbulletsandhney.com), Concerned Kenyan Writers, and Kenyanpundit.

<sup>243</sup> For example, [www.jaluo.com](http://www.jaluo.com), [www.kikuyu.com](http://www.kikuyu.com), [kalenjin.com](http://kalenjin.com), and [kisii.com](http://kisii.com).

<sup>244</sup> White African ‘Mashada forums: Kenya’s first digital casualty’ (29 January 2008) <https://whiteafrican.com/2008/01/29/mashada-forums-kenyas-first-digital-casualty/> (accessed 8 November 2023). In his email, David Kobia, the founder of the blog states: *As you may already know, I’ve been having quite a problem regulating Mashada.com, despite having recently hired people to moderate the forums. It is starting to become a reflection of what is going on on the ground in Kenya. I’d hate for it to hinder our current efforts since I’m directly connected to it, therefore I’m having to shut down the forums until further notice. Facilitating civil discussions and debates has become virtually impossible.*

<sup>245</sup> White African (n 244).

<sup>246</sup> Goldstein & Rotich (n 214) 5.

<sup>247</sup> Ushahidi ‘Our story’ <https://www.ushahidi.com/about/our-story> (accessed 8 November 2023).

<sup>248</sup> Ushahidi was the brainchild of Kenyan blogger, Ory Okolloh, and developed by David Kobia and Erik Hersman, who were technologists and bloggers too. See Kenyan Pundit, White African, Afromusing and Mentalacrobatics. Also see Ushahidi ‘Welcome to the Ushahidi blog’ <https://www.ushahidi.com/about/blog/welcome-to-the-ushahidi-blog> (accessed 8 November 2023).

reports in visual or written formats and the system administrators verifying the reports revolutionised the *Ushahidi* system.<sup>249</sup>

### 3.3 Uhuru Kenyatta era: Peace by all means and the 2013 elections

#### 3.3.1 Peace reporting by mainstream media

The solution-focused practice of peace journalism by the Kenyan mainstream media that clumsily took shape in the aftermath of the 2007 election was in its embryonic phases then. It snowballed in the leadup to the 2013 elections and came to encapsulate the dominant 2013 narrative. The stark memory of the devastating impact of the 2007 post-election violence influenced decision-making by critical electoral stakeholders, including the media.<sup>250</sup> The mainstream media were haunted by the accusations of their complicity in escalating the 2007-2008 violence such they exercised self-censorship to keep the peace and avoid reportage that might anger or trigger the masses.<sup>251</sup>

This overemphasis on peaceful elections, arguably to the detriment of equally important principles that deliver a free and fair election process, was multi-voiced. CSOs, politicians, the government, the private sector, clergy, donors and the general public also actively pursued a peaceful 2013 election.<sup>252</sup> The 2013 election period saw the reinvention of the ideology of order in burying stories that deviated from the peace narrative and may have a destabilising effect.<sup>253</sup> While ultimately, the 2013 elections were relatively peaceful, whether they were concomitantly credible is a subject that has attracted considerable discussion.<sup>254</sup>

While the pursuit of peaceful elections was logical and of public interest in the 2013 context, the constitutional and institutional reform measures that had been put in place in the interim election period provided a platform for delivering free and fair elections, which in itself includes peaceful elections. The 2010 Constitution, notably, provided for more independent

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<sup>249</sup> Zuckerman (n 239) 192.

<sup>250</sup> H Maupeu 'Kenyan elections: The ICC, God and the 2013 Kenyan general elections' (2013) 247(3) *Afrique Contemporaine* 27-28.

<sup>251</sup> D Galava 'From watchdogs to hostages of peace' in HM Mabweazara (ed) *Newsmaking cultures in Africa* (2018) 324.

<sup>252</sup> C Odote 'The 2013 elections and the peace narrative' in N Cheeseman, K Kanyiga & G Lynch (eds) *The Oxford handbook of Kenyan politics* (2020) 99.

<sup>253</sup> Galava (n 251) 329.

<sup>254</sup> JC Hoste 'Kenya's elections: the peace lobotomy?' (2013) *Africa Policy Brief* 1-2.

institutions, including a new EMB, the Independent Electoral and Boundaries Commission (IEBC).<sup>255</sup> The newly devolved system and the reduced powers of the presidency also aimed at tempering the impact of the ‘winner-take-all’ politics and providing for more inclusive governance. Further, the Constitution enhanced the independence of the judiciary and established a Supreme Court bequeathed with the exclusive jurisdiction to adjudicate presidential election disputes, a platform that was eventually utilised by the losing presidential candidate, Raila Odinga, to challenge the election results.<sup>256</sup> Even so, there was implicit resistance from stakeholders, including the media, to make waves by proactively interrogating whether the election was, in fact, holistically conducted in a free and fair manner as dictated by the 2010 Constitution. Questions on justice for post-election victims and accountability were also eschewed. Quoting Collin Odote on the 2013 scenario, ‘peace became an end in itself, as opposed to a means to an end’.<sup>257</sup>

Even in the novel presidential debate that NMG, Standard Group and RMS jointly organised, the undulations of the ‘peacocracy’ wave were evident in the media spectacle that sought to present a picture of elite friendship between the candidates.<sup>258</sup> This was particularly so for the two top candidates who come from historically rival tribes whose strife played out during the 2007-2008 post-election violence. While mainstream media can be applauded for providing a platform which, to some extent, allowed for an interrogation of campaign issues and policies, the tableau that courted the symbolism of handshakes and candidates surrounded by immediate and extended family, as well as soliciting of peace pledges from the candidates showed that the peace agenda was an underlying driving force of the debates.<sup>259</sup>

Galava points out that peace journalism advances information gatekeeping by the media by suppressing content that might destabilise society even though it is accurate, truthful,

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<sup>255</sup> JD Long & others ‘Kenya’s 2013 elections: Choosing peace over democracy’ (2013) 3 *Journal of Democracy* 143-144 & KHRC ‘The democratic paradox: A report on Kenya’s 2013 general elections’ (2014) 21-22 <https://www.khrc.or.ke/mobile-publications/civil-political-rights/21-democratic-paradox-a-report-on-kenya-s-2013-general-election/file.html> (accessed 8 November 2023).

<sup>256</sup> *Raila Odinga & 5 others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR <http://kenyalaw.org/caselaw/cases/view/91624/> (accessed 8 November 2023).

<sup>257</sup> Odote (n 252) 103.

<sup>258</sup> N Moss & A O’Hare (2014) Staging democracy: Kenya’s televised presidential debates (2014) 8 *Journal of Eastern African Studies* 83-84.

<sup>259</sup> Moss & O’Hare (n 258) 89.



objective, and balanced.<sup>260</sup> It is questionable whether the intervening period between the elections offered the Kenyan mainstream media a meaningful period of reflection on reporting during elections following a crisis. The peace journalism version that was evident during the 2013 elections meant that the public was prevented from engaging with other salient aspects of the electoral processes that challenged the peace narrative. Others have posited that the peace campaigns offered a convenient smokescreen against protests of election irregularities and excessive use of force.<sup>261</sup> Charles Onyango-Obbo later on described this phenomenon as ‘establishment media’ noting that ‘they cease to aggressively challenge the political system, become vested in “stability”, and begin to worry about what will happen if the system breaks down’.<sup>262</sup> The threat of disruption of the system and the implications on the survival of the media as a business that was glimpsed in 2007 provided a further strong motivation to contribute towards the preservation of stability.

The growing concentration of media ownership in Kenya, with political players also in the fray, constricted the diversity of opinions emanating from the mainstream media space. Further, the Media Owners Association (MOA) executed a ‘gentleman’s agreement’ to ‘keep the peace’ in election news reporting to ward off possible conflict.<sup>263</sup> The paternalistic gatekeeping of information by media owners, editors, journalists and the government from the public contributed to perceptions by both journalists and the public that media diversity was a threat and propelled the growth of online citizen media.<sup>264</sup>

Applying the Lynch framework of peace journalism, the 2013 reporting was still largely solution-focused. It has been posited that the reporting was neither proactive nor interventionist to meet the standard of peace journalism. Rather, it may have been a case of ‘accidental peace journalism’ prompted by the dominating narrative of the 2013 context.<sup>265</sup> The peace juggernaut

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<sup>260</sup> Galava (n 251) 316.

<sup>261</sup> G Lynch, N Cheeseman, & J Willis ‘From peace campaigns to peaceocracy: Elections, order and authority in Africa’ (2019) 118 (473) *African Affairs* 603.

<sup>262</sup> Onyango-Obbo (n 136).

<sup>263</sup> Galava (n 251) 329-330 & J Straziuso ‘Kenya media self-censoring to reduce vote tension’ *Associated Press* 7 March 2013 [https://news.yahoo.com/kenya-media-self-censoring-reduce-162127566.html?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2xILmNvbS8&guce\\_referrer\\_sig=AQAAHvEVY5Tog\\_ihupq4TrY4yevPrrve8EeSKuiKAiCX6d9OK6b45JidXrP-A2YQzbtS8vitX9RQsbYsee-z80DwFbGM5tgurs\\_35ufnPimrKoT5fjaEweBpvW9jDuZ1mW20jOnLQqUC\\_KNS6W7wxN9\\_MB5wp8Yof1deZN\\_AjmIzN7AC](https://news.yahoo.com/kenya-media-self-censoring-reduce-162127566.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xILmNvbS8&guce_referrer_sig=AQAAHvEVY5Tog_ihupq4TrY4yevPrrve8EeSKuiKAiCX6d9OK6b45JidXrP-A2YQzbtS8vitX9RQsbYsee-z80DwFbGM5tgurs_35ufnPimrKoT5fjaEweBpvW9jDuZ1mW20jOnLQqUC_KNS6W7wxN9_MB5wp8Yof1deZN_AjmIzN7AC) (accessed 8 November 2023).

<sup>264</sup> Simiyu (n 138)140.

<sup>265</sup> Galava (n 251) 322.

also overly focused on how not to report in a manner that would exacerbate tensions as opposed to emphasising the positives of peace journalism in analysing and finding solutions to the root causes of conflict.<sup>266</sup> The stories centred more on news reporting than analysis. Therefore, persisting underlying causes of the conflict in Kenya, such as structural inequalities, justice for victims, and unaddressed historical injustices, including the 2007 PEV, were not comprehensively covered.<sup>267</sup> This was particularly interesting given one of the presidential candidates, Uhuru Kenyatta, and his chosen vice president, William Ruto, had been indicted by the ICC for crimes against humanity perpetrated during the 2007-2008 PEV. The media failed to comprehensively analyse the suitability of their candidature, given leadership and integrity were crucial principles integrated into chapter six of the Constitution.<sup>268</sup> Similarly, a more in-depth analysis of the candidature of the other top runner Raila Odinga, who had a long history in government dating back to the 1970s, was necessary. Reports on the competence of the EMB, election campaign financing, conflicting election results, election irregularities and election violence were also downplayed for fear of inciting violence.<sup>269</sup>

The electoral context depicted a push for peace without an honest reflection of the measures necessary to foster lasting peace.<sup>270</sup> Arguably, this enables negative peace characterised by the absence of war but with unresolved historical issues that may re-emerge.<sup>271</sup> The news sources were elitist, with politicians and institutions such as IEBC serving as popular sources of news, while the perspectives of ordinary Kenyans were minimal, failing the people-orientation test.<sup>272</sup> In Bourdieu's critique of Habermas, he faults the public sphere as a space that is neither rational nor democratic but one where the opinions of certain groups are undermined and silenced.<sup>273</sup> This played out uniquely in the 2013 context. Potentially destabilising voices that deviated from the peace narrative were hushed.

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<sup>266</sup> N Cheeseman, J Maweu & S Ouma 'Peace but at what cost? Media coverage of elections and conflict in Kenya' in K Voltmer and others (eds) *Media, communication and the struggle for democratic change* (2019) 15-16.

<sup>267</sup> Galava (n 251) 323 & 329.

<sup>268</sup> J Gustafsson 'Media and the 2013 Kenyan election: From hate speech to peace preaching' (2016) 15 *Conflict & Communication Online* 7-8.

<sup>269</sup> Cheeseman, Maweu & Ouma (n 266) 19 & Wrong (n 137).

<sup>270</sup> Galava (n 251) 323 & 329-330 & Straziuso (n 263).

<sup>271</sup> J Galtung 'Violence, peace, and peace research' (1969) 6(3) *Journal of Peace Research* 183.

<sup>272</sup> Galava (n 251) 323.

<sup>273</sup> P Bourdieu *Practical reason: On the theory of action* (1998).

However, another realistic perception is that had the media unwaveringly played their institutional role and not succumbed to the peace juggernaut that seemed to elevate peace over all else, then the relative peacefulness of the 2013 elections may not have been achieved. To others, the decision to adopt ethnically ambiguous reporting was unifying.<sup>274</sup> Further, with the government as a key advocate of the peace narrative, it may have implemented restrictive measures on the media that would have had a lasting impact on its independence and impartiality. Case in point, critical journalists and bloggers were victims of threats, intimidation, harassment, arbitrary arrests, unlawful surveillance, and assault.<sup>275</sup> Drawing on some reflections on the 2013 context, the media was indeed caught between Scylla and Charybdis in making a choice between peace and democracy, with democracy having to be the unfortunate sacrificial lamb.<sup>276</sup>

### 3.3.2 Continued growth of online media as alternative media

Unencumbered by the considerations and fears of mainstream media, online media took on the hot public topics that mainstream media avoided, and its force as a subaltern counter-public intensified. Journalists struggling with the politics of content interference by media owners and advertisers also found refuge in online spaces, and so began the blurring of lines between traditional and online media.<sup>277</sup> While playing the gatekeeping function, some media owners and editors reportedly exploited the peace narrative to cut out stories threatening their commercial interests. Defiant journalists choose to anonymously publish these stories online.

In 2013, the *Ushahidi* group developed *Uchaguzi* (Swahili for election or choice), the customised initiative to monitor the 2013 elections to improve the quality of the elections and deliver peaceful, transparent and credible elections.<sup>278</sup> Similar to its progenitor, the *Uchaguzi* initiative was web-based and relied on crowdsourced evidence from multiple electronic sources, including SMS, social media posts on Facebook and Twitter, phone calls, and emails.<sup>279</sup> The

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<sup>274</sup> F Ogenga ‘The role of the Kenyan media in the 2007 elections’ (2008) 7(2) *Journal of African Elections* 129.

<sup>275</sup> Article 19 & HRW ‘“Not worth the risk” threats to free expression ahead of Kenya’s 2017 elections’ (2017) 2-3 [https://www.hrw.org/sites/default/files/report\\_pdf/kenya0517\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/kenya0517_web.pdf) (accessed 8 November 2023).

<sup>276</sup> Cheeseman, Maweu & Ouma (n 266) 21.

<sup>277</sup> Galava (n 251) 327.

<sup>278</sup> Ushahidi ‘Uchaguzi’ <https://www.ushahidi.com/in-action/uchaguzi> (accessed 8 November 2023).

<sup>279</sup> OCHA ‘Uchaguzi Kenya 2013 launched’ <https://reliefweb.int/report/kenya/uchaguzi-kenya-2013-launched> (accessed 8 November 2023).

2013 revamping of the project as an Information and Communications Technology (ICT) - election monitoring platform saw increased collaboration with CSOs.<sup>280</sup> The initiative expertly continued to elevate citizens as key players in democracy and elections by providing a platform to enhance citizen participation in promoting credible elections. Linkages with response mechanisms such as law enforcement enhanced the effectiveness of the initiative not only as a monitoring mechanism but also as responsive towards improving the election environment. The group also assisted the government in monitoring online media stemming from fears that the spread of hate speech via SMSs in 2007 would be transferred and replicated on social media platforms in 2013.<sup>281</sup>

The *Umati* project linked with *Uchaguzi* was another innovative initiative that monitored and countered online hate and dangerous speech during the 2013 election period.<sup>282</sup> With the advantage of relatively unbridled spaces for public discourse and participation came the risk of unmediated platforms where hate speech, misinformation, and disinformation may flourish.<sup>283</sup> Monitoring posts in diverse languages used in day-to-day conversations, including English, Kiswahili, slang (Sheng), and common vernacular languages, provided a relatively holistic examination of the online lexicon during the 2013 election. Hate and dangerous speech were more prevalent on Facebook as compared to Twitter.<sup>284</sup> Twitter users' fact-checking and shaming tendencies on the comment sections of posts that could be considered hate or dangerous speech countered such posts, thereby creating an informal user accountability system.<sup>285</sup> The potency of the content was also heightened in the lead-up to and soon after the elections and spiked during notable electoral-related events such as the determination of the 2013 presidential election

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<sup>280</sup> Ushahidi 'Uchaguzi monitoring and evaluation final report released' <https://www.usshahidi.com/about/blog/uchaguzi-monitoring-and-evaluation-final-report-released> (accessed 8 November 2023).

<sup>281</sup> D Jorgic 'Kenya tracks Facebook, Twitter for Election 'Hate Speech' *Reuters* 5 February 2013 <https://www.reuters.com/article/kenya-elections-socialmedia-idUKL5N0B4C4120130205> (accessed 8 November 2023).

<sup>282</sup> Umati 'Umati: Monitoring online dangerous speech February and March 2013 report' <https://stsinfrastructures.org/content/umati-monitoring-online-dangerous-speech-jan-nov-2013> (accessed 8 November 2023). The analysis adopted an analytical tool developed by Professor Susan Benesch on the propensity of certain speech to lead to violence. She identified five factors: the speaker and their influence on the audience; the audience; the content; the social and historical context; and the medium of disseminating the speech. See S Benesch 'Dangerous speech: A practical guide' (2018) 10.

<sup>283</sup> Onyango-Obbo (n 136).

<sup>284</sup> Umati (n 282) 13.

<sup>285</sup> Ushahidi 'Umati final report released' (2013) <https://www.usshahidi.com/about/blog/umati-final-report-released> (accessed 8 November 2023).

petition.<sup>286</sup> The evolving Kenyan networked sphere was a platform for subjectively critical and meaningful discourse and conflict that could easily be exploited for personal and political gains.

The monitoring project was apropos given the increasing shift of audiences to online platforms for electoral information and discourse. With the dialogic ability of the platforms, the acrimonious conversations that had taken place in comment sections of blogs and SMSs in 2007 expanded to social media sites such as Facebook and Twitter, whose content moderation practices in Kenya were severely wanting. The spewing of hateful comments that often took negative ethnic connotations was prevalent between the supporters of Uhuru Kenyatta and Raila Odinga, the leading contesters for office.<sup>287</sup>

The steady growth in mobile phone subscriptions, internet penetration, social media use and the general integration of ICTs in the zeitgeist had implications on various aspects of the 2013 election, including the media space.<sup>288</sup> The online space was growing in vibrancy and popularity among connected populations (approximately 13%)<sup>289</sup> and opened up spaces for participation with reduced gatekeeping from government and mainstream media elites. George Ogola notes of social media platforms, ‘While the platform seems to have created its own hierarchies, horizontal participation is still much greater than with mainstream media formats’.<sup>290</sup>

Alive to the potency of the online space, both international and national media reinforced their online footprint with websites and social media pages that catered to the online population, further loosening the boundaries separating traditional and online media. While the diverse online space has tempered the gatekeeping function of mainstream traditional media, their influence online as agenda-setters is undeniable. In 2013, trending hashtags on elections such as #kenyadecides, #choice2013, #keelections2013, #votepeacefully, #cord and #jubilee were

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<sup>286</sup> Umati (n 282) 9.

<sup>287</sup> M Pflanz ‘In Kenya, social media hate speech rises as nation awaits election ruling’ (2013) <https://www.csmonitor.com/World/Africa/2013/0321/In-Kenya-social-media-hate-speech-rises-as-nation-awaits-election-ruling> (accessed 8 November 2023).

<sup>288</sup> Business Daily ‘Mobile internet on course to becoming top earner for firms’ 21 April 2010 <https://www.businessdailyafrica.com/Mobile-internet-on-course-to-becoming-top-earner-for-firms/-/539444/903924/-/5e9tqa/-/index.html> (accessed 8 November 2023).

<sup>289</sup> World Bank ‘Individuals using the Internet (% of population) - Kenya’ <https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=KE> (accessed 8 November 2023).

<sup>290</sup> G Ogola ‘Social media as a heteroglossic discursive space and Kenya's emergent alternative/citizen experiment’ (2015) 36(4) *African Journalism Studies* 66.

created and pushed by online mainstream media sites and amplified by journalists.<sup>291</sup> Online versions of mainstream media and the accounts of journalists also enjoyed more public trust as sources of information online.<sup>292</sup>

Contrastingly to traditional agenda setting, mainstream traditional media no longer has sole control of creating and sustaining trending topics online. Their amplification is dependent on continuous public engagement, commenting, sharing and retweeting, thereby reifying the networked public sphere. Influential bloggers and accounts with large followers have also created trending hashtags tailored to developing aspects of the election process. The online engagement between traditional media and the public is also less unidirectional as compared to conventional media spaces, as seen when journalists engage with online audiences during broadcasts by reading the comments posted on online platforms. The ensuing symbiotic relationship between online and traditional media is seen in the cross-pollination of information between the online community and legacy media with both feeding, correcting, challenging and supplementing information that shapes public discourse.<sup>293</sup> During elections, this expands the opportunities for public and political participation and opens a window into public perceptions.

In another show of the transformative aspect of online media, particularly social media, by lowering the cost of participation for connected populations, it offered another platform for relatively broader communicative interaction between politicians and the wider electorate. The campaign strategies of politicians also expanded to the digital space to tap into the online audience, with all presidential candidates setting up social media accounts for voter engagement.<sup>294</sup> However, the aspects of equality online are threatened, given the more moneyed politicians have the wherewithal to increase their online visibility through paid political ads.

The macro and micro blogosphere was also teeming with diverse content in the 2013 election cycle.<sup>295</sup> Kenyans on Twitter (KOT) morphed into an undeniable force.<sup>296</sup> Online

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<sup>291</sup> C Odinga 'Use of new media during the Kenya elections' Master's thesis, Department of Informatics and Media, Uppsala University, 2013 at 26-28.

<sup>292</sup> Portland Communications 'How Africa tweets 2018' (2018) <https://portland-communications.com/pdf/How-Africa-Tweets-2018.pdf> (accessed 8 November 2023).

<sup>293</sup> Mudhai (n 215) 23.

<sup>294</sup> Ogola (n 290) 66.

<sup>295</sup> Freedom House 'Freedom on the net 2013 – Kenya' (2013) <https://www.refworld.org/docid/52663ae85.html> (accessed 8 November 2023).

<sup>296</sup> Nyabola (n 147) 89-90.

campaigns were increasingly spurring or contributing to offline action. Bloggers and social media users also often held mainstream traditional media accountable for shirking their institutional responsibilities, contributing to added layers of oversight. For example, the breakfast meeting hosted by President Kenyatta and Deputy President William Ruto with over 100 journalists from media houses in 2013 demonstrated a questionable display of professionalism and independence from the media.<sup>297</sup> This became a trending topic, with many questioning the power distance between government and media, the co-option of the mainstream traditional media, implications on media freedom, and the media's ability to effectively play its normative role during the elections.

With the increased popularity of ICTs as alternative spaces for political discourse, including political campaigning, electoral stakeholders were concerned about persons misappropriating the space for prohibited expressions such as hate speech. The 2013 context saw the extended hand of the government in regulating the online space. As it was then, the Communications Commission of Kenya (CCK) issued guidelines that required the vetting and pre-approval of bulk political messages before their dissemination.<sup>298</sup> The Guidelines sought to curb the spread of prohibited expression, such as hate speech and inflammatory and inciteful messages. The Guidelines prohibited the dissemination of unsolicited content and required opt-in and opt-out options for recipients.<sup>299</sup> The CCK also required mobile phone service providers to screen and block messages inciting violence. Reportedly, this led to the censorship of around 300 000 SMSs daily with hate speech content.<sup>300</sup> The government, however, struggled to regulate such content on popular social media sites such as Facebook and Twitter.<sup>301</sup>

Service providers were also required to install the Network Early Warning System, an internet traffic monitoring equipment which raised concerns about privacy and government

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<sup>297</sup> G Ogola 'Journalists avoid tough probing questions as State and media find new bonhomie' *Nation* 20 July 2013.

<sup>298</sup> CCK Guidelines for the Prevention of Transmission of Undesirable Bulk Political Content/Messages via Electronic Communications Networks <https://www.refworld.org/docid/52663ae85.html> (accessed 8 November 2023).

<sup>299</sup> Guideline 7, CCK Guidelines.

<sup>300</sup> The Nation 'Phone firms block 300,000 hate texts daily, says Ndemo' 20 March 2013 <https://nation.africa/kenya/news/Phone-firms-block-300-000-hate-texts-daily-says-Ndemo-/1056-1726172-ktkiafz/index.html> (accessed 8 November 2023).

<sup>301</sup> As above.

surveillance.<sup>302</sup> The work of a media monitoring committee led to the arrest of 14 bloggers for online hate speech.<sup>303</sup> Complaints by politicians resulting in nebulous charges such as posting ‘annoying’ statements on social media sites justified concerns around politically motivated arrests and prosecutions.<sup>304</sup>

Efforts to regulate content through ICTs were also seen in guidelines issued by the National Cohesion and Integration Commission (NCIC) on hate speech and Safaricom’s political advertising guidelines.<sup>305</sup> The government also enlisted monitors for online content. Further, the government required mobile phone users to register their SIM cards to promote personal accountability for content sent through specific numbers.<sup>306</sup> While there were reports of government acquisition of PacketShaper, a content monitoring and filtering device, it is unclear whether and to what extent the government used it in 2013.<sup>307</sup>

### 3.4 Uhuru Kenyatta era: The 2017 and 2022 elections

Parallels can be drawn between the online and offline media performance in the 2017 and 2022 elections, informing the merged discussion of the two election periods under this section. The coexistence and blurring of lines between traditional and online media have produced an alchemy which has seen both media spaces supplementing and completing each other, informing

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<sup>302</sup> The Nation ‘We will not spy on Kenyans online, says internet watchdog’ 22 March 2012 <https://nation.africa/kenya/business/news/We-will-not-spy-on-Kenyans-online-says-internet-watchdog-1006-1371608-hn6q03/index.html> (accessed 8 November 2023) & Business Daily ‘New internet version to deepen spying on users’ 2 September 2012 <https://www.businessdailyafrica.com/New-internet-version-to-deepen-spying-on-users-/-/539546/1493584/-/fc2470z/-/index.html> (accessed 8 November 2023).

<sup>303</sup> The Nation ‘14 bloggers linked to hate messages’ 27 March 2013 <https://nation.africa/kenya/news/14-bloggers-linked-to-hate-messages/1056-1732288-cut5kvz/index.html> (accessed 8 November 2023).

<sup>304</sup> As above. See section 29(b) of the 2009 Kenya Information and Communications Act, which proscribes the transmission of a message that is known “to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person. The section was challenged in *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR High Court Petition No 149 of 2015 <http://kenyalaw.org/caselaw/cases/view/121033/> (accessed 8 November 2023). The High Court declared it unconstitutional.

<sup>305</sup> Safaricom ‘Guidelines for political mobile advertising on Safaricom’s premium rate messaging network’ (2012) [https://www.safaricom.co.ke/images/Downloads/Resources\\_Downloads/POLITICAL\\_MOBILE\\_ADVERTISING\\_NOTICE\\_FULL\\_PAGE\\_2b.pdf](https://www.safaricom.co.ke/images/Downloads/Resources_Downloads/POLITICAL_MOBILE_ADVERTISING_NOTICE_FULL_PAGE_2b.pdf) (accessed 8 November 2023).

<sup>306</sup> G Maina ‘New technology for peace in Kenya’ in A Súilleabháin (ed) *Leveraging local knowledge for peacebuilding and state building in Africa* (2015) 47.

<sup>307</sup> CitizenLab ‘Planet Blue Coat mapping global censorship and surveillance tools’ <https://citizenlab.ca/2013/01/planet-blue-coat-mapping-global-censorship-and-surveillance-tools/#4> (accessed 8 November 2023) & Freedom House (n 295).



the holistic discussion of both media and how they have shaped the contemporary Kenyan networked public sphere.

The liberalisation of the media suffers from an inchoateness that has fed into the disillusionment with mainstream media and migration to alternative spaces such as those created by online media, particularly social media.<sup>308</sup> The political context greatly contributed to the woes of mainstream media, with media engaged in a constant battle to ensure their survival while performing their role as the Fourth Estate. The government and media relations from 2013 to 2022 under the Uhuru Kenyatta regime progressed from attempted co-option to acrimony with reported incidents of harassment and attacks on journalists.<sup>309</sup> Borrowing a leaf from the book of the post-independence regime, the government emphasised that the media should be partners in advancing national development. A revival of the developmental theory of the media that was often used to restrict media freedom.<sup>310</sup> The government was seen to adopt a carrot-and-stick approach that, in some instances, violated media freedom. Journalists were subjected to harassment, intimidation, and threats for critical pieces, with reports of journalists being summoned to the State House.<sup>311</sup> Government spending on advertising was reduced with the introduction of My.Gov,<sup>312</sup> a digital advertising platform and an equivalent print pull-out that channelled all of the government's advertisements instead of directly advertising in print media.<sup>313</sup> As one of the media's biggest advertisers, this jeopardised the commercial survival of the media. Following the 2017 elections, *Citizen*, *Inooro TV*, *KTN*, and *NTV* signals were cut to prevent them from airing a mock swearing-in of Raila Odinga as the people's president.<sup>314</sup> In a

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<sup>308</sup> Ogola (n 290) 72.

<sup>309</sup> M Simiyu 'Media Council urges police to probe attack on NMG journalist' *Nation* 12 July 2022 <https://nation.africa/kenya/news/media-council-urges-police-to-probe-attack-on-nmg-journalist-3877322> (accessed 8 November 2023) & Mutembei TV 'Political Journalists Association of Kenya PJAK raise alarm over journalists safety and security' [https://www.youtube.com/watch?v=4fFwFQZ26Yk&ab\\_channel=MutembeiTV](https://www.youtube.com/watch?v=4fFwFQZ26Yk&ab_channel=MutembeiTV) (accessed 8 November 2023).

<sup>310</sup> PCS 'No absolute media freedom, Uhuru says' *Capital FM* 2 May 2014 <https://www.capitalfm.co.ke/news/2014/05/no-absolute-media-freedom-uhuru-says/> (accessed 8 November 2023).

<sup>311</sup> G Ogola 'How Kenyatta has gone about stifling the free press in Kenya' *The Conversation* 7 February 2018 <https://theconversation.com/how-kenyatta-has-gone-about-stifling-the-free-press-in-kenya-91335> (accessed 8 November 2023).

<sup>312</sup> My.Gov 'Home' <https://www.mygov.go.ke/> (accessed 8 November 2023).

<sup>313</sup> G Ogola 'How African governments use advertising as a weapon against media freedom' *The Conversation* (18 April 2017) <https://theconversation.com/how-african-governments-use-advertising-as-a-weapon-against-media-freedom-75702> (accessed 8 November 2023).

<sup>314</sup> CIVICUS 'Crackdown on media and opposition around mock inauguration of Odinga' <https://monitor.civicus.org/updates/2018/04/05/crackdown-media-and-opposition-around-mock-inauguration-odinga/> (accessed 8 November 2023).

blatant disregard of a court order, their signal was only restored after a week. Therefore, media freedom discourse cannot be removed from the political context that seems to pose an ever-present threat to objective and critical media playing the watchdog function.

### 3.4.1 The contemporary dynamic of media ownership and audience attraction

The political economy of the media has visibly featured in the Kenyan context. History has shown elite players in the economic and political class using their dominance to influence public opinion and discourse in the public sphere through mainstream and alternative media. The politics of media ownership, control and bias persist as an Achilles heel of the Kenyan mainstream media sector with implications on media trust. An examination of the contemporary media milieu reveals certain key players with stark political connections. RMS, which owns three TV stations, 14 radio stations, and digital and video-on-demand online platforms, is owned by SK Macharia.<sup>315</sup> In 2022, Macharia openly campaigned<sup>316</sup> for Raila Odinga, but the media house denied that this political affiliation influenced framing and agenda setting.<sup>316</sup> Nonetheless, the symbiotic relationship was gleaned from the advertisement profits channelled to RMS from Odinga's political party.<sup>317</sup>

NMG remains in the control of the Aga Khan family, with the Aga Khan Fund for Economic Development listed as the principal shareholder.<sup>318</sup> It has a transnational presence with 18 brands that include TV, print, and online media in four countries.<sup>319</sup> The Moi (Kenya's second president) family's influence in the Standard Group persists. Mr Gideon Towett Moi, former President Moi's son, is the principal shareholder of SNG Holdings Limited.<sup>320</sup> Until his

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<sup>315</sup> Royal Media 'Home' <https://www.royalmedia.co.ke/> (accessed 8 November 2023).

<sup>316</sup> W Wangui 'Media told to take bias complaints seriously' *Capital FM* 7 June 2022 <https://www.capitalfm.co.ke/news/2022/06/media-told-to-take-bias-complaints-seriously/> (accessed 8 November 2023).

<sup>317</sup> For example, NASA's media advertising budget for July-August 2017 was KES 301 820 944. KES 188 366 124 was spent on Royal Media Services stations using the 11 radio stations and Citizen TV. See The Star Team 'The millions Raila paid US consultants for election' *The Star* 4 November 2017 <https://www.the-star.co.ke/news/2017-11-13-the-millions-raila-paid-us-consultants-for-election/> (accessed 8 November 2023).

<sup>318</sup> Nation Media '2020 annual report & financial statements' (2020) 125 & 128 <https://www.nationmedia.com/annualreport2020/assets/downloads/2020-Annual-Report-Financial-Statements.pdf> (accessed 8 November 2023).

<sup>319</sup> Nation Media 'Brands' <https://www.nationmedia.com/brands/?sortby=country> (accessed 8 November 2023).

<sup>320</sup> Standard Media 'Annual report & financial statements for the year ended 31 December 2022' (2022) 40 (accessed 8 November 2023) & UK Government 'SNG Holdings Limited' <https://find-and-update.company-information.service.gov.uk/company/03159833/persons-with-significant-control> (accessed 8 November 2023).

death in 2020, former President Moi was listed as a top shareholder. NMG's market share spans TV, radio, print and online sites. Further, incumbent President William Ruto is the controlling shareholder of another key player in the market, Mediamax Network Limited.<sup>321</sup> The Kenyatta family previously owned the media company (first and fourth presidents of Kenya).<sup>322</sup> Keeping in mind that incumbents have historically drawn more coverage, ordinarily positive, from the state broadcaster, the glaring footprint of key political players in the private mainstream media sector that is a central medium for public participation depicts a public sphere that is not entirely separate from the state. In advocating for multiple publics to enhance participatory parity, Fraser posits that 'where societal inequality persists, deliberative processes in public spheres will tend to operate to the advantage of dominant groups and to the disadvantage of subordinates'.<sup>323</sup> The upper hand of the political class in the Kenyan public sphere has been seen in their ownership of media houses and ability to influence news agendas and framing and distort public debate. Unavoidably, perspectives of media bias emerge.

An MCK report two months before the 2022 elections revealed that media ownership had implications on news framing and coverage.<sup>324</sup> Initially, coverage in all legacy media formats, TV, radio and print, was skewed in favour of Raila Odinga (who was closely linked with the presidency) as compared to William Ruto (the ostracised Deputy President). These were the top two presidential candidates. However, this was adjusted in the lead-up to the elections.<sup>325</sup> Curiously, even the Ruto-owned K24 initially gave more coverage to Raila Odinga.<sup>326</sup>

Audience stats reveal that Citizen TV and Radio Citizen of RMS draw the highest audiences, with 24.03% and 10.19%, respectively. Other top TV stations are NTV (9.46%) of NMG, and KTN (8.78%) and KTN News (7.92%) of Standard Group. K24, the first online streaming TV owned by Mediamax Network Ltd, attracts 7.01%, and the similarly owned

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<sup>321</sup> BT Reporter 'DP William Ruto takes over Uhuru's media house' *Business Daily* 10 May 2018 <https://businesstoday.co.ke/dp-ruto-secures-grip-mediamax/> (accessed 8 November 2023).

<sup>322</sup> As above.

<sup>323</sup> Fraser (n 34) 66.

<sup>324</sup> MCK 'Balanced or biased: An analysis of media coverage of the 2022 general election campaign April- early June 2022' (2022) 30 <https://mediacouncil.or.ke/~mediaco7/sites/default/files/downloads/Media%20Monitoring%20%20Research%20Report%20on%20Election%20Coverage%20April-%20June%202022.pdf> (accessed 8 November 2023).

<sup>325</sup> As above.

<sup>326</sup> MCK (n 324) 18.

Kameme vernacular radio station, popular among audiences above 35 years, has a 2.88% viewership. KBC, the state broadcaster, is positioned at number eight with 4.26% viewership.<sup>327</sup>

The plurality of online and offline information sources is critical to combat the government's attempt to control information and opinion-shaping in the public sphere through tactics such as ownership of mainstream media and restrictive media laws and practices. Following the 2017 signal interruption, the affected TV stations were still available for online audiences.<sup>328</sup> Further, the potential of the online space as a viable avenue for citizen engagement with reduced state interference saw online political discourse and political campaigns gradually grow between the 2007 and 2022 elections. Investment in an enabling digital infrastructure increased mobile and internet penetration in Kenya buoyed the online audience's growth. As of 2023, mobile and internet penetration in Kenya was estimated at 117% and 33%, respectively with most people accessing the internet through their phones.<sup>329</sup> Further, social media is only surpassed by television as the most popular news source in Kenya.<sup>330</sup> Radio, once the most popular media source, comes in third.<sup>331</sup>

The popularity of the online space is not lost on politicians and other electoral stakeholders who find ways to both utilise and exploit this online audience. The impact is twofold, with increased access to information and spaces for public discourse, education and engagement. The other side of the coin is more sinister, with unethical political campaigns, the spread of misinformation, disinformation, propaganda, and hate speech, and infringement on the right to privacy of the electorate.

### **3.4.2 Access to information**

In 2022, media stakeholders adopted various measures to facilitate accurate, informative and ethical reporting during the election period. For example, the Guidelines for Election Coverage

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<sup>327</sup> F Kibuacha 'Top TV and radio stations in Kenya – Q1 2022' (26 April 2022) <https://www.geopoll.com/blog/top-tv-radio-stations-kenya-q1-2022/> (accessed 8 November 2023).

<sup>328</sup> CIVICUS (n 314).

<sup>329</sup> Datareportal 'Digital 2023: Kenya' <https://datareportal.com/reports/digital-2023-kenya> (accessed 8 November 2023).

<sup>330</sup> CRSM & TIFA Research 'National 2022 report on disinformation & the role of big tech in Kenya' 11 [https://accountablebigtech.com/wp-content/uploads/2023/01/Public-Opinion-Research-on-Disinformation-Big-Tech-Harms-DISSEMINATED-REPORT\\_Final-1.pdf](https://accountablebigtech.com/wp-content/uploads/2023/01/Public-Opinion-Research-on-Disinformation-Big-Tech-Harms-DISSEMINATED-REPORT_Final-1.pdf) (accessed 8 November 2023).

<sup>331</sup> As above.

2022<sup>332</sup> were instructive for media practitioners. The IEBC, Kenya Union of Journalists (KUJ), and the Kenya Editors Guild (KEG) committed to a Memorandum of Understanding to ensure access to information during the electoral period.<sup>333</sup> MCK trained at least 3 500 journalists on responsible and professional election reporting. Further, the Kenya Editors Guild (KEG), MOA, and MCK collaborated to host debates for the president, deputy president, and Nairobi gubernatorial candidates. Raila Odinga and George Wajakoya, however declined to participate in the presidential debate.<sup>334</sup>

Positively, access to information was amplified with the increased diversity of voices on traditional and online media, especially social media. The IEBC, for example, utilised both legacy media and online media, including its website and social media pages, to share real-time updates on the electoral process during the 2017 and 2022 elections.<sup>335</sup> The presence of a results portal was one such measure that enhanced access to electoral information and introduced an extra level of transparency in the electoral process.<sup>336</sup> In 2017 and 2022, presidential election results were continuously uploaded on the portal for public access. Persons were free to check, verify and even independently compare and collate the results based on the data in the portal. However, in 2017, the portal malfunctioned before all the results were uploaded.<sup>337</sup>

Inconsistency with some of the results in the portal and those publicly published at polling stations or the copies given to the party agents was one of the contesting grounds in the landmark 2017 presidential election petition.<sup>338</sup> This contributed to the annulment of the results

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<sup>332</sup> MCK ‘The Guidelines for Election Coverage 2022’ <https://mediacouncil.or.ke/sites/default/files/downloads/GUIDELINES%20FOR%20ELECTION%20COVERAGE.pdf> (accessed 8 November 2023).

<sup>333</sup> MCK ‘Hits and misses: Media performance & press freedom violations pre, during & post the August 9 general election in Kenya’ (2022) 1-2 <https://mediacouncil.or.ke/sites/default/files/downloads/REPORT%20ON%20MEDIA%20PERFORMANCE%20DURING%20THE%202022%20GENERAL%20ELECTION.pdf> (accessed 8 November 2023).

<sup>334</sup> As above.

<sup>335</sup> KNCHR ‘Mirage at dusk’ (2018) 155 & EU EOM ‘Kenya 2022 final report general elections 9 August 2022’ (2022) 39-40. For IEBC website see <https://www.iebc.or.ke/> (accessed 8 November 2023). Its social media handles include @IEBCKenya (Twitter), Facebook.com/IEBCKenya (Facebook), and @iebckenya (Instagram).

<sup>336</sup> See the 2022 presidential results portal at IEBC ‘Home’ <https://www.iebc.or.ke/> (accessed 8 November 2023). As of July 2023, the link to the portal (<https://forms.iebc.or.ke/>) is not working. The link to the 2017 results portal is no longer available.

<sup>337</sup> KNCHR (n 335) 155.

<sup>338</sup> *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR <http://kenyalaw.org/caselaw/cases/view/140716/> (accessed 8 November 2023).

for gross illegalities and irregularities, thereby supporting the democracy project and accountability pursuits.

In 2022, the results portal for the presidential results was praised for enhancing transparency.<sup>339</sup> Following the conclusion of voting, media houses undertook independent tallies of the results from the portal, keeping Kenyans updated on the progress, given the IEBC did not provide real-time updates on the collation of the results. The absence of a coordinated approach and methodology among the media houses and dissimilar resource capacities led to differing computations that confused the public and raised perceptions of media bias.<sup>340</sup> The mainstream media houses became a trending topic, with some Kenyans joking that if your candidate was not winning, you just had to change the channel. Curiously, rather than streamline results reporting, the mainstream traditional media chose to halt the collation altogether, plunging Kenyans into an information vacuum that enabled the spread of false and misleading information and rumourmongering. Paid social media influencers allied with politicians from the leading coalitions revelled in this information gap and posted alternate claims of victory, causing further confusion on the outcome of the vote.<sup>341</sup> This fed into electoral information disorder that already persisted in the 2017 and 2022 information ecosystem that influenced the quality of information in the public sphere, impacted public opinion shaping and discourse and may have interfered with informed decision-making in the voting process.

### **3.4.3 A polluted information ecosystem: Information disorder, hate speech, and propaganda**

Information disorder poses an insidious threat to election information integrity in Kenya. Wardle and Derakhshan breakdown information disorder into three dimensions: misinformation, disinformation and mal-information.<sup>342</sup> Misinformation is false information shared without the

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<sup>339</sup> EU EOM (n 335) 39-40.

<sup>340</sup> P Lang'at 'Explainer: Why media are displaying different tallies of presidential election results' *Daily Nation* 10 August 2022 <https://nation.africa/kenya/news/politics/explainer-why-media-are-displaying-different-tallies-of-presidential-election-results-3910300> (accessed 8 November 2023).

<sup>341</sup> ADDO 'How hate speech trolls targeted Kenya's 2022 elections' <https://disinfo.africa/early-detection-and-countering-hate-speech-during-the-2022-kenyan-elections-e0f183b7bdd1> (accessed 8 November 2023).

<sup>342</sup> C Wardle & H Derakhshan 'Information disorder: Toward an interdisciplinary framework for research and policymaking' (2017) 5 <https://rm.coe.int/information-disorder-toward-an-interdisciplinary-framework-for-research/168076277c> (accessed 8 November 2023).

intention to cause harm or the knowledge that it is false; disinformation is false information created and shared with the intention to cause harm; and mal-information is true information but shared with the intention to cause harm.

The risk of manipulated consent compromising the development of an informed electorate is heightened when both state and non-state actors act as purveyors of misinformation, disinformation and propaganda both offline and online. This has been witnessed in increasing intensity in recent successive election cycles with the growth of the digital public sphere and more politicians engaging in online campaigns.<sup>343</sup> While not to the extent of traditional media, the Kenyan online space is vulnerable to state interference. Since 2013, the Kenyan government has increased its spending on bots and paid influencers, often coordinated through the Presidential Strategic Communication Unit (PSCU) to influence and control online public debate and opinion shaping.<sup>344</sup> It takes the intervention of professional journalists, peripheral journalists, keen and active citizens, civil society, and other electoral stakeholders to identify and counter online mis/disinformation and propaganda to balance public discourse and pursue a discursive agenda for the common good. Government-sponsored mis/disinformation and propaganda are an ever-growing threat to meaningful public debate and the development of an informed electorate.

Foreign data analytics companies have also been complicit in advancing political interests by compromising the quality of information in the ecosystem during elections. In 2017, both top contending presidential candidates, Uhuru Kenyatta and Raila Odinga, employed foreign data analytics companies to manage their campaigns. Aristotle, an American data firm was retained by Raila Odinga's National Super Alliance (NASA) and the infamous United Kingdom (UK) based Cambridge Analytica (CA), worked for Uhuru Kenyatta's Jubilee Party, a company that they had also employed in 2013.<sup>345</sup> CA fronted itself as a unique data analytics

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<sup>343</sup> O Madung 'Opaque and Overstretched, Part II: How platforms failed to curb misinformation during the Kenyan 2022 election' <https://foundation.mozilla.org/en/campaigns/opaque-and-overstretched-part-ii/#case-study-labeling-failures> (accessed 8 November 2023). Also see B Imende 'Uhuru, Raila teams take campaign wars online' *The Star* 6 June 2017 <https://www.the-star.co.ke/news/2017-06-06-uhuru-raila-teams-take-campaign-wars-online/> (accessed 8 November 2023).

<sup>344</sup> Nyabola (n 147) 106.

<sup>345</sup> Imende (n 343).

company that developed data-driven campaigns using psychometric profiling.<sup>346</sup> Much of the details behind their operations in elections were revealed following an expose by the UK's Channel 4 News. In one of the covertly recorded clips, Mark Turnbull, the managing director of the political division of CA, brags about their involvement in Jubilee Party's campaign and basically claims credit for the eventual success of the party.<sup>347</sup> Whether this was hyperbole or not, CA banked USD 6 million for its work.<sup>348</sup> Jubilee Party countered these allegations, defining the role of the company as 'just branding'.<sup>349</sup> On the other hand, NASA is said to have paid Aristotle International Inc. USD 470 000.<sup>350</sup> An interesting perspective emerges on the high cost of election campaigning in Kenya in the digital age to influence voter opinion formation and decision-making as a barrier to equal and meaningful participation in the public sphere.

CA claimed that the campaign strategy for Uhuru Kenyatta was created after interviewing over 47 000 people to assess the needs, fears, trust levels, voting behaviours and political consumption of information by Kenyan voters. CA allegedly used this data for targeted campaigns aimed at influencing emotions instead of using facts to win the election.<sup>351</sup> Research has long shown that many successful political campaigns have been won on emotions.<sup>352</sup> Marcus and Mackuen, posit an interesting theory on the relationship between emotions and public participation, stating:<sup>353</sup>

...the democratic process may not be undermined by emotionality as is generally presupposed. Instead, we believe that people use emotions as tools for efficient information processing and thus enhance their abilities to engage in meaningful political deliberation.

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<sup>346</sup> A Hern 'Cambridge Analytica: How did it turn clicks into votes?' *The Guardian* 6 May 2018 <https://www.theguardian.com/news/2018/may/06/cambridge-analytica-how-turn-clicks-into-votes-christopher-wylie> (accessed 8 November 2023).

<sup>347</sup> LA Dahir "'We'd stage the whole thing': Cambridge Analytica was filmed boasting of its role in Kenya's polls' *Quartz* 20 March 2018 <https://qz.com/africa/1233084/channel-4-news-films-cambridge-analytica-execs-saying-they-staged-kenya-uhuru-kenyatta-elections/> (accessed 8 November 2023).

<sup>348</sup> Privacy International 'Voter profiling in the 2017 Kenyan election' <https://privacyinternational.org/blog/845/voter-profiling-2017-kenyan-election> (accessed 8 November 2023).

<sup>349</sup> BBC 'Cambridge Analytica: The data firm's global influence' 22 March 2018 <https://www.bbc.com/news/world-43476762> (accessed 8 November 2023).

<sup>350</sup> The Star Team (n 317).

<sup>351</sup> Nyabola (n 147) 60-61.

<sup>352</sup> DO Sears (ed) *Political cognition* (1986) 279-294 & GE Marcus 'Emotions in politics' (2000) 3 *Annual Reviews Political Science* 221-250.

<sup>353</sup> GE Marcus & MB Mackuen 'Anxiety, enthusiasm, and the vote: The emotional underpinnings of learning and involvement during presidential campaigns' (1993) 87(3) *The American Political Science Review* 672.



Over the years, duplicitous strategies have evolved to tap into the affective foundations of public decision-making to influence voter choice. The online space has increasingly become a lucrative trove of data on the likes, dislikes, emotions, behaviours and personality traits of users for politicians and political strategists seeking to deploy targeted political messages to different segments of the electorate.<sup>354</sup> Social media algorithms use these personalised digital profiles to determine what information to amplify on news feeds.<sup>355</sup> Through posts, political ads, and trending topics, politicians have learned to exploit the digital space to influence public emotion, opinion, and decision-making in the public sphere.

What emotion is elicited, be it anger, fear, anxiety, or enthusiasm, is key. Anxious or fearful voters tend to be more critical, while angry voters may be more instinctual.<sup>356</sup> Anger is a potent keg when mobilising masses and inspires information seeking albeit content that reinforces existing biases.<sup>357</sup> Angry voters are seen to engage actively in online debates, although they are often partisan and confrontational against opposing views, which impacts the quality of information and debate in the online public sphere and increases polarisation.<sup>358</sup> Anger has been seen to increase vulnerability to false and misleading information that reinforces existing biases and enhances the proclivity to reject contradictory information.<sup>359</sup> Contrarily, anxiety often propels citizens to more consciously assess candidates and their policy positions, arguably, prototype citizens in the public sphere.<sup>360</sup> While enthusiasm may enhance citizen participation,<sup>361</sup> this may be within their innate political inclinations.<sup>362</sup> Therefore, anger, enthusiasm and anxiety encourage citizen participation; however, the begotten voter may be instinctual and partisan,

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<sup>354</sup> D Ingram 'Factbox: Who is Cambridge Analytica and what did it do?' *Reuters* 20 March 2018 <https://www.reuters.com/article/us-facebook-cambridge-analytica-factbox-idUSKBNIGW07F> (accessed 8 November 2023).

<sup>355</sup> Hern (n 346).

<sup>356</sup> JM Ladd & GS Lenz 'Reassessing the role of anxiety in vote choice' 29 (2) (2008) *Political Psychology* 275-276 & N Valentino & others 'Election night's alright for fighting: The role of emotions in political participation' (2011) 73 *The Journal of Politics* 168.

<sup>357</sup> P Iyer 'Emotions and vote choice: Perspectives from the US and India' (March 2021) 447 *Issue Brief* 9; Valentino & others (n 356) 168 & P Vasilopoulos & others 'Fear, anger and voting for the far right: Evidence from the November 13, 2015 Paris terror attacks' (2019) 40 *Political Psychology* 692.

<sup>358</sup> A Hasell & BE Weeks 'Partisan provocation: The role of partisan news use and emotional responses in political information sharing in social media' (2016) 42 *Human Communication Research* 641-661 & D Wollebæk, R Karlsen & B Enjolras 'Anger, fear, and echo chambers: The emotional basis for online behavior' (2019) *Social Media + Society* 9.

<sup>359</sup> BE Weeks 'Emotions, partisanship, and misperceptions: How anger and anxiety moderate the effect of partisan bias on susceptibility to political misinformation' (2015) 65 *Journal of Communication* 699-719.

<sup>360</sup> Marcus & Mackuen (n 353) 67 & 680.

<sup>361</sup> As above.

<sup>362</sup> Ladd & Lenz (n 356) 275-276 & Marcus & Mackuen (n 353) 681.

loyal, or rational and critical, respectively. Social, political or economic context is key in nuancing positive and negative valence and voter opinion shaping and decision-making.<sup>363</sup> Take the 2013 electoral period in Kenya, for instance, the public was generally fearful of repeat electoral violence, and this influenced information and communication habits. To some extent, citizen participation was boosted in the wake of media censorship and self-censorship as public discourse ramped up on social media platforms. However, whether the majority of voters critically and rationally examined the candidate choice beyond innate ethnic and regional leanings that have long plagued voter decision-making is debatable. Research, however, shows evidence of issue-based voting, especially on socio-economic well-being, superseding ethnic voting in some regions.<sup>364</sup>

Online political ads increasingly exploit the fears and aspirations of Kenyans to influence voter decision-making. In 2017, a 1-minute 28-second propaganda video titled ‘The Real Raila’ that was amplified by Google AdWords and linked with many election-related search words went viral.<sup>365</sup> The sensational YouTube video that has more than 144 000 views as of November 2023 was widely shared in other popular social media platforms. It exploited fears of terrorism, ethnic violence and poverty of Kenyans to paint an apocalyptic picture in the event of Raila Odinga ascending to power. The visceral effect of audio-visual stimulus on emotions and decision-making cannot be ignored and was capitalised in this production.<sup>366</sup> The propaganda video was accredited to Harris Media LLC, a right-wing American communications and media agency retained by President Uhuru as part of his campaign strategy.<sup>367</sup> Contrastingly, there was a ‘Uhuru for us’ video advancing a positive valence that touted the achievements of the president.<sup>368</sup>

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<sup>363</sup> Marcus & Mackuen (n 353) 681

<sup>364</sup> FO Wanyama and others ‘Ethnicity and/or issues? The 2013 general elections in Western Kenya’ (2014) 13 *Journal of African Elections* 192-193. Also see A Oloo ‘The triumph of ethnic identity over ideology in the 2013 general election in Kenya’ in K Njogu & PW Wekesa (eds) *Kenya's 2013 general election: Stakes, practices and outcome* (2015) 48-49.

<sup>365</sup> The Real Raila ‘Kenya in 2020 if Raila Odinga is elected President’ 10 July 2017 [https://www.youtube.com/watch?v=o45NlqZDXw&t=4s&ab\\_channel=TheRealRaila](https://www.youtube.com/watch?v=o45NlqZDXw&t=4s&ab_channel=TheRealRaila) (accessed 8 November 2023).

<sup>366</sup> J Renshon, JJ Lee & D Tingley ‘Physiological arousal and political beliefs’ (2015) 36(5) *Political Psychology* 569.

<sup>367</sup> Privacy International ‘Texas media company hired by Trump created Kenyan President's viral 'anonymous' attack campaign against rival, new investigation reveals’ <https://privacyinternational.org/long-read/954/texas-media-company-hired-trump-created-kenyan-presidents-viral-anonymous-attack> (accessed 8 November 2023).

<sup>368</sup> The YouTube video and the website <http://www.uhuruforus.com/> are no longer accessible.

In light of the revelations of CA's involvement in illegal data mining of Facebook user information of about 50 million users that was exploited to influence voter decisions, there was a nagging concern as to the extent their data analytics strategies manipulated voter behaviour.<sup>369</sup> Although the data was obtained in violation of Facebook's policies, it is unclear whether CA kept or deleted the data they amassed.<sup>370</sup> The workings of CA in Kenya are largely shrouded in mystery, but allegations abound about their hand in spreading disinformation during the election period. Speculation on whether there was misuse of personal data or microtargeting of Kenyans was also largely unascertained.<sup>371</sup> Murkier is the data protection and privacy implications of CA activities in Kenya, given that they occurred before Kenya passed its data protection law. The information on what data was collected and how it was stored and used remains unanswered.<sup>372</sup> In 2017 and 2022, Kenyans reported receiving unsolicited and targeted political messages on WhatsApp requesting votes that made reference to personal registration details such as constituency and polling station.<sup>373</sup> While it was not established whether the IEBC or mobile service providers released such personal information, the actions violated the political messaging guidelines.<sup>374</sup>

While the exact impact of the involvement of the foreign companies in crafting campaign strategies of both presidential candidates cannot be or has not been definitively measured, there was interference with the information ecosystem that may have compromised the development of an informed electorate, distorted public discourse, engendered voter apathy, and impaired trust in institutions. That the end game of the foreign companies was purely financial raises implications of what Nyabola calls digital colonialism.<sup>375</sup>

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<sup>369</sup> Dahir (n 347).

<sup>370</sup> Ingram (n 354).

<sup>371</sup> Privacy International 'Further questions on Cambridge Analytica's involvement in the 2017 Kenyan elections and Privacy International's investigations' <https://privacyinternational.org/long-read/1708/further-questions-cambridge-analyticas-involvement-2017-kenyan-elections-and-privacy> (accessed 8 November 2023)

<sup>372</sup> As above.

<sup>373</sup> R Muthuri, F Monyango & W Karanja 'Biometric technology, elections, and privacy: Investigating privacy implications of biometric voter registration in Kenya's 2017 election process' (2018) <https://cipit.strathmore.edu/biometric-technology-elections-and-privacy-investigating-privacy-implications-of-biometric-voter-registration-in-kenyas-2017-election-process/> (accessed 8 November 2023).

<sup>374</sup> Guidelines on Prevention of Dissemination of Undesirable Bulk and Premium Rate Political Messages and Political Social Media Content via Electronic Communications Networks, July 2017 (accessed 8 November 2023).

<sup>375</sup> Nyabola (n 147) 163 & 200.

Supporters of political candidates have also been seen to congregate under thematic social media groups such as The Kalenjin Forum, Raila Odinga for President, and the Marsabit County We All Want, whose discourse is often marred with hate speech and false and misleading information.<sup>376</sup> While such subaltern counter-publics help minority groups to congregate in a shared space outside the wider public sphere to discuss and strategize on shared interests, they can contradict democratic and egalitarian principles.<sup>377</sup> The increased adoption of ‘paid-for-influence’ strategies is also manipulative. More and more, politicians retain teams of online influencers who draw numerous supporters to push political content. This is often coordinated through WhatsApp groups.<sup>378</sup> Paid influencers or ‘keyboard warriors’ operate through dummy accounts designed to push topics that may be amplified through social media algorithms such as Twitter’s trending algorithm. Often, the material is propagandistic, misinformation, disinformation, and hate speech, which violates the policies of the social media platforms they are peddled in, with little accountability.<sup>379</sup> The politics of poverty are also in play, with some influencers working for opposing politicians who want to tap into their follower base and channel campaign messages.<sup>380</sup> The influencer-politician collaborations are often money-driven and not grounded on shared ideologies.<sup>381</sup> This poses an inimical threat to meaningful public debate and informed decision-making during elections. Divisive and deceiving content maligning political opponents and discrediting the EMB and its officials, false election results, manipulated pictures and videos, and spurious narratives packaged as trending public topics depict the information pollution climate of the recent elections.<sup>382</sup> Hacking candidates’ websites and social media accounts to impersonate them was also reported. The electoral information milieu resultantly threatened the integrity of the elections.

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<sup>376</sup> T Jebet ‘NCIC says Facebook leads in hate speech, inflammatory content’ *Capital FM* 8 April 2022 <https://www.capitalfm.co.ke/news/2022/04/ncic-says-facebook-leaders-in-hate-speech-inflammatory-remarks/> (accessed 8 November 2023).

<sup>377</sup> Fraser (n 34) 67.

<sup>378</sup> O Madung ‘Inside the shadowy world of disinformation for hire in Kenya’ (2021) [https://assets.mofoprod.net/network/documents/Report Inside the shadowy world of disinformation for hire in Kenya 5. hcc.pdf](https://assets.mofoprod.net/network/documents/Report%20Inside%20the%20shadowy%20world%20of%20disinformation%20for%20hire%20in%20Kenya%205.%20hcc.pdf) (accessed 8 November 2023).

<sup>379</sup> LA Dahir ‘Facebook has joined the battle to combat fake news in Kenya’ *Quartz* 2 August 2017 <https://qz.com/africa/1044573/facebook-and-whatsapp-introduce-fake-news-tool-ahead-of-kenya-elections/> (accessed 8 November 2023) & Madung (n 343).

<sup>380</sup> Madung (n 378).

<sup>381</sup> J Goodman ‘Kenya election: The influencers paid to push hashtags’ *BBC News* 31 July 2022 [https://www.bbc.com/news/world-africa-62077651?utm\\_campaign=fellows&utm\\_source=mozilla&utm\\_medium=social&utm\\_content=1659628747](https://www.bbc.com/news/world-africa-62077651?utm_campaign=fellows&utm_source=mozilla&utm_medium=social&utm_content=1659628747) (accessed 8 November 2023).

<sup>382</sup> ADDO (n 341).

The threat of information pollution on the quality of information and discourse in the Kenyan online public sphere was more prevalent on Facebook, which draws the greatest number of social media users in Kenya at approximately 35%, followed by YouTube at 29% then Twitter at 17%.<sup>383</sup> Content sharing within the popular WhatsApp is also susceptible to pollution. However, it is difficult to monitor the app, given the end-to-end encryption capabilities. TikTok was also a popular platform for election-related false news and hate speech during the 2022 elections.<sup>384</sup>

It would have been foolhardy for other electoral stakeholders to ignore the sway effect of influencers as opinion shapers on critical issues of public interest. Civil society initiatives that leveraged this influencer base and formed collaborations to counter information disorder and hate speech were a vital countermanding force. Initiatives such as AIfluence<sup>385</sup> and organisations such as Inuka Kenya Sisi worked with trusted influencers with shared values to lead campaigns to counter false and misleading information, channel credible electoral information, and encourage meaningful public debate and participation. Maintaining Peace through Early Warning, Monitoring and Analysis (MAPEMA) consortium partners such as Shujaaz worked with the youth to enhance meaningful public debate and participation.<sup>386</sup> Social media companies also suspended some influencer accounts that spread deceiving content in violation of their platform policies.<sup>387</sup> Unfortunately, the effectiveness of content moderation is encumbered by poor policy implementation, resourcing and attention in Africa and Kenya as compared to the West, as discussed further in chapter five. Apropos of Kenya's historical context, peace

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<sup>383</sup> AL Dahir 'WhatsApp and Facebook are driving Kenya's fake news cycle' *Quartz Africa* 24 July 2017 <https://qz.com/africa/1033181/whatsapp-and-facebook-are-driving-kenyas-fake-news-cycle-ahead-of-august-elections/> (accessed 8 November 2023); Jebet (n 379) & SCN 'Polarising content and hate speech ahead of Kenya's 2022 elections: Challenges and ways forward' (2021) 5. On platform user statistics see Statcounter 'Social media stats Kenya' <https://gs.statcounter.com/social-media-stats/all/kenya/#monthly-202205-202208-bar> (accessed 8 November 2023). YouTube has 14.07% and Instagram 6.17%. Datareportal (n 329).

<sup>384</sup> O Madung 'From dance app to political mercenary: How disinformation on TikTok gaslights political tensions in Kenya' (2022) <https://foundation.mozilla.org/en/campaigns/kenya-tiktok/> (accessed 8 November 2023).

<sup>385</sup> AIfluence 'About' <https://www.ai-fluence.com/#!about> (accessed 8 November 2023).

<sup>386</sup> Shujaaz 'Youth pulse|Young people and the Kenyan general election: Hopes, fears and new perspectives' <https://www.shujaazinc.com/publications/kenyan-youth-pulse-and-perspective-on-elections/> (accessed 8 November 2023).

<sup>387</sup> Madung (n 343).

messaging and peacebuilding were integrated into most local initiatives to counter information disorder, propaganda, and hate speech.<sup>388</sup>

Electorate stakeholders, including the IEBC, media, and CSOs, actively countered false news in the online public sphere. Proactive disclosure practices by the IEBC, often through media briefings on traditional media and online platforms such as their website and social media handles, helped counteract some false narratives. However, there is still room for increased transparency within the IEBC, given the public trust deficit suffered by the EMB.<sup>389</sup> As explored above, the mainstream traditional media, to some extent, played their institutional role in public education. Also underscored are projects and tools created to counter information disorder, including fact-checking platforms such as Africheck,<sup>390</sup> PesaCheck,<sup>391</sup> and iverify.<sup>392</sup> Projects such as MAPEMA<sup>393</sup> that proactively disclosed information and created spaces for credible information sharing and debate, and campaigns such as #uchaguzibilauwongo (Swahili for elections without lies) are some notable initiatives. The technology-reliant nature of these measures excludes unconnected populations from benefitting from them. Mis/disinformation, propaganda and hate speech feed into informal networks and are shared in offline settings, such as rallies, *barazas* (community meetings), salons and barbershops, religious gatherings, and vice versa. Proactively disclosing accurate, relevant and timely information through popular media sources such as broadcast and print media is vital. To avoid information vacuums, both the EMB and CSOs need to consciously integrate combating information disorder into civic and voter education curriculums.

Ultimately, the Supreme Court of Kenya declared the 2022 elections free and fair after Raila Odinga (the second runner-up in the presidential race) challenged the presidential election

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<sup>388</sup> F Ogenga 'A local turn: Influencing online peacebuilding through evidence-based interventions in Kenya's 2022 elections' *Africa Up Close* 26 October 2022 <https://africaupclose.wilsoncenter.org/a-local-turn-influencing-online-peacebuilding-through-evidence-based-interventions-in-kenyas-2022-elections/> (accessed 8 November 2023).

<sup>389</sup> Afrobarometer 'Summary of results Afrobarometer round 8 survey in Kenya, 2019' (2020) [https://afrobarometer.org/sites/default/files/publications/Summary%20of%20results/afrobarometer\\_sor\\_ken\\_r8\\_en\\_2019.pdf](https://afrobarometer.org/sites/default/files/publications/Summary%20of%20results/afrobarometer_sor_ken_r8_en_2019.pdf) (accessed 8 November 2023).

<sup>390</sup> Africheck 'Kenya' [https://africheck.org/search?f%5B0%5D=country\\_search%3AKE](https://africheck.org/search?f%5B0%5D=country_search%3AKE) (accessed 8 November 2023).

<sup>391</sup> Pesacheck 'Kenya' <https://pesacheck.org/search?q=kenya> (accessed 8 November 2023).

<sup>392</sup> iVerify 'Home' <https://www.iverify.or.ke/> (accessed 8 November 2023).

<sup>393</sup> ADDO (n 341) & Shujaaz (n 386).

results.<sup>394</sup> The prevailing Kenyan public sphere, mediated by the alchemy of offline and online media channels of information—especially traditional and social media—is in a perpetual state of evolution. This chapter has shown evidence of a politically engaged citizenry in the public sphere, which also manifests in the above-average voter turnout in elections: 68% in 1992,<sup>395</sup> 65.4% in 1997,<sup>396</sup> 57.2% in 2002,<sup>397</sup> 69% in 2007<sup>398</sup>, 85.9% in 2013,<sup>399</sup> 78% in 2017,<sup>400</sup> and 64.77% in 2022<sup>401</sup>. Although voter turnout has fluctuated over the years, with the highest turnout registered in the 2013 elections after the promulgation of the 2010 Constitution, there is an encouraging depiction of citizen participation in elections. Given the central role of media in facilitating political participation, electoral stakeholders and the general public are obligated to amplify the positive qualities of the blended media space that promote meaningful political participation and public accountability for improved elections and guard against elements that compromise it.

#### 4 Conclusion

This chapter canvasses media evolution in Kenya from pre-independence to 2022, with elections as the axis of the assessment. Notwithstanding characterisations of robustness, vibrancy and independence, the performance of normative functions by mainstream traditional media in Kenya, particularly during elections, has been constrained by diverse factors, including politics,

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<sup>394</sup> *Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated))* [2022] KESC 56 (KLR) (Election Petitions) (26 September 2022) (Judgment) <http://kenyalaw.org/caselaw/cases/view/241353/> (accessed 8 November 2023)

<sup>395</sup> P Wanyande ‘Electoral politics and election outcomes in Kenya’ (2006) 31 *Africa Development* 67-68.

<sup>396</sup> IPU ‘Kenya parliamentary chamber: Bunge - National Assembly’ [http://archive.ipu.org/parlinee/reports/arc/2167\\_97.htm](http://archive.ipu.org/parlinee/reports/arc/2167_97.htm) (accessed 8 November 2023).

<sup>397</sup> EU EOM ‘Final report Kenya general elections 27 December 2002’ (2003) 31 <https://aceproject.org/ero-en/regions/africa/KE/Kenya%20-%20EU%20rep02.pdf> (accessed 8 November 2023).

<sup>398</sup> IRI ‘Kenya presidential, parliamentary and local elections December 27, 2007 election observation mission final report’ (2008) 7 [https://www.iri.org/wp-content/uploads/2021/12/kenyas\\_2007\\_presidential\\_parliamentary\\_and\\_local\\_elections-1.pdf](https://www.iri.org/wp-content/uploads/2021/12/kenyas_2007_presidential_parliamentary_and_local_elections-1.pdf) (accessed 8 November 2023).

<sup>399</sup> ELOG ‘The historic vote: Elections 2013’ 64 [https://elog.or.ke/wp-content/uploads/2022/06/THE\\_ELOG\\_REPORT\\_2013\\_final.pdf](https://elog.or.ke/wp-content/uploads/2022/06/THE_ELOG_REPORT_2013_final.pdf) (accessed 8 November 2023).

<sup>400</sup> IEBC ‘Data report of 2017 elections’ 3 <https://www.iebc.or.ke/uploads/resources/siEABKREDq.pdf> (accessed 8 November 2023).

<sup>401</sup> IEBC ‘Post election evaluation report for the 9th August, 2022 general election’ xvii <https://www.iebc.or.ke/uploads/resources/pabjKTV6Xa.pdf> (accessed 8 November 2023).

market economy, media ownership, peace and conflict, social pressures, some restrictive media laws and practices, and the growth of online media.

In retrospect, the struggle by mainstream traditional media to effectively play its institutional functions of watchdog, public educator, debate forum and campaign platform in the wider public sphere, particularly by gatekeeping information of public interest, catapulted the online space, especially social media, as a subaltern counter-public sphere. Notably, state censorship of the media and self-censorship by the media in the aftermath of the devastating 2007 election violence spurred public adoption and migration to online platforms as alternative spaces for public discourse and participation. The online public sphere has created an alternative arena for ‘mediated and dialogic’ conversations between citizens, as well as citizens, their leaders and other stakeholders. This has revolutionised modes of citizen participation. Online spaces benefit from homegrown content that is conceived, articulated, dispersed and curated for and by a national audience. Social media, in particular, has disrupted the media space and emerged as the second most popular source of news for Kenyans after television.

This chapter finds that passive and unidirectional audience engagement between mainstream traditional media and the public is a disappearing relic. The cross-pollination of information between legacy and online media and the increased online presence of mainstream traditional media eschews a strict separation of traditional media from online media. In fact, as an institution that still boosts considerable public trust, mainstream traditional media and journalists continue to shape public discourse and opinions online. Contrastingly to the period predating the creation of the Kenyan networked sphere, the space is more open to a wider audience, with ordinary citizens able to shape public discourse and opinion. However, it cannot be discounted that broadcast media (radio and television) still holds considerable reach and sway in mediating the public sphere and influencing public education, discourse, and participation, especially for unconnected populations often situated in rural areas who represent a critical mass of the electorate. The protection of their freedom is imperative.

Realistically, the chimerical liberal public sphere conceived by Jurgen Habermas that was a space for critical and rational discourse, open and accessible to all, separate from the state, and conditionalized to shape public opinion towards a consensus for the common good is holistically unrealised in Kenya. The political economy of the media restrained this ideal before the



development of the Kenyan online media space. Consequently, while the networked public sphere has increased opportunities for public engagement away from the gatekeeping chokeholds of mainstream traditional media, information disorder, hate speech, and propaganda, heightened during election periods, distort and constrain meaningful public debate and engagement in this space. Barriers to entry, such as data costs, poor infrastructure, and illiteracy, limit the participation of certain population segments. The separation from the state and other powerful forces is encumbered, given that the dominant classes have weaved into this subaltern public to influence public opinion shaping and electorate decisions. Politicians and political factotums, such as online influencers who present as equal participants in the public space, often purvey false and misleading information and propaganda that threatens meaningful public discourse and may result in manipulated consent. Proactive disclosure practices by electoral stakeholders are critical to combat this information warfare and protect electoral integrity and meaningful participation.

The public sphere, characterised by rational-critical discourse, or better yet, meaningful debate, towards a common good and essential for holding the government accountable, remains inchoate in the Kenyan context. Rationality as a concept is hamstrung by the subjectivity innate in Kenyan society, especially one where a history of ethnic and regional exclusion has shaped the socio-economic and political culture and influenced voter decision-making. The emotional link to voter decisions should not be ignored, given how politicians exploit valence to influence the electorate's decisions through both traditional and social media. Even with its imperfections, the coexistence of offline and online media as creators, shapers, disseminators and moderators of public interest information has relatively enhanced the space for meaningful public participation towards promoting electoral accountability and integrity. Both media are critical pieces in achieving the international law and constitutional standard of free and fair elections. While Kenya has a progressive Constitution, the presence of some regressive media law provisions (as explored further in chapter four) restrict the realisation of fundamental human rights. The vigilance of electoral stakeholders, including media, CSOs and the wider public, is key to confronting challenges to media rights online and offline to promote meaningful political participation of the electorate.

## **CHAPTER 3: THE INTERNATIONAL LEGAL FRAMEWORK FOR THE PROTECTION OF MEDIA FREEDOM AND POLITICAL PARTICIPATION IN THE DIGITAL AGE**

### **1 Introduction**

This chapter examines the international law framework for the protection of freedom of expression and media freedom (media rights), and the right to political participation. It further explores how the international law protection of these rights has adapted to the developments in the digital age. In doing so, it aims to determine whether the international law framework effectively protects media rights to foster a public sphere that enhances meaningful public participation in democratic processes such as elections.

In discussing the international law regulatory framework, this chapter is divided into five parts. Part one is this introduction. Part two discusses the protection of media rights and political participation under the United Nations (UN) human rights frameworks, exploring the nuances of conceptualisation, the limitations, and the relationship between these rights. Part three explores the same under the African human rights framework. Under both sections, the chapter examines whether the existing regulatory framework is sufficient to address the opportunities and challenges presented by the digital age to the respect, protection and fulfilment of media rights and political participation. Part four discusses the role of African civil society in norm development and enforcement at the international level. The preceding assessment lays the foundation for discussing the feasibility of international law as a key component of the proposed human rights-based approach to the protection of media freedom as an enabler of meaningful political participation and free and fair elections in the digital age. This is further explored in part five, which examines the impact of international law in nurturing the public sphere. Part five is the conclusion.

## 2 Protection of media rights under the United Nations human rights system

### 2.1 Freedom of expression and media freedom

It is fitting to commence this assessment from the normative provenance of the international human rights framework: the 1948 Universal Declaration of Human Rights (Universal Declaration).<sup>1</sup> Together with the International Covenant on Civil and Political Rights (ICCPR),<sup>2</sup> the Universal Declaration is the foundational document that codifies international human rights and is part of the International Bill of Rights.<sup>3</sup> 173 countries globally have ratified the ICCPR, including Kenya.<sup>4</sup> Most of the provisions of the Universal Declaration have achieved customary law status and have been codified in binding instruments such as the ICCPR.<sup>5</sup> Freedom of expression and media freedom are protected under article 19 of the Universal Declaration. It provides:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Similarly, article 19(1) and (2) of the ICCPR provide:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

These provisions in the Universal Declaration and the ICCPR can be broken down into four types of rights: the right to hold opinions, freedom of expression, media freedom and access to information. Further, the wording of article 19(1) and (2) allows for a discussion on whether this

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<sup>1</sup> Universal Declaration <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed 8 November 2023). Also see HJ Steiner 'Political participation as a human right' (1988) 1 *Harvard Human Rights Yearbook* 77-79; HJ Steiner & P Alston *International human rights in context: Law, politics, morals: Text and materials* (2000).

<sup>2</sup> ICCPR <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (accessed 8 November 2023).

<sup>3</sup> H Hannum 'The status of the Universal Declaration of Human Rights in national and international law' (1995-1996) 25 *Georgia Journal of International and Comparative Law* 289. The International Covenant on Economic, Social and Cultural Rights is the third component.

<sup>4</sup> OHCHR 'Status of ratification interactive dashboard' <https://indicators.ohchr.org/> (accessed 8 November 2023).

<sup>5</sup> UN 'The foundation of international human rights law' <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law#:~:text=The%20Universal%20Declaration%20of%20Human,binding%20international%20human%20rights%20treaties> (accessed 8 November 2023).

protection extends to the digital age. In interpreting these sections, the discussion below refers to General Comment 34.<sup>6</sup>

- Freedom of opinion

Freedom of opinion or thought is a non-derogable right also provided under article 18 of the ICCPR. It is closely linked with freedom of expression, given that expression is a manifestation of thoughts.<sup>7</sup> This expression can take different forms, including spoken speech, writings, sign language and non-verbal forms of communication such as images and art.<sup>8</sup>

- Freedom of expression and media freedom

Article 19(2) of the ICCPR provides for ‘the right to freedom of expression’, which includes ‘freedom to seek, receive and impart information and ideas’, through any other media. The wording of this section implies media is a vehicle for freedom of expression, illustrating the inseparability of these rights. This thesis focuses on the indivisibility of these rights and collectively refers to them as media rights. General Comment 34 further captures the link between freedom of expression and the media by providing:<sup>9</sup>

A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society.

States have a duty to not only respect human rights and freedoms in seminal human rights treaties but also protect these rights by, among other things, adopting the necessary laws and other measures to realise these rights.<sup>10</sup> In this regard, states must develop legislative and regulatory frameworks for realising freedom of expression and media freedom. In doing so, these frameworks should consider the similarities and uniqueness of print, broadcast, and digital media in providing an enabling environment for the media.<sup>11</sup> These considerations extend to licensing requirements and fees, which should be ‘reasonable and objective, clear, transparent, non-

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<sup>6</sup> Human Rights Committee, General Comment 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> (accessed 8 November 2023).

<sup>7</sup> General Comment 34 paras 9 & 10.

<sup>8</sup> General Comment 34 para 12.

<sup>9</sup> General Comment 34 para 1 & *Rafael Marques de Morais v Angola*, communication 1128/2002, Human Rights Committee, views, 29 March 2005 (*Marques de Morais v Angola*).

<sup>10</sup> Art 2(2) ICCPR & Art 1 African Charter.

<sup>11</sup> General Comment 34 para 39.

discriminatory and otherwise in compliance with the ICCPR'.<sup>12</sup> While accreditation of journalists is important, it should be restricted to providing special access to journalists, for example, to election centres.<sup>13</sup>

General Comment 34 calls on states to put in place measures to ensure the independence and plurality of media to promote access to diverse views and inclusive participation.<sup>14</sup> Media monopolies in public and private media hinder people's ability to sample information from various sources.<sup>15</sup> Further, states are required to examine their media funding strategies. There should be transparent and equitable distribution of subsidies, government advertisements and public interest news from the government so as to avoid giving public media an unfair advantage over private media.<sup>16</sup>

General Comment 34 warns that the punishment of journalists and other media for criticising the government is inimical to freedom of expression.<sup>17</sup> The General Comment also recognises the importance of freedom of expression and media freedom in ensuring accountability and transparency.<sup>18</sup> Accountability and transparency are crucial to promoting free and fair election processes.

- Freedom of expression and access to information

Freedom of expression includes the right to 'receive and impart information and ideas of all kinds'. In its ordinary sense, this element of freedom of expression portrays a right to use a medium that allows a person to access and share information. As discussed above, this can be through print, broadcast and online media, as well as other verbal and non-verbal means of receiving and sharing information.<sup>19</sup> The human rights community has further refined this right to include the right to access public interest information in the preserve of the state, public bodies or relevant private bodies who possess information of public interest.<sup>20</sup>

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<sup>12</sup> General Comment 34 para 39.

<sup>13</sup> General Comment 34 para 44 & 45.

<sup>14</sup> General Comment 34 paras 14 & 40.

<sup>15</sup> General Comment 34 para 40.

<sup>16</sup> General Comment 34 paras 40 & 41.

<sup>17</sup> General Comment 34 para 42.

<sup>18</sup> General Comment 34 para 3.

<sup>19</sup> General Comment 34 para 12.

<sup>20</sup> General Comment 34 para 18.

States are encouraged to proactively disclose public interest information without requiring a specific request.<sup>21</sup> Further, states should enact laws to facilitate access to public interest information that provides for ‘easy, prompt, effective and practical’ procedures with reasonable fees. A denial of a request for information should be well-reasoned, and the requester should be allowed avenues to appeal such refusal or failure to respond.<sup>22</sup> With the proliferation of digital technologies, public bodies and relevant private bodies have in their purview the ability to reinforce the realisation of access to information. Regular updates of public interest information on their websites and social media handles, especially during critical periods such as elections, realise the principle of proactive disclosure of information. In order to accommodate the unconnected populations, relevant actors should utilise diverse media formats, including traditional media.

Beyond the articulation of media rights under the Universal Declaration and ICCPR, the 1991 Windhoek Declaration,<sup>23</sup> penned by African journalists and adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO), is another notable instrument worthy of a special mention. It enunciates press freedom principles contextualising the unique challenges faced by newspaper journalists in Africa and aimed at reinforcing protections in light of their invaluable public service role. The seminar that birthed the Declaration also led to the recognition of 3 May as World Press Freedom Day, commemorated annually, allowing for global reflections on the evolving state of press freedom. 10 years later, stakeholders adopted the African Charter on Broadcasting 2001<sup>24</sup> as an offshoot of the Windhoek Declaration, focusing on the broadcasting sector. This Charter adds to existing regulations on media freedom in Africa, particularly the Windhoek Declaration that called for independent and pluralistic print media.<sup>25</sup> The Charter seeks to promote independence and pluralism in broadcast media in Africa.<sup>26</sup>

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<sup>21</sup> General Comment 34 para 19.

<sup>22</sup> General Comment 34 para 19.

<sup>23</sup>

Windhoek

Declaration

<https://www.europarl.europa.eu/document/activities/cont/201104/20110429ATT18422/20110429ATT18422EN.pdf> (accessed 8 November 2023).

<sup>24</sup> The African Charter on Broadcasting 2001 <http://archive.niza.nl/docs/200207191410309398.pdf> (accessed 8 November 2023).

<sup>25</sup> Preamble African Charter on Broadcasting.

<sup>26</sup> Preamble, part I (1), (2) & part II (2) African Charter on Broadcasting.

### 2.1.1 Limitations of media rights

While it is accepted that the umbrella right of freedom of expression is a fundamental human right and integral to the exercise of other rights, such as political participation, unrestricted exercise may very well defeat this purpose. Freedom of expression is not absolute and is subject to limitations as enunciated under international law. States are also allowed to derogate from part of their responsibilities under article 19 of the ICCPR in the event of a public emergency as long as the measures do not conflict with their other obligations under international law and are not discriminatory.<sup>27</sup> However, freedom of thought and opinion, a constituent of freedom of expression, is not subject to any restrictions, and states cannot derogate from this right in the event of an emergency.<sup>28</sup>

On the limitations of freedom of expression, international law enunciates a three-part test to guide states in drafting laws. Article 19(3) of the ICCPR provides that any restriction shall be provided by law and be necessary for the respect of the rights or reputations of others and the protection of national security, public order, public health or public morals. Article 20 of the ICCPR further provides that expression that amounts to propaganda for war and ‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’. Therefore, article 20 enunciates the basis for what is deemed as illegal or unlawful expression.<sup>29</sup> Severe examples of hate speech fall under this umbrella. The Rabat Plan of Action guides states on legal and policy interventions to implement article 20(2) of the ICCPR.<sup>30</sup> On the other hand, article 19(3) provides the blueprint for the permissible restriction of harmful expression. Defamatory statements, misinformation, disinformation and propaganda may have implications on the rights and reputations of others, national security, public order, health or morals and can be categorised as harmful expression.

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<sup>27</sup> Art 4 ICCPR.

<sup>28</sup> Human Rights Committee, General Comment 22 (48) (article 18), CCPR/C/21/Rev.1/Add.4 para 3 [https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CCPR\\_General\\_Comment\\_22\\_1993\\_en.pdf](https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CCPR_General_Comment_22_1993_en.pdf) (accessed 8 November 2023) & General Comment 34 (n 8) para 9.

<sup>29</sup> GPD ‘A rights-respecting model of online content regulation by platforms’ (May 2018) 12 <https://www.gp-digital.org/wp-content/uploads/2018/05/A-rights-respecting-model-of-online-content-regulation-by-platforms.pdf> (accessed 8 November 2023).

<sup>30</sup> The Rabat Plan of Action on ‘the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to hostility, discrimination or violence’ <https://www.istanbulprocess1618.info/rabat-plan-of-action/#:~:text=The%20Rabat%20Plan%20of%20Action%20endorses%20the%20Camden%20Principles%20on,eac h%20have%20to%20combat%20intolerance.> (accessed 8 November 2023).

The limitations on freedom of expression notwithstanding, states are called to ensure that restrictions to freedom of expression do not defeat the exercise of the right in itself.<sup>31</sup> General Comment 34 requires that:<sup>32</sup>

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.

Article 19(3) of the ICCPR establishes a three-part test that can guide states in determining whether a restriction on freedom of expression is valid or not:

- Provided by law

To meet the ‘provided by law’ standard, the restricting provision must be contained in legislation, as opposed to directives such as executive or ministerial orders.<sup>33</sup> The law must be precisely drafted to adequately guide a person on what form of expression is allowed or prohibited. Such a law should be publicly accessible. Some countries, including Kenya,<sup>34</sup> South Africa,<sup>35</sup> and Ghana,<sup>36</sup> have online databases with national laws, which is a positive indication of access to information. However, accessibility requires states to go a step further and facilitate the inclusion of unconnected and vulnerable populations, as well as provide civic and public education to ensure citizens are well-versed about their rights and obligations. The ICCPR also requires that a law limiting freedom of expression should be compatible with its provisions, objectives and aims, as well as non-discrimination principles.<sup>37</sup> Applicable sanctions should also align with the spirit of the ICCPR.<sup>38</sup>

It is concerning that many emerging laws in African countries purporting to regulate digital harms have fallen short of meeting the legality test. This was a key finding of LEXOTA (Laws on Expression Online: Tracker and Analysis), a tool that examines the impact of false news laws on freedom of expression in sub-Saharan Africa that the author of this thesis

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<sup>31</sup> General Comment 34 para 21.

<sup>32</sup> General Comment 34 para 35.

<sup>33</sup> General Comment 34 para 25.

<sup>34</sup> Kenya Law ‘Laws of Kenya’ <http://kenyalaw.org/kl/> (accessed 8 November 2023).

<sup>35</sup> LawLibrary ‘Legislation’ <https://lawlibrary.org.za/legislation/> (accessed 8 November 2023).

<sup>36</sup> GhaLII ‘Legislation’ <https://ghalii.org/legislation/> (accessed 8 November 2023).

<sup>37</sup> General Comment 34 paras 25 & 26.

<sup>38</sup> General Comment 34 para 26.



participated in developing.<sup>39</sup> The majority of the laws failed the legality test, given broad and ambiguous descriptions of offences related to online freedom of expression. The failure to clearly guide enforcement agencies' actions on what is regulated and what is not and restrain unfettered discretion in the exercise of their mandate is a further indictment of poor compliance with the legality requirement.<sup>40</sup> The ensuing consequence is the misuse of these laws by law enforcement agencies to curtail legitimate expression.<sup>41</sup>

- Serve a legitimate aim

The first legitimate aim that a state can rely on to justify a limitation on freedom of expression is protecting the rights or reputations of others. The rights alluded to in article 19 (3) of the ICCPR are the human rights and fundamental freedoms guaranteed under the ICCPR and international human rights law.<sup>42</sup> For example, in the context of elections, while states have a duty to facilitate freedom of expression for public debate, they may restrict expression that intimidates, threatens, coerces or harasses voters, thereby threatening their right to political participation.<sup>43</sup>

The second legitimate aim under the ICCPR is the protection of national security, public order, public health or morals.<sup>44</sup> States are urged to balance the achievement of this aim against ensuring access to public interest information.<sup>45</sup> Provisions on national security are often found in treason, sedition, official secrets or public order laws.<sup>46</sup> Unfortunately, some despotic regimes misuse these laws to target dissenting voices, including journalists and human rights defenders, when they exercise their watchdog function.<sup>47</sup> Such actions are incompatible with article 19 of the ICCPR and jeopardise media rights.<sup>48</sup> When done in the context of elections, it prevents the public from accessing public interest information necessary for shaping electoral discourse and their decisions as voters.

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<sup>39</sup> LEXOTA 'Compare laws and actions' <https://lexota.org/comparator/?type=laws> (accessed 8 November 2023).

<sup>40</sup> General Comment 34 para 25. Also see *Leonardus Johannes Maria de Groot v The Netherlands*, communication 578/1994, Human Rights Committee, views, 14 July 1995 <http://hrlibrary.umn.edu/undocs/html/dec578.htm> (accessed 8 November 2023).

<sup>41</sup> LEXOTA 'Compare laws and actions' <https://lexota.org/comparator/?type=laws> (accessed 8 November 2023).

<sup>42</sup> General Comment 34 para 8.

<sup>43</sup> General Comment 34 para 28. Also see *Leonid Svetik v Belarus*, communication 927/2000, Human Rights Committee, views, 8 July 2004 <http://hrlibrary.umn.edu/undocs/html/927-2000.html> (accessed 8 November 2023).

<sup>44</sup> General Comment 34 para 29

<sup>45</sup> General Comment 34 para 30.

<sup>46</sup> General Comment 34 para 30.

<sup>47</sup> As above.

<sup>48</sup> As above.

Before the COVID-19 pandemic, restricting freedom of expression to protect public health was notably discussed in some Western countries, such as the United States of America (USA), in the context of anti-vaccine proponents and their right to personal liberty.<sup>49</sup> The COVID-19 pandemic, however, forced broader discussion on public health justifications for the restriction of rights, including freedom of expression, and tested the observance of this international law-prescribed limitation. Some countries, including France, Germany, Malaysia, Russia, Singapore, South Africa, Lesotho, Botswana, and Mauritius, implemented regulations against health misinformation and disinformation in the wake of the pandemic.<sup>50</sup> COVID-19 sent planned election schedules on a tailspin, and in some instances, legitimate expression was curtailed in the name of public health.<sup>51</sup> This was particularly concerning in countries such as Tanzania that held elections in 2020 and where media and other critical voices were silenced under the pretext of managing COVID-related misinformation and disinformation.<sup>52</sup> States should ensure a careful balance so that in protecting public health, people are not denied crucial public interest information.

Lastly, expression can be restricted to protect public morals. International law requires that states should be guided by the universality of human rights and the principle of non-discrimination as opposed to the dictates of a single tradition.<sup>53</sup> This brief elaboration on public morality limitations leaves significant discretion to states to determine the dictates of public morality.<sup>54</sup> The majoritarian implications and the risks presented to minorities are undeniable. Case in point, the rights of sexual minorities come into sharp focus in the discussion of expression restrictions based on public morality. Many African countries have criminalised

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<sup>49</sup> M Mills & J Sivelä 'Should spreading anti-vaccine misinformation be criminalised?' (2021) 372 *BMJ* 1.

<sup>50</sup> As above. Also see LEXOTA (n 39).

<sup>51</sup> IDEA 'Global overview of COVID-19: Impact on elections' <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections> (accessed 8 November 2023) & MA Simiyu 'Digital solutions for African elections in the time of COVID-19' (2020) <https://africlaw.com/2020/04/22/digital-solutions-for-african-elections-in-the-time-of-covid-19/#more-1706> (accessed 8 November 2023).

<sup>52</sup> MISA Zimbabwe 'Tanzania resorts to fake news laws to shut down TV station' <https://zimbabwe.misa.org/2020/07/10/tanzania-resorts-to-fake-news-laws-to-shut-down-tv-station/> (accessed 8 November 2023).

<sup>53</sup> General Comment 34 para 30.

<sup>54</sup> N Febrian & others 'Is public morality able to restrict human rights?' *Proceedings of the 3rd International Conference on Globalization of Law and Local Wisdom (ICGLOW 2019)* (2020) <https://www.atlantispress.com/article/125920758.pdf> (accessed 8 November 2023).

homosexuality on public morality grounds.<sup>55</sup> For example, the punitive Ugandan Anti-Homosexuality Act of 2023 contains restrictions that go as far as prohibiting the promotion of homosexuality, thereby constraining education and advocacy for sexual minority rights.<sup>56</sup> The tough sanctions in the Act have contributed to whipping up public frenzy against sexual minorities in Uganda, severely restricting their ability to exercise their right to public participation generally as well as political participation, both online and offline.<sup>57</sup>

- Necessity and proportionality

The ICCPR also requires that a restriction to freedom of expression be necessary and proportional to achieve a stated legitimate aim. In analysing whether a restriction meets this standard, states should ensure that the restriction is not too broad, which links with the legality test.<sup>58</sup> Further, they should consider whether there is a less restrictive means of achieving the aim without restricting freedom of expression.

Notably, the UN human rights system places a high value on public debate on matters of public interest.<sup>59</sup> Public offices, by nature, attract opposition and criticism. Therefore, public officials are called to exercise more restraint when faced with such dissent or public debate that they deem insulting as opposed to finding avenues to punish such expression.<sup>60</sup> This tolerance is especially important in the context of elections to avoid curtailing electoral discourse.<sup>61</sup>

The legitimacy of the limitation of freedom of expression, especially involving a public figure, has been examined by the Human Rights Committee in the case of *Marques de Morais v Angola*,<sup>62</sup> where the applicant alleged a violation of his human rights, including freedom of

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<sup>55</sup> ILGA 'Legal frameworks. Criminalisation of consensual same-sex sexual acts' <https://database.ilga.org/criminalisation-consensual-same-sex-sexual-acts> (accessed 8 November 2023).

<sup>56</sup> See sec 11 of the Act on promotion of homosexuality (accessed 8 November 2023) & S Okiror 'Uganda's parliament passes mostly unchanged anti-LGBTQ bill' *The Guardian* 2 May 2023 <https://www.theguardian.com/world/2023/may/02/uganda-parliament-passes-anti-lgbtq-bill> (accessed 8 November 2023).

<sup>57</sup> A Budoo-Scholtz 'Uganda's president signs repressive anti-LGBT law' *HRW* 30 May 2023 <https://www.hrw.org/news/2023/05/30/ugandas-president-signs-repressive-anti-lgbt-law> (accessed 8 November 2023).

<sup>58</sup> General Comment 34 para 34.

<sup>59</sup> General Comment 34 para 34.

<sup>60</sup> General Comment 34 paras 38 & 47.

<sup>61</sup> General Comment 34 para 37.

<sup>62</sup> *Marques de Morais v Angola* (n 9).

expression.<sup>63</sup> These allegations emerged from the arrest, detention and conviction of the journalist after he published articles and participated in interviews criticising the President of Angola.<sup>64</sup> In finding a violation of article 19 of the ICCPR, the Committee stated:<sup>65</sup>

...Even if it were assumed that his arrest and detention, or the restrictions on his travel, had a basis in Angolan law, and that these measures, as well as his conviction, pursued a legitimate aim, such as protecting the President's rights and reputation or public order, it cannot be said that the restrictions were necessary to achieve one of these aims. The Committee observes that the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. Given the paramount importance, in a democratic society, of the right to freedom of expression and of a free and uncensored press or other media, the severity of the sanctions imposed on the author cannot be considered as a proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition ... In the circumstances, the Committee concludes that there has been a violation of article 19.

States are also obligated to establish reasonable punitive measures and penalties in the event of legitimate restrictions on expression. International law condemns the use of criminal sanctions as a punishment for cases such as defamation.<sup>66</sup> Increasingly, despotic governments have misappropriated restrictive laws with harsh penal sentences to curtail media rights.<sup>67</sup> This is reminiscent of the colonial epoch, where prohibitive laws and penitentiary punishment were used to subjugate and gain control over the colonies rather than reform.<sup>68</sup> When examined under the pre-colonial Africa lens, this approach to governance and punishment was un-African. In post-colonial and contemporary Africa, unjust legal provisions and punitive measures blight many African laws and government actions.<sup>69</sup> Circling back to the findings of LEXOTA to support this assertion, the imposition of disproportionate sanctions that are at variance with the necessity and

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<sup>63</sup> *Marques de Morais v Angola* (n 9) para 1.

<sup>64</sup> *Marques de Morais v Angola* (n 9) paras 2.1 -2.5 & 3.9.

<sup>65</sup> *Marques de Morais v Angola* (n 9) para 6.8.

<sup>66</sup> General Comment 34 para 47.

<sup>67</sup> Freedom House 'Freedom in the world 2023' (2023) [https://freedomhouse.org/sites/default/files/2023-03/FIW\\_World\\_2023\\_DigitalPDF.pdf](https://freedomhouse.org/sites/default/files/2023-03/FIW_World_2023_DigitalPDF.pdf) (accessed 8 November 2023) for the latest report.

<sup>68</sup> F Bernault *A history of prison and confinement in Africa* (2003) 3.

<sup>69</sup> For the state of political rights and civil liberties in Africa see the Freedom House series report. See Freedom House (n 67) for the latest report.

proportionality tests was another shortcoming of laws on disinformation in many African countries.<sup>70</sup>

## 2.2 The right to political participation

Democratic governments derive their legitimacy, power and authority from the people through the exercise of the right to political participation. The exercise of this sovereign right is manifested in participation in public affairs, voting, and running for public office. These actions collectively constitute the right to political participation. This thesis underscores the right to political participation of the electorate during elections and the importance of media rights to meaningful political participation. This effective protection of these rights enables the nurturing of the public sphere.

In guaranteeing the right to political participation, article 21 of the Universal Declaration provides:

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (2) Everyone has the right of equal access to public service in his country.
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The ICCPR is similarly worded in guaranteeing the right to political participation under article 25, which provides:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

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<sup>70</sup> LEXOTA (n 39).

The discussion below analyses the wording of article 25(a) and (b) in guaranteeing the right to political participation and facilitating free and fair elections with reference to General Comment 25.<sup>71</sup>

- A right guaranteed to citizens

Article 25 of the ICCPR stipulates that the right therein is guaranteed to ‘every citizen’ as opposed to all people within a country’s jurisdiction.<sup>72</sup> This differs from article 21 of the Universal Declaration, which confers the right to ‘everyone’. Majority state practice aligns with the dictates of the ICCPR by guaranteeing the right to political participation exclusively to the citizens of a country.<sup>73</sup> Given the link between citizenship and article 25 rights, it makes it necessary to consider how states confer citizenship rights and how they determine to what extent the rights under article 25 of the ICCPR can be extended to non-citizens.

- Principle of non-discrimination

General Comment 25 stipulates that conferring citizenship rights and determining the extent of participation of non-citizens under article 25 of the ICCPR should not be discriminatory.<sup>74</sup> Article 2 of the ICCPR prohibits discrimination based on ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. Separate treatment of citizens by birth and citizens by naturalisation, and stringent citizenship requirements for political participation may contradict article 25.<sup>75</sup>

- Conditional exercise of the right to political participation

States should ensure that any conditions placed on political participation are reasonable and objective.<sup>76</sup> For example, states usually place age restrictions for voting or candidature for public office. Additionally, imprisonment and mental capacity, among others, are generally considered

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<sup>71</sup> General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), CCPR/C/21/Rev.1/Add.7 <https://www.equalrightstrust.org/ertdocumentbank/general%20comment%2025.pdf> (accessed 8 November 2023).

<sup>72</sup> S Joseph & M Castan *The International Covenant on Civil and Political Rights: Cases, materials and commentary 3<sup>rd</sup> edition* (2013) 728.

<sup>73</sup> Joseph & Castan (n 72) 727-729.

<sup>74</sup> General Comment 25 para 3.

<sup>75</sup> General Comment 25 para 3.

<sup>76</sup> General Comment 25 para 4.

reasonable restrictions to political participation.<sup>77</sup> On the other hand, physical disability, class, literacy, education, party membership, residence or descent, or political affiliation are unreasonable restrictions and infringe on the distinctions under article 2 of the ICCPR.<sup>78</sup>

- Direct and indirect political participation, and meaningful participation

Article 25(a) of the ICCPR and article 21(1) of the Universal Declaration provide that citizens can participate in public affairs directly or indirectly. Citizens can directly participate in public affairs as elected officials on the government's legislative or executive arm. Participating in popular assemblies at the local level or plebiscitary or other electoral processes to choose or amend their constitutions or decide on matters of public interest are other forms of direct participation and participatory democracy.<sup>79</sup>

Indirect participation in line with representative democracy is realised when citizens confer this power to elected officials through elections and exercising the right to vote.<sup>80</sup> Voting represents one of the electorate's most recognised forms of political participation. In this vein, elected officials are accountable to the electorate. The constitution and laws of the land should guide the actions of elected representatives.<sup>81</sup> The Universal Declaration and the ICCPR provide that indirect participation is achieved when citizens take part in public affairs through 'freely chosen' representatives. This provision envisages that the participation by citizens will be 'free'. To achieve this standard of freeness, states need to ensure that political participation is not compromised by intimidation, harassment, coercion and bribery from other actors in the electoral process.<sup>82</sup> The media plays a key oversight role in this regard.

Meaningful participation materialises when citizens actively participate in public and political affairs beyond voting. Citizens can also exercise their right to public a political participation by engaging in public debate on traditional and online media platforms or public meetings. For example, everyone can comment on news items online or call in or text their

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<sup>77</sup> General Comment 25 para 4. For a discussion on judicial perspectives on disenfranchisement due to imprisonment see AK Abebe 'In pursuit of universal suffrage: The right of prisoners in Africa to vote' (2013) 3 *The Comparative and International Law Journal of Southern Africa* 410-446.

<sup>78</sup> General Comment 25 paras 10 & 15.

<sup>79</sup> General Comment 25 para 6.

<sup>80</sup> As above.

<sup>81</sup> General Comment 25 para 7.

<sup>82</sup> Centre for Human Rights 'Human rights and elections: A handbook on the legal, technical and human rights aspects of elections' (1994) 6.

opinions to legacy media. Posting and commenting online, correcting false news, and writing blogs, academic articles and opinion pieces enable knowledge sharing and debate on public interest issues. Such participation enhances the vibrancy and diversity of the public sphere. Further, citizens can actively reach out to their representatives and engage with them in person or online to hold them accountable to the rule of law and good governance. Accepting calls for public participation in legislative-making processes can reinforce human rights safeguards in state laws. Working with organisations on public interest issues, participating in citizen election observation, volunteering during elections, mobilising voters, engaging in human rights activism and campaigns, and community and political organising are also markers of active and meaningful public and political participation. The presence of free media, both offline and online that allow for enabling rights such as free expression, assembly and association are crucial to meaningful participation in the public sphere.<sup>83</sup> Both state and non-state actors should proactively disclose public interest information to facilitate public education and awareness. Citizens should also self-incentivise to seek information that enhances their participation in shaping national democracy. Meaningful political participation can only be achieved by an informed electorate.

Steiner discusses criticism about the ambiguity of the phrase ‘take part’ under article 25(a) although this may have been a deliberate construction by the framers of the Covenant.<sup>84</sup> ‘Take part’ generally means to ‘join in or be involved’ in an activity.<sup>85</sup> The contention emerges from the centrality of the role of a citizen in this process, considering that this is a sovereign right that is the source of the legitimacy of government. It has been posited that largely, it is governments and not individuals that conduct public affairs, and that is why this section qualifies that people are given the right to ‘take part’. It rests on governments to fulfil and put in place the necessary measures to determine how citizens will ‘take part’ in the process, facilitating political participation.<sup>86</sup> While it is true that governments dictate many of the procedures in a political process, they do so as representatives of the people. Therefore, these procedures should be reflective of the will of the people. It is vital that this aspect of ‘taking part’ is meaningful. Freedom of expression and media freedom are essential in ensuring citizens engage meaningfully

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<sup>83</sup> General Comment 25 para 8.

<sup>84</sup> Steiner (n 1) 106 & 109.

<sup>85</sup> Definition from the Oxford dictionary.

<sup>86</sup> Steiner (n 1) 106 & 109.



in this process. Even if governments largely conduct public affairs, they represent citizens and their decisions should reflect the people's will.

- Genuine periodic process

Article 25(b) describes a 'genuine periodic' process, by universal and equal suffrage and held by secret ballot to guarantee the free expression of the will of the people. Article 21(3) of the Universal Declaration also stipulates that the government's authority is founded on the people's will. This 'will' is expressed in periodic and genuine elections. It is necessary to break down these elements to see how they contribute to the free expression of the will of the people.

Periodic elections imply a country will hold regular elections within a defined period of time. There is no standard practice on the duration between elections, but research shows that most states hold their elections between three and seven years.<sup>87</sup> The goal is to ensure that countries have regular elections such that the incumbent government reflects the current will of the people.<sup>88</sup> Most constitutions and legislation dictate the periodicity requirement of elections. However, in certain circumstances, the regularity of elections may be interrupted because of a state of emergency or other extenuating circumstances.<sup>89</sup> For example, in 2020, managing the spread of the coronavirus caused at least 78 countries and territories to postpone their elections.<sup>90</sup> In 2021, the African Court on Human and Peoples' Rights rendered an advisory opinion on elections conducted in the context of a public health emergency that called for the incumbent government to ensure that decisions that interfere with the periodicity requirement during public health emergencies follow wide stakeholder engagement.<sup>91</sup> The government should also hold

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<sup>87</sup> S Joseph 'Rights to political participation' in D Harris & S Joseph (eds) *The International Covenant on Civil and Political Rights and United Kingdom Law* (1995) 554 & Venice Commission 'Code of Good Practice in Electoral Matters' (2002) 23.

<sup>88</sup> Centre for Human Rights (n 82) 11.

<sup>89</sup> Centre for Human Rights (n 82) 11-12.

<sup>90</sup> IDEA (n 51).

<sup>91</sup> Advisory Opinion on request No. 001/2020 by the Pan African Lawyers Union (PALU), On the right to participate in the government of one's country in the context of an election held during a public health emergency or a pandemic, such as the COVID-19 crisis 16 July 2021 para 107 & 108. Also see Resolution on Human and Peoples' Rights as central pillar of successful response to COVID-19 and recovery from its socio-political impacts - ACHPR/Res. 449 (LXVI) 2020 <https://achpr.au.int/index.php/en/adopted-resolutions/449-resolution-human-and-peoples-rights-central-pillar-successful-response> (accessed 3 June 2024) & K Ellena 'The legal quagmire of postponing or modifying elections' <https://www.ifes.org/news/legal-quagmire-postponing-or-modifying-elections> (accessed 8 November 2023)

elections as soon as feasibly possible to ensure that the leadership continues to reflect the will of the people.<sup>92</sup>

The Universal Declaration and ICCPR also stipulate for a genuine process. During the drafting of the ICCPR, a Chilean delegate attempted to define the term genuine in the *travaux preparatoire* and stated as such:<sup>93</sup>

[t]he adjective 'genuine' had been used to guarantee that all elections of every kind faithfully reflected the opinion of the population and to protect the electors against government pressure and fraud.

This definition points to a 'faithful reflection' that is without the 'pressure of fraud' that is closely linked with a free election. Therefore, a genuine periodic election has adequate procedural integrity before, during and after voting, allowing free expression and guaranteeing the will of the electors.<sup>94</sup> When states hold elections to avoid international scrutiny or pressure or to prevent or stop protests, it may conflict with the concept of genuine elections, especially in the absence of procedural integrity.<sup>95</sup> Genuine elections also reflect a respect for other human rights norms that enable the full realisation of the right to political participation. This includes the facilitation of media rights.<sup>96</sup> Electoral authoritarianism, where states use elections as a smokescreen to sustain despotic regimes, poses a real threat to genuine elections in many countries in Africa.<sup>97</sup> The clampdown on freedom of expression of political opposition and civil society and media freedom is a coveted tool to sustain the lifeline of regimes that emulate competitive elections.

Further, general elections or referendums should be 'free of violence or threat of violence, compulsion, inducement or manipulative interference.'<sup>98</sup> Runway campaign financing that favours a certain candidate and political party may also give a candidate or political party an undue advantage to influence the will of the people.<sup>99</sup> In Kenya, attempts to regulate election campaign financing have been thwarted by political expediency in the 2017 and 2022 election

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<sup>92</sup> As above.

<sup>93</sup> GH Fox 'The right to political participation in international law' (1992) 17 *Yale Journal of International Law* 557.

<sup>94</sup> Fox (n 93) 557-558.

<sup>95</sup> Centre for Human Rights (n 82) 12.

<sup>96</sup> Steiner (n 1) 111.

<sup>97</sup> M Bernhard, AB Edgell & SI Lindberg 'Institutionalising electoral uncertainty and authoritarian regime survival' (2020) 59(2) *European Journal of Political Research* 465-487.

<sup>98</sup> General Comment 25 para 19.

<sup>99</sup> General Comment 25 para 19.

cycles.<sup>100</sup> The advantage of incumbency has also persisted, and abuses of state resources during election campaigns have been regularly reported.<sup>101</sup> These factors pose a real threat to the ability of voters to freely express their opinions and exercise their will.

This thesis also emphasises that genuine and free elections are achieved when informed voters, free from political misinformation, disinformation and propaganda, engage in the process. This emphasis is necessary given that information technology has eased the ability to spread both true and false information to large audiences instantly, influencing the ‘freeness’ of the electorate’s decision-making process. Government-orchestrated or supported misinformation, disinformation and propaganda particularly compromise the credibility of an election, given the government plays a large part in protecting the procedural and substantive integrity of an election process.<sup>102</sup>

Genuine elections also offer citizens a real choice. This is facilitated by political pluralism that not only allows for the existence of multiple parties but also provides an enabling environment for the organising and functioning of political parties.<sup>103</sup> Political parties and candidates should be able to express themselves freely and have fair access to media sources for the purposes of political campaigning.<sup>104</sup> The drafters of the ICCPR and Universal Declaration have been accused of not giving weight to the debate on whether there can be genuine elections that offer citizens a real choice in one-party states.<sup>105</sup> At the time of drafting these instruments, there was widespread existence of one-party states that continued to grow post-colonialism and before the third wave of democratisation in Africa.<sup>106</sup>

The Human Rights Committee examined the clash between one-party political systems and the right to political participation in *Bwalya v Zambia*.<sup>107</sup> The Committee found that the

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<sup>100</sup> G Ndirangu ‘No limits: Campaign spending spikes ahead of Kenyan elections’ *Aljazeera* 22 June 2022 <https://www.aljazeera.com/features/2022/6/22/no-limits-campaign-spending-spikes-ahead-of-kenyan-elections> (accessed 8 November 2023).

<sup>101</sup> As above.

<sup>102</sup> See chapters two and five of this thesis for a broader discussion on the quality of information online during elections in Kenya, the role of the media, and the impact on meaningful political participation.

<sup>103</sup> Centre for Human Rights (n 82) & Principle VIII Draft Principles on Freedom and Non-Discrimination in the Matter of Political Rights (1963) <https://digitallibrary.un.org/record/643700?ln=en> (accessed 8 November 2023).

<sup>104</sup> As above.

<sup>105</sup> Steiner (n 1) 106 & 114

<sup>106</sup> As above.

<sup>107</sup> *Chiiko Bwalya v Zambia*, communication 314/1988, Human Rights Committee, views, 14 July 1993 (*Bwalya v Zambia*) <http://hrlibrary.umn.edu/undocs/html/vws314.htm> (accessed 8 November 2023).

government of Zambia had violated the applicant's right to take part in public affairs by arresting and detaining the applicant because of his political affiliation. It held that limiting the applicant's political activity was an unreasonable restriction because he belonged to another party other than the ruling party.<sup>108</sup>

Similarly, in *Mukong v Cameroon*,<sup>109</sup> the author of the communication alleged the violation of his freedom of expression, among other rights. He was a journalist and writer who was a strong critic of the then one-party system in Cameroon and an advocate for political pluralism. Consequently, he was subjected to arbitrary arrests, detention and cruel and inhuman treatment.<sup>110</sup> The State of Cameroon justified this treatment on the basis that the applicant's expression and activities were illegal and the restriction of the applicant's rights aimed to protect national security and public order.<sup>111</sup> In finding a violation of article 19 of the ICCPR, the communication reads:<sup>112</sup>

The Committee ... further considers that the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights; in this regard, the question of deciding which measures might meet the "necessity" test in such situations does not arise.

These decisions support the argument that one-party rule is incompatible with the realisation of article 25 rights.<sup>113</sup> Further, it emerges how often authoritative states clamp down on media rights to stifle activism for democratic principles as well as genuine elections. Following the third wave of democratisation, most African countries adopted multiparty democracy, including Zambia, Cameroon and Kenya.<sup>114</sup> As of 2023, only Eritrea and the part of Western Sahara territory controlled by the Polisario Front in Africa are under one-party rule.<sup>115</sup> However, the

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<sup>108</sup> *Bwalya v Zambia* (n 107) para 6.2 & 6.6.

<sup>109</sup> *Womah Mukong v Cameroon*, communication 458/1991, Human Rights Committee, 21 July 1994 (*Mukong v Cameroon*) <http://hrlibrary.umn.edu/undocs/html/vws458.htm> (accessed 8 November 2023).

<sup>110</sup> *Mukong v Cameroon* (n 109) paras 2.2 & 3.4.

<sup>111</sup> *Mukong v Cameroon* (n 109) para 9.6.

<sup>112</sup> *Mukong v Cameroon* (n 109) paras 9.7.

<sup>113</sup> Joseph & Castan (n 72) 745.

<sup>114</sup> Zambia was a single party state from 1972 to 1991. See C Baylies & M Szeftel 'The fall and rise of multi-party politics in Zambia' (1992) 54 *Review of African Political Economy* 75. Cameroon was a one-party state from 1966 to 1990. See TN Fonchingong 'Multipartyism and democratization in Cameroon' (1998) 15 *Journal of Third World Studies* 119.

<sup>115</sup> Freedom House 'Freedom in the World 2023: Eritrea' <https://freedomhouse.org/country/eritrea/freedom-world/2023> (accessed 8 November 2023) & Freedom House 'Freedom in the World 2023: Western Sahara' <https://freedomhouse.org/country/western-sahara/freedom-world/2023> (accessed 8 November 2023).

adoption of multi-party rule in Africa did not in itself guarantee genuine elections. Across the world, with Africa as most affected, media coverage remains a challenge for the integrity of elections.<sup>116</sup> Media freedom, media ownership and concentration, and the quality of election information on media platforms are some of the inhibiting factors to genuine elections.<sup>117</sup>

- Universal and equal suffrage

The principles of universal and equal suffrage require that the right to political participation will apply equally to all citizens who have attained the minimum voting age and are not subject to valid restrictions to vote on grounds such as incarceration and mental incapacity.<sup>118</sup> Overall, the minimum voting age in most countries is 18 years. State practice shows that the lowest voting age is 16 years and the highest 25 years.<sup>119</sup>

Every person is entitled to one vote, and each vote should count equally against the other.<sup>120</sup> Scholars have criticised the drafters of the ICCPR for failing to consider whether the votes will have an equal effect sufficiently.<sup>121</sup> This stems from the fact that the ICCPR does not favour or propose a particular electoral system to effect article 25 of the ICCPR. States are only required to meet the minimum fairness test prescribed under article 25 of the ICCPR.<sup>122</sup>

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<sup>116</sup> P Norris & M Grömping ‘Electoral integrity worldwide’ (2019) 6-8 <https://static1.squarespace.com/static/58533f31bebafe99c85dc9b/t/5ce60bd6b208fcd93be49430/1558580197717/Electoral+Integrity+Worldwide.pdf> (accessed 8 November 2023).

<sup>117</sup> Norris & Grömping (n 116) 6-8.

<sup>118</sup> Joseph & Castan (n 72) 742.

<sup>119</sup> Ace Project ‘Voting age: What is the legal voting age in the national elections?’ <https://aceproject.org/epic-en/CDTable?view=country&question=VR001> (accessed 8 November 2023). Also, see World Atlas ‘Legal voting age by country’ <https://www.worldatlas.com/articles/legal-voting-age-by-country.html> (accessed 8 November 2023). The minimum voting age in Nicaragua, Scotland, Isle of Man, Guernsey, Ethiopia, Ecuador, Cuba, Brazil, and Austria is 16, while the United Arab Emirates has the oldest voting age at 25 and above.

<sup>120</sup> Joseph & Castan (n 72) 742.

<sup>121</sup> Joseph & Castan (n 72) 742 & 750; Joseph (n 87) 543 & 555; M Nowak *U.N. Covenant on Civil and Political Rights: CCPR commentary* (2005) 581-582; ML Balinski & HP Young *Fair representation: Meeting the ideal of one man, one vote* (1982); Steiner (n 1) 108 & Fox (n 93) 556. On the advantages and disadvantages of the different electoral system see IDEA ‘Elections, electoral systems and party systems: A resource guide’ (2017) 6-10 <https://www.idea.int/gsod-2017/files/IDEA-GSOD-2017-RESOURCE-GUIDE-ELECTIONS.pdf> (accessed 8 November 2023).

<sup>122</sup> As above. Also see *Mathieu-Mohin and Clerfayt v Belgium*, application 9267/81, European Court of Human Rights, judgement, 2 March 1987 para 54 (*Mathieu-Mohin and Clerfayt v Belgium*) <https://www.eods.eu/elex/uploads/files/57cd780a57125-Mathieu-Mohin%20and%20Clerfayt%20v.%20Belgium.pdf> (accessed 8 November 2023).

Some scholars and political scientists argue that it is only in pure proportional representation electoral systems that the final outcome reflects the genuine will of the people.<sup>123</sup> It is difficult to guarantee that all votes will have equal weight as to the outcome of an election.<sup>124</sup> Genuine elections are often a game of chance with no assurance that a candidate or political party running for an election will emerge victorious. Inevitably, some votes will not have an impact. In this vein, other electoral systems, such as majoritarian and semi-proportional systems, may distort the final election outcome.<sup>125</sup>

- Secret ballot

The concept of voting by secret ballot emerged from a need to protect the vote from intimidation and ensure the voter's choice remains confidential.<sup>126</sup> This voting method is put forward in both the Universal Declaration and the ICCPR. However, while the ICCPR provides for the secret ballot as the sole voting method, the Universal Declaration provides for a vote by secret ballot or 'by equivalent free voting procedures'. The window of opportunity provided by the Universal Declaration is relevant in the wake of the increasing integration of technology into elections. With countries looking to adopt technological solutions in voting processes, such as internet and remote voting, the secrecy of the vote is threatened.<sup>127</sup> It should be noted that the Universal Declaration calls for 'equivalent free voting procedures.' This should guide interventions to ensure voting methods protect the free choice of the electors.

### **2.2.1 The relationship between political participation and media rights**

Free expression and an conducive environment that allows media to play its normative functions promotes the right to meaningful political participation by ensuring the electorate is acting from an informed perspective.<sup>128</sup> To facilitate this, international law requires states to adopt measures that address barriers to media rights and ensure the publication of these measures during voter

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<sup>123</sup> Joseph & Castan (n 72) 742 & 750; Joseph (n 87) 543 & 555; Nowak (n 121) 581-582; Balinski & Young (n 121) & Steiner (n 1) 108.

<sup>124</sup> *Mathieu-Mohin and Clerfayt v Belgium* (n 122) para 54.

<sup>125</sup> Joseph & Castan (n 72) 742 & 750; Joseph (n 87) 543 & 555 & Nowak (n 121) 581-582.

<sup>126</sup> Centre for Human Rights (n 82) 10.

<sup>127</sup> COE 'Ad hoc Committee of Experts on Legal, Operational and Technical Standards for e-voting (CAHVE)' [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=0900001680726c0b](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680726c0b) (accessed 8 November 2023) & IFES 'Considerations on internet voting: An overview for electoral decision-makers' (2020) 8-9.

<sup>128</sup> General Comment 25 para 12.

education and registration processes.<sup>129</sup> In developing an informed electorate, electoral stakeholders need to implement measures to address illiteracy and, in the context of the digital age, digital illiteracy.<sup>130</sup> Additionally, Election Management Bodies (EMBs) should ensure the availability of election materials in minority languages and adopt pictures and symbols to address language and literacy barriers. These considerations extend to accessibility to persons with disabilities through the use of braille, assisted digital technologies, and interpreters. Other barriers include poverty and physical accessibility.<sup>131</sup> To implement such measures, states have to investigate and address the unique challenges that impact this right given a country's social, economic, political, demographic and cultural setup.

Free and independent traditional and online media allows professional and peripheral journalists to exercise their media rights and shape public opinion without censorship or undue restraint in the public sphere.<sup>132</sup> General Comment 25 also links the exercise of these rights with the right to peaceful assembly and the right to association.<sup>133</sup> These rights allow the electorate and the wider public to participate in political activities, including conducting political campaigning and advertising, engaging in public debate, creating and sharing political content, criticising and opposing stakeholders, and organising and participating in peaceful demonstrations.

Corruption and bribery in electoral processes also threaten free and fair elections. The media's watchdog function is especially critical in such cases to reveal irregular practices that compromise the transparency and integrity of elections. This aspect was not covered under General Comment 25.<sup>134</sup>

### **2.3 Adaptability of the UN human rights framework on media rights and political participation in the digital age**

The Universal Declaration and the ICCPR were adopted in 1948 and 1966, respectively. Since then, technology has advanced in leaps and bounds, significantly impacting the exercise of

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<sup>129</sup> General Comment 25 para 11.

<sup>130</sup> General Comment 25 para 12.

<sup>131</sup> General Comment 25 para 12.

<sup>132</sup> General Comment 25 para 25 & General Comment 34 para 20.

<sup>133</sup> Arts 21 & 22 ICCPR & General Comment 25 para 25.

<sup>134</sup> Joseph & Castan (n 72) 737.

human rights, including media rights and political participation. Largely, the broad phrasing of some of the provisions and their elaboration by soft law instruments has enabled their relevance and adaptability to the paradigm-shifting nature of the digital age. The phrasing of the respective articles that guarantee the freedom of expression ‘through any media’ extends this protection to expression through the internet and other mediums such as print, electronic, dress, and legal submissions, among others.<sup>135</sup> This, at a minimum, provides the foundation for the protection of media rights in the digital age.

However, it would be remiss of the international community to fail to adapt the human rights framework to the human rights implications of digital technologies. The UN human rights system has largely favoured the soft law approach to enunciate provisions on the protection or limitation of media rights in the digital age and the impact on political participation. As a point of departure, the UN Resolution on the promotion, protection and enjoyment of human rights on the Internet (Internet Resolution) provides some clarity on the framework for the protection of human rights in the digital age by affirming that ‘...the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice...’.<sup>136</sup> This affirmation is crucial as a first step to clarifying the place of existing laws in the rapidly evolving digital rights milieu. Further, the Internet Resolution underscores the principles of universal access to the internet as well as open, accessible and inclusive internet access.<sup>137</sup> It also calls on states to take measures to address the digital divide, including the gender digital divide.<sup>138</sup>

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<sup>135</sup> 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 21 & General Comment 34 para 12.

<sup>136</sup> HRC ‘The promotion, protection and enjoyment of human rights on the Internet’ (7 July 2021) A/HRC/47/L.22. (UN Internet Resolution) Preamble and para 1 <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G21/173/56/PDF/G2117356.pdf?OpenElement> (accessed 8 November 2023). Please note that the resolution has undergone several revisions and this is the latest version at the time of writing this thesis. Previous similar resolutions on freedom of expression in the digital age include: ‘ Council resolutions 31/7 of 23 March 2016 on the rights of the child: information and communications technologies and child sexual exploitation, 38/7 of 5 July 2018 on the promotion, protection and enjoyment of human rights on the Internet, 42/15 of 16 September 2019 on the right to privacy in the digital age, and 44/12 of 16 July 2020 on freedom of opinion and expression, and, and recalling also General Assembly resolutions 70/125 of 16 December 2015 containing the outcome document of the high-level meeting of the Assembly on the overall review of the implementation of the outcomes of the World Summit on the Information Society, 75/176 of 16 December 2020 on the right to privacy in the digital age, 75/202 of 21 December 2020 on information and communications technologies for development...’

<sup>137</sup> UN Internet Resolution preamble and para 18.

<sup>138</sup> UN Internet Resolution para 5 & 18.



Unsurprisingly, the conceptualisation of media in the digital age and the nature of protection has drawn stakeholder debate. On its part, the UN recognised the expansion of the concept of media and journalists in the digital age beyond print and broadcast media to ordinary citizens and bloggers who create and disseminate content on digital avenues such as social media platforms.<sup>139</sup> Further, international law calls on states to promote the independence of online media, given the increasing role of the internet in facilitating communication and developing enabling legal frameworks.<sup>140</sup> This should be done alongside measures to protect and promote independent and impartial traditional media.<sup>141</sup> As discussed in chapter one of this thesis, the expansion of this concept has drawn polarised debate on the extent to which online media actors who practice peripheral journalism should enjoy the protections conferred on traditional media. International law has not yet addressed this contention unequivocally. It is axiomatic that the roles played by media—watchdog, public educator, and public debate—demand special protection, particularly from political and economic interference. However, online citizen journalists are similarly undertaking these roles, albeit in less structured ways. Online citizen journalism's fluidity and unstructured nature defies a rigid duty and protective framework as that of traditional journalists. A worthwhile argument to consider is the public interest nature of their work in extending special protections of media, although this risks subjective interpretation and is onerous given the nature of citizen journalism.<sup>142</sup> The inseparability of freedom of expression and media freedom manifests in this normative dilemma that demands better clarification from the international community.

Beyond the conceptualisation of media in the digital age, tech innovation in the information sector has had transformative effects on the exercise of media rights for traditional media and ordinary citizens. The ability for instantaneous communication that defies the strictures of time, space, geographical boundaries, and audience size has reinforced old challenges and birthed new ones regarding the spread of illegal and harmful expression with human rights implications, including meaningful political participation. Emerging issues such as

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<sup>139</sup> General Comment 34 para 44.

<sup>140</sup> General Comment 34 para 15 & part iv (4) African Charter on Broadcasting (n 28).

<sup>141</sup> General Comment 34 para 16.

<sup>142</sup> J Oster, 'Theory and doctrine of "media freedom" as a legal concept' (2013) 5(1) *Journal of Media Law* 58 & 74.

internet shutdowns,<sup>143</sup> and the dissemination of false and misleading information and propaganda generally and in the context of elections have gained articulation in instruments such as the Internet Resolution<sup>144</sup> and the 2017 Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda (2017 Joint Declaration).<sup>145</sup> The 2020 Joint Declaration on Freedom of Expression and Elections in the Digital Age,<sup>146</sup> specifically addresses the potential and threats of digital technologies to media rights during elections and proffers recommendations to states.

While the emerging digital rights international law parlance tasks states to address online harms and abuses that curtail the enjoyment of human rights,<sup>147</sup> states are also called to eschew undue restrictions on online media rights.<sup>148</sup> Ambiguous and restrictive expression laws, excessive sanctions, and network disruptions are some of the disproportionate state actions confronting the exercise of online media freedom. Common justifications fronted by states follow the line of pursuing legitimate aims, including public order, national security and protecting the rights of others. However, they often fall short under the legality and the necessity and proportionality test. International law condemns such approaches and obligates states to adopt a rights-based approach in regulating online media freedom and align laws, policies and

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<sup>143</sup> Access Now ‘The return of digital authoritarianism: Internet shutdowns in 2021’ (2022) <https://www.accessnow.org/wp-content/uploads/2022/05/2021-KIO-Report-May-24-2022.pdf> (accessed 8 November 2023) & DD Aydin ‘Five excuses governments use to justify internet shutdowns’ <https://www.accessnow.org/five-excuses-governments-abuse-justify-internet-shutdowns/> (accessed 8 November 2023).

<sup>144</sup> UN Internet Resolution.

<sup>145</sup> 2017 Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda <https://www.ohchr.org/Documents/Issues/Expression/JointDeclaration3March2017.doc> (accessed 8 November 2023). The Declaration was developed and adopted by The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, with the input of civil society.

<sup>146</sup> 2020 Joint Declaration on Freedom of Expression and Elections in the Digital Age [https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/JointDeclarationDigitalAge\\_30April2020\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/JointDeclarationDigitalAge_30April2020_EN.pdf) (accessed 8 November 2023). Adopted in 2020 by The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, and the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, with the input of civil society.

<sup>147</sup> UN Internet Resolution paras 8,10 & 15.

<sup>148</sup> UN Internet Resolution paras 13 & 14, sec 2 (a) 2017 Joint Declaration & part iv (4) African Charter on Broadcasting.

practices with international law obligations on freedom of expression.<sup>149</sup> The Universal Periodic Review (UPR) process before the UN Human Rights Council that assesses individual country's human rights performance has provided a good opportunity to call on states that unduly restrict digital rights to comply with international law and standards.<sup>150</sup>

The internet's transformative and empowering abilities in the work of journalists, particularly in promoting access to credible information, especially during elections, are also captured in the international law digital rights framework. States are called to ensure '... a safe and enabling online environment for the enjoyment of human rights so that journalists may perform their work independently and without undue or unlawful interference...'<sup>151</sup> These are important in addressing the political economy challenges faced by the traditional and new media.

The 2017 and 2020 Joint Declarations also attempt to address a significant lacuna in international law by extending human rights obligations to internet intermediaries.<sup>152</sup> The influence of internet intermediaries, especially social media companies, on exercising online media freedom has gained prominence in digital times. The regulation of the internet has largely adopted a self-regulatory approach in the preserve of internet intermediaries. Concerns around capitalist considerations trumping human rights online and poor accountability and transparency have revved up calls for multistakeholder intervention, including adopting international law measures.<sup>153</sup> On its part, the 2017 Joint Declaration extends guidelines to internet intermediaries requiring that content restriction should be guided by clear, concise, and accessible policies 'based on objectively justifiable criteria rather than ideological or political objectives'. Further, such measures should follow consultations with users.<sup>154</sup> The 2020 Joint Declaration calls on online media and platforms to adopt reasonable measures to ensure access to diverse political

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<sup>149</sup> UN Internet Resolution paras 5, 13, 14 & 18, sec 1(a) & (b) 2017 Joint Declaration & sec 1(c)(i) 2020 Joint Declaration.

<sup>150</sup> See recommendation 163.218 to Ethiopia by Australia to uphold civil and political rights, especially freedom of expression by ending internet shutdowns. HRC 'Universal Periodic Review – Ethiopia Matrix of recommendations' [https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/Session33/ET/UPR33\\_Ethiopia\\_Thematic\\_List\\_of\\_Recommendations\\_E.docx](https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/Session33/ET/UPR33_Ethiopia_Thematic_List_of_Recommendations_E.docx) (accessed 2 June 2024).

<sup>151</sup> UN Internet Resolution para 12. Also see Sec 3(a) & 5(b) 2017 Joint Declaration & Sec 1(a)(i) 2020 Joint Declaration.

<sup>152</sup> Sec 4 2017 Joint Declaration & sec 1(c)(iv) 2020 Joint Declaration.

<sup>153</sup> D Kaye *Speech Police: The Global Struggle to Govern the Internet* (2019) 10-12 & S Levy *Facebook: The Inside Story* (2020) 6-7.

<sup>154</sup> Sec 4(a) & (b) 2017 Joint Declaration. Also see Sec 2(a)(v) 2020 Joint Declaration.

views and perspectives.<sup>155</sup> To this end, dominant online media platforms should assess their products, policies and practices on political advertising to ensure that they do not arbitrarily violate the freedom of expression of political candidates or parties.<sup>156</sup> Online media and platforms are also urged to make reasonable efforts to address information disorder through measures such as independent fact-checking, advertisement repositories, appropriate content moderation and public alerts.<sup>157</sup> They are also urged to be transparent about the impact of their products on human rights, such as privacy and freedom of expression, particularly on election information.<sup>158</sup>

The UN Guiding Principles on Business and Human Rights (UNGPs) have been instructive in articulating the responsibilities of business enterprises, including social media companies.<sup>159</sup> Resting on the three pillars of state duty to protect human rights, businesses' responsibility to respect human rights, and access to remedy, the instrument is a key normative reference point for the development of laws and policies on business and human rights.<sup>160</sup> Its foundational principles place a responsibility on businesses to respect internationally recognised human rights.<sup>161</sup> Conventionally, duties to protect and fulfil human rights have fallen on states, but there is a growing credible push for an extension of these duties to businesses as well.<sup>162</sup> Interestingly, the UNGPs conflates elements of responsibility to protect and fulfil under the responsibility to respect, for example, in relation to human rights due diligence obligations.<sup>163</sup> However, its author, John Ruggie, former Special Representative to the Secretary-General of the United Nations on Business and Human Rights, argued that these duties flow from the responsibility to respect and not distinct duties, situating the responsibility of businesses

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<sup>155</sup> Sec 2(a)(ii) 2020 Joint Declaration.

<sup>156</sup> Sec 2(a)(iii) 2020 Joint Declaration.

<sup>157</sup> Sec 2(a)(iv) 2020 Joint Declaration.

<sup>158</sup> Sec 2(a)(v) 2020 Joint Declaration.

<sup>159</sup> UN Guiding Principles on Business and Human Rights [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf) (accessed 8 November 2023).

<sup>160</sup> E George *Incorporating rights: Strategies to advance corporate accountability* (2021) 17-21.

<sup>161</sup> Guideline 11 and 12 UNGPs.

<sup>162</sup> D Bilchitz 'The Ruggie framework: An adequate rubric for corporate human rights obligations?'(2010) 7(12) *Sur –International Journal of Human Rights* 204 - 215; D Bilchitz *Fundamental rights and the legal obligations of business* (2021) 59-60; S Deva 'Covid-19, business and human rights: A wake-up call to revisit the "protect, respect and remedy" framework?', (2021) 23 *International Community Law Review* 433 & F Wettstein *Multinational corporations and global justice: Human rights obligations of a quasi-governmental institution* (2009) 305.

<sup>163</sup> See for example Principle 13 (b) and 17 UNGPs. Also see Bilchitz (n 162) 206-207 & S Deva 'Mandatory human rights due diligence laws in Europe: A mirage for rightsholders?' (2023) *Leiden Journal of International Law* 3.

primarily under the umbrella of responsibility to respect.<sup>164</sup> Particular reference is made to the Universal Declaration, the ICCPR and the International Covenant for Economic, Social and Cultural Rights (ICESCR),<sup>165</sup> as well as the human rights principles under the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.<sup>166</sup> Pivoting from this current position, this thesis argues for online intermediaries to adopt a rights-based approach to human rights regulation that extends beyond respecting human rights to enhance the protection of online media freedom.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) spearheaded a multistakeholder process with the participation of states, private sector civil society, the technical community, and the international community to develop Guidelines for Regulating Digital Platforms.<sup>167</sup> The goal is to guide stakeholders such as governments, parliaments and companies on how to address harmful and illegal digital content while protecting freedom of expression. UNESCO has also organised and participated in many events exploring the impact of digital technologies on human rights, including on elections in the digital age,<sup>168</sup> and immensely contributed to research on this dynamic subject.<sup>169</sup> Further, the UN is developing a Business and Human Rights Treaty to enunciate binding obligations that enhance businesses' respect for human rights.<sup>170</sup>

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<sup>164</sup> UN HRC 'Protect, respect and remedy: A framework for business and human rights, UN Doc A/HRC/8/5' (2008) paras 54-58 [\\*0812861 \(business-humanrights.org\)](https://www.business-humanrights.org/en/un-protect-respect-and-remedy) (accessed 8 November 2023).

<sup>165</sup> ICESCR <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights#:~:text=The%20States%20Parties%20to%20the%20present%20Covenant%20undertake%20to%20guarantee,property%2C%20birth%20or%20other%20status> (accessed 8 November 2023).

<sup>166</sup> ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/normativeinstrument/wcms\\_716594.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/wcms_716594.pdf) (accessed 8 November 2023).

<sup>167</sup> UNESCO 'Guidelines for the governance of digital platforms: safeguarding freedom of expression and access to information through a multi-stakeholder approach' (2023) <https://unesdoc.unesco.org/ark:/48223/pf0000387339> (accessed 8 November 2023).

<sup>168</sup> See reports on UNESCO 'Elections in digital times: A guide for electoral practitioners' (2022) <https://unesdoc.unesco.org/ark:/48223/pf0000382102> (accessed 8 November 2023) & UNESCO 'Social media and elections' (2019) <https://unesdoc.unesco.org/ark:/48223/pf0000370634> (accessed 8 November 2023).

<sup>169</sup> See section on website, especially publications' section at UNESCO 'Home' <https://www.unesco.org/en/internet-conference?hub=71542> (accessed 8 November 2023).

<sup>170</sup> OHCHR 'BHR treaty process' <https://www.ohchr.org/en/business-and-human-rights/bhr-treaty-process> (accessed 8 November 2023).

### 3 Media rights and political participation under the African human rights framework

#### 3.1 Legal framework and jurisprudence on media rights

The African Charter<sup>171</sup> lays the foundation for the continental framework for human rights and contributes to international human rights law. Freedom of expression and media freedom are protected under article 9, which reads:

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

Arguably, the gravitas of the guarantees under article 9 is diluted by the clawback tenor of the phrase ‘within the law’. Clawback clauses in the African Charter have long drawn criticism. In the context of article 9, the African Commission, in undertaking its protection mandate, examined this aspect in the *Media Rights Agenda and Others v Nigeria*.<sup>172</sup> This communication arose from the alleged proscription of three newspapers by the Nigerian military in 1994 by decree.<sup>173</sup> The communication submitted that the decrees violated the freedom of expression of Nigerians.<sup>174</sup> The complainants argued that the phrase ‘within the law’ under article 9(2) of the African Charter did not give Nigeria the mandate to derogate from its international law obligations by enacting contradictory laws.<sup>175</sup> The government justified this derogation on grounds to protect public morals, public safety and public interest. It further added that the phrase ‘within the law’ referred to Nigeria’s current law as opposed to the Nigerian constitution or international standards.<sup>176</sup> In its decision, the African Commission disagreed with the respondent, stating:<sup>177</sup>

According to Article 9.2 of the Charter, dissemination of opinions may be restricted by law. This does not however mean that national law can set aside the right to express and disseminate one's opinions guaranteed at the international level; this would make the protection of the right to express one's opinion

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<sup>171</sup> African Charter [https://au.int/sites/default/files/treaties/36390-treaty-0011\\_-\\_african\\_charter\\_on\\_human\\_and\\_peoples\\_rights\\_e.pdf](https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf) (accessed 8 November 2023).

<sup>172</sup> *Media Rights Agenda and Others v Nigeria* 105/93, 128/94, 130/94 and 152/96, ACHPR, judgement, 22-31 October 1998 (*Media Rights Agenda and Others v Nigeria*) <https://africanlii.org/akn/aa-au/judgment/achpr/1998/3/eng@1998-10-31> (accessed 8 November 2023). Also see *Mukong v. Cameroon* (n 107) para 9.8.

<sup>173</sup> *Media Rights Agenda and Others v Nigeria* (n 172) para 1.

<sup>174</sup> *Media Rights Agenda and Others v Nigeria* (n 172) para 4.

<sup>175</sup> *Media Rights Agenda and Others v Nigeria* (n 172) para 13.

<sup>176</sup> *Media Rights Agenda and Others v Nigeria* (n 172) para 14.

<sup>177</sup> *Media Rights Agenda and Others v Nigeria* (n 172) para 40.

ineffective. To permit national law to take precedence over international law would defeat the purpose of codifying certain rights in international law and indeed, the whole essence of treaty making.

The decision restrains countries from enacting laws at variance with international law, a practice that has weakened media rights protections in Africa. The communication was also instructive in affirming the enabling qualities of media rights to public education and political participation.<sup>178</sup>

On limitations of human rights under the African Charter, article 27(2) contains a general clause that provides: ‘The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.’ However, the African Charter is unique in that it is silent on whether states can derogate from their international law responsibilities in the event of an emergency or other extenuating circumstance.<sup>179</sup>

The African Commission’s decision in *Article 19 v Eritrea*<sup>180</sup> is also instructive on limitations of media rights under the African Charter. Article 19 alleged that the arbitrary arrests and continued detention of 18 journalists, incommunicado, and for more than three years by the government of Eritrea violated articles 9 and 13 of the African Charter, among other rights.<sup>181</sup> The government owned the only newspaper allowed to operate.<sup>182</sup> Further, the government cancelled the elections scheduled for December 2001.<sup>183</sup> The government justified its actions on several grounds, including promoting national security and failure of the media to observe licensing requirements.<sup>184</sup>

In deciding the merits of the case, the African Commission analysed the respondent’s justifications, particularly that the actions were undertaken in the context of war and, as such Eritrea chose to derogate some rights in the interest of national security. The African

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<sup>178</sup> *Media Rights Agenda and Others v Nigeria* (n 172) para 36.

<sup>179</sup> *Media Rights Agenda and Others v Nigeria* (n 172) para 41.

<sup>180</sup> *Article 19 v State of Eritrea*, communication 275/2003, ACHPR, judgement, 30 May 2007 (*Article 19 v Eritrea*) <https://africanlii.org/akn/aa-au/judgment/achpr/2007/79/eng@2007-05-30> (accessed 8 November 2023).

<sup>181</sup> *Article 19 v Eritrea* (n 180) para 2 & 9.

<sup>182</sup> *Article 19 v Eritrea* (n 180) para 4-7.

<sup>183</sup> *Article 19 v Eritrea* (n 180) para 4.

<sup>184</sup> *Article 19 v Eritrea* (n 180) para 6.

Commission reiterated the uniqueness of the African Charter, which does not allow for the derogation of rights during an emergency or similar event.<sup>185</sup>

With regard to the violation of article 9, the African Commission stated that a law that bans the media and imprisons persons with dissenting views is incompatible with the spirit and the purpose of article 9 of the African Charter.<sup>186</sup> The African Commission made reference to the clawback clause under article 9(2) of the African Charter that limited the exercise of freedom of expression ‘within the law’. It emphasised that national law cannot negate freedom of expression. The African Charter takes precedence over national law because the reverse will nullify the guarantees of the African Charter. Therefore, when faced with conflicting national laws, the provisions of the African Charter reign supreme.<sup>187</sup> In finding Eritrea in violation of article 9 of the African Charter, the African Commission emphasised that ‘A free press is one of the tenets of a democratic society, and a valuable check on potential excesses by government.’<sup>188</sup>

Noteworthy, the African Commission did not make a finding on the violation of article 13 of the African Charter. While the assertion of the importance of free press as crucial to a democratic society was important, a pronouncement on the vital role of free press during elections would have added to this jurisprudence in the African continent. Further, the African Commission should have examined the effect of cancelling the elections in light of protecting the rights under article 13 of the African Charter. A free press would also have been essential to convey the public’s reaction to the government’s actions.

As with the UN human rights system, soft laws have elaborated and shored up media rights offline and online. The African Commission developed the revised 2019 Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019 Declaration)<sup>189</sup>

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<sup>185</sup> *Article 19 v Eritrea* (n 180) para 87. Also see the decision in *Commission nationale des droits de l’Homme et des libertés / Chad*, communication 74/92, ACHPR, judgement, 11 October 1995 para 21 <http://hrlibrary.umn.edu/africa/comcases/74-92.html> (accessed 8 November 2023).

<sup>186</sup> *Article 19 v Eritrea* (n 180) para 105. The Commission referred to the previous judgement in *Media Rights Agenda and Others v Nigeria* (n 172).

<sup>187</sup> *Article 19 v Eritrea* (n 180) para 105.

<sup>188</sup> *Article 19 v Eritrea* (n 180) para 109.

<sup>189</sup> 2019 Declaration on Principles of Freedom of Expression and Access to Information in Africa [https://www.chr.up.ac.za/images/researchunits/dgdr/documents/ati/Declaration\\_of\\_Principles\\_on\\_Freedom\\_of\\_Expression\\_ENG\\_2019.pdf](https://www.chr.up.ac.za/images/researchunits/dgdr/documents/ati/Declaration_of_Principles_on_Freedom_of_Expression_ENG_2019.pdf) (accessed 8 November 2023). The revised Declaration was adopted by the African Commission at its 65<sup>th</sup> ordinary session, 21 October 2019 to 10 November 2019, in Banjul, The Gambia. It replaced the 2002 precursor titled, the Declaration on Principles of Freedom of Expression in Africa.



in line with its promotional mandate under article 45(1) of the African Charter.<sup>190</sup> The 2019 Declaration recognises that freedom of expression is subject to justifiable limitations and largely resonates with the provisions in the ICCPR and General Comment 34.<sup>191</sup> It provides that a law limiting freedom of expression:<sup>192</sup>

- a. is clear, precise, accessible and foreseeable;
- b. is overseen by an independent body in a manner that is not arbitrary or discriminatory; and
- c. effectively safeguards against abuse including through the provision of a right of appeal to independent and impartial courts.

While recognising that a limitation should serve a legitimate aim, it does not include public morality as a legitimate objective as did the ICCPR. Further, while it acknowledges protecting the rights and reputations of others as a legitimate aim, it especially calls on public figures to be more tolerant to criticism and that sanctions for defamation should not be disproportionate, such as to inhibit freedom of expression.<sup>193</sup>

On the principle of necessity and proportionality, the 2019 Declaration requires that the limitation shall:

- a. originate from a pressing and substantial need that is relevant and sufficient;
- b. have a direct and immediate connection to the expression and disclosure of information, and be the least restrictive means of achieving the stated aim; and
- c. be such that the benefit of protecting the stated interest outweighs the harm to the expression and disclosure of information, including with respect to the sanctions authorised.

In promoting freedom of expression, the 2019 Declaration condemns monopoly over print and broadcast media and online media. It strengthens this provision by requiring states to promote media diversity, plurality and independence.<sup>194</sup> The African Commission in *Open Society Justice Initiative (on behalf of Pius Njawe Noumeni) v the Republic of Cameroon (OSJI v Cameroon)* emphasises the importance of 'diverse and pluralistic media'.<sup>195</sup> The complaint was instituted by OSJI on behalf of the victim Pius Noumeni against the Cameroon government alleging the

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<sup>190</sup> Art 45(1)(b) African Charter.

<sup>191</sup> Preamble 2019 Declaration.

<sup>192</sup> Principle 9 2019 Declaration.

<sup>193</sup> Principle 21 2019 Declaration.

<sup>194</sup> Principle 11, 12 & 24 (3) 2019 Declaration.

<sup>195</sup> *Open Society Justice Initiative (on behalf of Pius Njawe Noumeni) v the Republic of Cameroon*, communication 290/2004, ACHPR, judgement, 25 May 2006 [https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2021/08/Communication-290-04-OSJI-v-Cameroon\\_ENG.pdf](https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2021/08/Communication-290-04-OSJI-v-Cameroon_ENG.pdf) (accessed 8 November 2023).

violation of, among other rights, article 9 of the African Charter.<sup>196</sup> It emerged from the unsuccessful attempts by the victim, a journalist, to obtain an operating licence for a radio station for about three years.<sup>197</sup> The journalist was a well-known activist for media freedom in Cameroon who had been arrested and imprisoned because of his activism.<sup>198</sup>

The complainant further alleged there was no independent licencing authority and fair procedures when issuing operating licenses.<sup>199</sup> The complainant submitted that the de facto state monopoly was a violation of article 9 of the African Charter.<sup>200</sup> The complainant further alleged that the government's actions went against article 1 of the African Charter that mandated states 'to adopt legislative and other measures' to give effect to the rights in the African Charter.<sup>201</sup>

The African Commission did not pronounce itself on allegations of broadcast monopoly because, at the time of filing the application, the state no longer enjoyed state monopoly in broadcasting. However, the African Commission referred to principle v of the 2002 Declaration on Freedom of Expression that state monopoly is incompatible with freedom of expression.<sup>202</sup>

On the submission on the lack of an independent licensing authority and fair procedures, the African Commission referred to principle vii of the Declaration that stipulated that a media regulatory body should be independent and protected from interference.<sup>203</sup> The Minister of Communication and his technical advisory committee, who were 'representatives of executive bodies', failed to meet this standard.<sup>204</sup> The African Commission also found the refusal to issue a broadcasting licence was prior restraint and violated the complainant's freedom of expression.<sup>205</sup> Additionally, the African Commission stated that the interference with the victim's freedom of expression did not meet the legality test of limitations of rights, given there was no precisely drafted law to guide the victim's action.<sup>206</sup>

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<sup>196</sup> *OSJI v Cameroon* (n 195) paras 1, 2 & 19.

<sup>197</sup> *OSJI v Cameroon* (n 195) paras 1-18.

<sup>198</sup> *OSJI v Cameroon* (n 195) para 3, & 107-109.

<sup>199</sup> *OSJI v Cameroon* (n 195) paras 14, 15 & 96.

<sup>200</sup> *OSJI v Cameroon* (n 195) para 97.

<sup>201</sup> *OSJI v Cameroon* (n 195) para 106.

<sup>202</sup> *OSJI v Cameroon* (n 195) paras 128-131.

<sup>203</sup> *OSJI v Cameroon* (n 195) para 133.

<sup>204</sup> *OSJI v Cameroon* (n 195) paras 134, 135 & 155.

<sup>205</sup> *OSJI v Cameroon* (n 195) para 139 & 170.

<sup>206</sup> *OSJI v Cameroon* (n 195) para 147.

Principle 24 of the 2019 Declaration touches on the correlation between money and media, which, if effectively implemented, counters the political economy of the media. It tasks states to promote an enabling environment for media through the adoption of favourable economic measures. In doing so, public advertising should also be transparent, accountable and objective.<sup>207</sup>

The 2019 Declaration further calls for the decriminalisation of laws related to speech, such as sedition, insult, false news, defamation and libel.<sup>208</sup> It also cautions against the criminalisation of prohibited speech, such as hate speech and incitement to violence. States should only use such criminal laws in severe cases or as a measure of last resort.<sup>209</sup> In such circumstances, the 2019 Declaration urges states to consider: ‘prevailing social and political context; status of the speaker in relation to the audience; existence of a clear intent to incite; content and form of the speech; extent of the speech, including its public nature, size of audience and means of dissemination; and real likelihood and imminence of harm.’

Such clear guidance is important in the context of elections. For example, is the speaker a public figure, political candidate or someone who can strongly influence an audience? Is the speech highly likely to incite electoral violence? Is the content of the expression a severe form of hate speech? Is the expression disseminated in a political rally or on broadcast or online media with wide viewership or followership? Based on this, is there a real likelihood or threat of harm, for example, electoral violence or harmful voter behaviour? These are some of the issues that a court can explore under principles 22 and 23 of the 2019 Declaration to determine whether a severe criminal sanction is relevant, but generally, it should be eschewed.

The African Court on Human and Peoples’ Rights (African Court) examined some of the above issues in *Lohé Issa Konaté v Burkina Faso*,<sup>210</sup> where the applicant had been charged and convicted for the offence of defamation, public insult and contempt of court. The defamation and public insult allegations arose from publications that alleged the prosecutor of Burkina Faso was

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<sup>207</sup> Principle 24(2) 2019 Declaration.

<sup>208</sup> Principle 22 2019 Declaration.

<sup>209</sup> Principle 23 2019 Declaration.

<sup>210</sup> *Konate v Burkina Faso*, application 4/2013, African Court on Human and Peoples' Rights, judgement, 5 December 2014 (*Konate v Burkina Faso*) <https://www.african-court.org/en/images/Cases/Judgment/Judgment%20Appl.004-2013%20Lohe%20Issa%20Konate%20v%20Burkina%20Faso%20-English.pdf> (accessed 8 November 2023).

involved in corrupt activities.<sup>211</sup> He was sentenced to a 12-month jail term and slapped with exorbitant fines.<sup>212</sup> The applicant asserted that the sanctions imposed on him violated his freedom of expression under article 9 of the African Charter, article 19 of the ICCPR, and article 66(2)(c) of the revised treaty of the Economic Community of West African States (ECOWAS).<sup>213</sup> The applicant also argued that the law underpinning the charges and conviction was not precisely drafted to justify the restriction on his freedom of expression.<sup>214</sup>

While the African Court found that the impugned laws met the test of legality and legitimate aim for limitation of rights, it faulted the proportionality of the sanctions and the nature of the offence.<sup>215</sup> The African Court stated that ‘freedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate relating to public figures.’<sup>216</sup> The African Court referred to the *Media Rights Agenda & Others* case, where the African Commission stated, ‘people who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise, public debate may be stifled altogether’.<sup>217</sup>

The African Court also referenced other decisions and commentary from the international human rights framework against the criminalisation of defamation and peaceful expression.<sup>218</sup> It concurred with the rulings from previous regional courts and stated that the sections under which the applicant was convicted and sentenced contravened article 9 of the African Charter, article 19

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<sup>211</sup> *Konate v Burkina Faso* (n 210) para 3.

<sup>212</sup> *Konate v Burkina Faso* (n 210) para 4.

<sup>213</sup> *Konate v Burkina Faso* (n 210) para 9.

<sup>214</sup> *Konate v Burkina Faso* (n 210) para 123.

<sup>215</sup> *Konate v Burkina Faso* (n 210) paras 131, 136, 137 & 139.

<sup>216</sup> *Konate v Burkina Faso* (n 210) para 155.

<sup>217</sup> *Media Rights Agenda and Others v Nigeria* (n 172) para 74.

<sup>218</sup> These include *Gavrilovic v Moldavia*, application 25464/05, ECtHR, judgement, 2009 para 60; *Cumpana and Mazare v Romania*, application 33348/96, ECtHR, judgement, 17 December 2004 para 115; *Mahmudov and Agazade v Azerbaijan*, application 38577/04, ECtHR, judgement, 2008 para 50; *Lehideux et Isorni v. France*, application 24662/94, ECtHR, judgement, 23 September 1998 para 57; *Radio France and all v France*, application 53984/00 ECtHR, judgement, 2004 para 40; *Raichinov v Bulgaria*, application 47579/99, ECtHR, judgement, 2006 para 50; *Kubaszewski v Poland*, application 571/04, ECtHR, judgement, 2010 para 45; *Mahmudov and Agazade v Azerbaijan*, application 35877/04, ECtHR, judgement, 2008 para 50; *Lyashko v Ukraine*, application 210/40/02, ECtHR, judgement, 2006 para 41(f); *Fedchanko v Russia*, application 33333/04, ECtHR, judgement, 2010; *Krutov v Russia*, application 15469/04, ECtHR, judgement, 2009; *Lombardo et al. v Malta*, application 7333/06, ECtHR, judgement, 2007. The European Court stated that it should be sued as a measure of last resort and only in severe cases such as incitement to violence and hate speech. The Inter-American Court also ruled against criminal defamation in *Trisant Donoso v Panama*, IACHR, merits judgement, 2009, Series C No 193 para 20; *Herrera-Ulloa v Costa Rica*, IACHR, merits judgement, 2 July 2004, Series C No 107 para 124-135 & *Palamara Iribarne v Chile*, IACHR, merits judgement, 22 November 2005, Series C No 135 para 63 Also see General Comment 34 para 47.

of the ICCPR, and article 66(2)(c) of the revised treaty of the ECOWAS.<sup>219</sup> Further, the custodial sentence was not a necessary measure to protect the honour and reputation of members of the bench and disproportionately interfered with the freedom of expression of journalists.<sup>220</sup> The African Court also emphasised that civil sanctions should meet the test of necessity and proportionality.<sup>221</sup>

The effect of criminalisation of expression was also examined in the *Federation of African Journalists and others v The Gambia*.<sup>222</sup> The main contention of the case was the oppressive media laws on sedition, criminal libel and publication of false news in The Gambia.<sup>223</sup> The ECOWAS Court of Justice agreed with the applicants that the said laws grossly violated freedom of expression under international law.<sup>224</sup> The ECOWAS Court emphasised the need for precise drafting of laws to guide persons on what constitutes legal or illegal speech and conduct.<sup>225</sup> The Court also cautioned against the adverse ‘chilling effect’ of vague or broadly worded legal provisions on free speech rather than risk engendering self-censorship.<sup>226</sup> It determined that criminal sanctions imposed on the applicants did not meet the proportionality and necessity test.<sup>227</sup>

Beyond this, the 2019 Declaration in principle 22(5) prohibits restrictions of freedom of expression on grounds of public order and national security ‘unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.’ The emphasis on misuse of public order and national security laws is relevant in the context of Africa. Many African countries have witnessed pre- and post-election protests regarding the

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<sup>219</sup> *Konate v Burkina Faso* (n 210) paras 163 & 164.

<sup>220</sup> As above.

<sup>221</sup> *Konate v Burkina Faso* (n 210) para 166.

<sup>222</sup> *Federation of African Journalists and 4 others v The Gambia*, suit ECW/CCJ/APP/36/15, ECOWAS Court of Justice, judgment, 13 March 2018 (*FAJ & 4 others v The Gambia*) <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2016/04/FAJ-and-Others-v-The-Gambia-Judgment.pdf> (accessed 8 November 2023).

<sup>223</sup> *FAJ & 4 others v The Gambia* (n 222) 4-5.

<sup>224</sup> *FAJ & 4 others v The Gambia* (n 222) 36-37 & 43.

<sup>225</sup> As above.

<sup>226</sup> *FAJ & 4 others v The Gambia* (n 222) 38 & 40-41. Also see *Nevanji Madanhire and Nquaba Matzhizi v Attorney General* 2015 ZWCC 02 <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2015/03/Madhanhire-v.-Attorney-General-CCZ-214.pdf> (accessed 8 November 2023).

<sup>227</sup> *FAJ & 4 others v The Gambia* (n 222) 44.

credibility of election results.<sup>228</sup> Some governments employ these laws to clamp down on these protests, and sometimes journalists documenting these events are caught up in the melee.<sup>229</sup>

### 3.2 The right of political participation

Article 13(1) of the African Charter guarantees the right to political participation, which provides that ‘Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.’ Article 13(1) does not expressly provide for the right to vote but guarantees the right to participate in government directly or indirectly. Guided by the elaboration of these rights under the ICCPR, particularly on what entails direct and indirect participation of citizens in the government of their country, it can be correctly concluded that this includes the right to vote and run for political office.

Deviating from the use of soft law instruments to reinforce protections for human rights,<sup>230</sup> the AU adopted the African Charter on Democracy, Elections and Governance (ACDEG)<sup>231</sup> to articulate binding provisions on elections, democracy and governance in the continent. ACDEG shores up the protection for political participation in Africa, and as of November 2023, 38 African countries had ratified the instrument, with Kenya depositing the instrument of ratification in 2022.<sup>232</sup> ACDEG imposes obligations on African countries to promote democracy and human rights, respect for the rule of law, and inculcate good governance in their systems.<sup>233</sup>

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<sup>228</sup> African Union Panel of the Wise ‘Election-related disputes and political violence: Strengthening the role of the African Union in preventing, managing, and resolving conflict’ (July 2010) 1.

<sup>229</sup> Human Rights Committee, General comment 37 (2020), on art 21 of the International Covenant on Civil and Political Rights – Right of peaceful assembly paras 44 & 30 <https://digitallibrary.un.org/record/3884725?ln=en> (accessed 8 November 2023).

<sup>230</sup> Other relevant declarations and decisions include: 1990 Declaration on the political and socio-economic situation in Africa and the fundamental changes taking place in the world; 1995 Cairo Agenda for the Re-launch of Africa’s Economic and Social Development; 1999 Algiers Declaration on Unconstitutional Changes of Government; 2000 Lomé Declaration for an OAU Response to Unconstitutional Changes of Government; 2002 OAU/AU Declaration on Principles Governing Democratic Elections in Africa & 2003 Protocol Relating to the Establishment of the Peace and Security Council of the African Union.

<sup>231</sup> ACDEG <https://au.int/sites/default/files/treaties/36384-treaty-african-charter-on-democracy-and-governance.pdf> (accessed 8 November 2023). ACDEG was adopted in 2007 and entered into force in 2012.

<sup>232</sup> AU ‘List of countries which have signed, ratified/acceded to the ACDEG’ [https://au.int/sites/default/files/treaties/36384-sl-AFRICAN\\_CHARTER\\_ON\\_DEMOCRACY\\_ELECTIONS\\_AND\\_GVERNANCE\\_0.pdf](https://au.int/sites/default/files/treaties/36384-sl-AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GVERNANCE_0.pdf) (accessed 8 November 2023).

<sup>233</sup> Art 2, 3, 4 & 6 ACDEG.

It also promotes regular, free and fair elections as the basis of the legitimate authority of African governments.<sup>234</sup> This thesis especially highlights the objective under article 2(10) to:

Promote the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs...

The obligation to promote freedom of expression and professional media is reiterated under article 27 (8) of ACDEG.<sup>235</sup>

Although a soft law instrument, the Guidelines on Access to Information and Elections in Africa (the Guidelines)<sup>236</sup> is another notable instrument developed by the African Commission to enhance access to information during elections in Africa, particularly by advocating for proactive disclosure of public interest information. This need was informed by a recognition of the link between the absence of information during elections and the threat posed to peace, security and stability in Africa.<sup>237</sup> The Guidelines assert that proactive disclosure of information by key electoral stakeholders would facilitate accountability and transparency and promote the credibility and integrity of the electoral process.<sup>238</sup>

Decisions of the African Commission and the African Court have affirmed the right to political participation as articulated under international law.<sup>239</sup> This is despite navigating challenges, including no or poor state compliance. Some scholars have explored this Achilles heel that persists for both the African Commission and the African Court regardless of the non-

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<sup>234</sup> Art 2(3), 2(4), 2(6) ACDEG.

<sup>235</sup> Art 27 (8) ACDEG.

<sup>236</sup> 2017 Guidelines on Access to Information and Elections in Africa [https://www.chr.up.ac.za/images/researchunits/dgdr/documents/resources/guidelines\\_on\\_access\\_to\\_information\\_and\\_elections\\_in\\_africa\\_en.pdf](https://www.chr.up.ac.za/images/researchunits/dgdr/documents/resources/guidelines_on_access_to_information_and_elections_in_africa_en.pdf) (accessed 8 November 2023). The African Commission adopted the Guidelines on 10 November 2017, during the Ordinary session in Banjul, The Gambia.

<sup>237</sup> Rationale and objectives of the 2017 Guidelines 5.

<sup>238</sup> Rationale and objectives of the 2017 Guidelines 5-6.

<sup>239</sup> See decisions including *Tanganyika Law Society, the Legal and Human Rights Centre v Tanzania; Reverend Christopher R Mtikila v Tanzania* Application No. 009/2011, Application No 011/2011 [2011] AfCHPR 7 (22 September 2011) <https://www.african-court.org/en/images/Cases/Judgment/Judgment%20Application%20009-011-2011%20Rev%20Christopher%20Mtikila%20v.%20Tanzania.pdf> (accessed 8 November 2023). The African Court found Tanzania in violation of the right to political participation by barring the candidature of independent candidates in presidential, parliamentary and local government elections in its Constitution in *Suy Bi Gohore Emile & others v Côte d'Ivoire* Application No 044/019, judgement, 15 July 2020 <http://www.african-court.org/en/images/Cases/Judgment/Apl.%20044%20-2019%20-%20Suy%20be%20Gohore-%20English.pdf> (accessed 8 November 2023).

binding and binding nature of their decisions, respectively.<sup>240</sup> Individuals and Non-Governmental Organizations (NGOs) with observer status before the African Commission are further restrained from accessing the African Court because of the failure of states to make the article 34 (6) declaration that would facilitate such access.<sup>241</sup> The long delays in determining cases of the African Commission and the African Court also make it a challenging avenue for the determination of election-related disputes given the average five-year cycle of election periods. Makunya argues that the use of provisional measures and amicable settlement is necessary to enhance the feasibility of these bodies as avenues for recourse for election-related disputes.<sup>242</sup>

### **3.3 Assessing the protection of media rights and political participation in the digital age in the African human rights system**

The African human rights system has similarly bolstered media rights protection and political participation in the internet age largely through soft law instruments developed by the African Commission under its promotional mandate. Inspired by the Joint Declaration and the UN Internet Resolution, the African Commission passed Africa's own internet resolution that recognised the opportunities and unique challenges facing media rights in the digital age, including the digital divide and internet shutdowns.<sup>243</sup> It 'calls on States Parties to respect and take legislative and other measures to guarantee, respect and protect citizen's right to freedom of information and expression through access to Internet services'. Significantly, part IV of the revised 2019 Declaration is impressive in its provisions for media rights online. It calls on states to facilitate freedom of expression online, and in doing so, it emphasises 'universal, equitable,

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<sup>240</sup> G Kakai 'The role of continental and regional courts in peace-building through the judicial resolution of election-related disputes' (2020) 4 *African Human Rights Yearbook* 343-344 & C Okoloise 'Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights' (2018) 18 *African Human Rights Law Journal* 27-28.

<sup>241</sup> African Court 'Declarations' <https://www.african-court.org/wpafc/declarations/> (accessed 8 November 2023).

<sup>242</sup> TM Makunya 'Overcoming challenges to the adjudication of election-related disputes at the African Commission on Human and Peoples' Rights: Perspectives from the Ngandu case' (2022) 22 *African Human Rights Law Journal* 399.

<sup>243</sup> Resolution on the Right to Freedom of Information and Expression on the Internet in Africa - ACHPR/Res. 362(LIX) 2016 [http://www.oas.org/en/sla/dil/docs/acceso\\_informacion\\_desarrollos\\_UA\\_ACHPR-Res\\_362\\_LIX\\_2016.pdf](http://www.oas.org/en/sla/dil/docs/acceso_informacion_desarrollos_UA_ACHPR-Res_362_LIX_2016.pdf) (accessed 8 November 2023).



affordable and meaningful' access to the internet as a means to facilitate the exercise of this right and interrelated rights.<sup>244</sup> It calls on a multi-stakeholder process to realise this right.<sup>245</sup>

Both the 2019 Declaration and the Guidelines on Access to Information and Elections in Africa recognise the threat of internet shutdowns on the exercise of human rights. Elections have prompted government-orchestrated internet shutdowns in some African countries such as Uganda (2021), Tanzania (2020), and the Gambia (2016) in the name of ensuring public order, among other reasons.<sup>246</sup> Principle 38 of the Declaration confronts internet shutdowns by providing for the non-interference of freedom of expression online by measures such as 'removal, blocking or filtering of content, unless such interference is justifiable and compatible with international human rights law and standards'. It further obligates states not to condone or engage in disruption of access to the internet for part or whole populations.<sup>247</sup> Guideline 25 obligates states to refrain from implementing internet shutdowns or other interruptions of media services during elections.<sup>248</sup> In the exceptional circumstances where a shutdown is allowed under international law, guideline 27 requires states to proactively disclose the basis for the shutdown. Further, this being a limitation of rights, it should meet the three-part test of provided by law, serve a legitimate aim and be necessary and proportionate in a democratic society. Internet shutdowns or interruption of media services should also be subject to expedited judicial review.<sup>249</sup>

It is concerning that the Guidelines appear to open a window of opportunity for internet shutdowns, although this is qualified by requiring it to meet the limitations of rights test. However, given the threat posed by internet shutdowns to human rights in Africa, the position of this thesis is that a more human rights-centred approach would firmly stipulate that internet shutdowns are incompatible with the guarantee for freedom of expression, particularly in the context of elections when the free flow of information is vital for meaningful public and political participation. Given the burgeoning reliance on online media as a source of information and a

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<sup>244</sup> Principle 37 2019 Declaration.

<sup>245</sup> Principle 37 (3) 2019 Declaration.

<sup>246</sup> Access Now 'The return of digital authoritarianism Internet shutdowns in 2021' (2022) <https://www.accessnow.org/wp-content/uploads/2022/05/2021-KIO-Report-May-24-2022.pdf> (accessed 8 November 2023).& Access Now 'Weapons of control, shields of impunity' <https://www.accessnow.org/wp-content/uploads/2023/05/2022-KIO-Report-final.pdf> (accessed 8 November 2023).

<sup>247</sup> Principle 38 (2) Declaration.

<sup>248</sup> Guideline 26 2017 Guidelines.

<sup>249</sup> Guideline 28 2017 Guidelines.

platform for public and electoral discourse, implementing an internet shutdown effectively restricts a crucial communication channel.

Looking at case law, while the African Commission is yet to deliver a determination on online media freedom, guidance has been provided by the ECOWAS Court of Justice on the impact of internet shutdowns on freedom of expression. The applicants in the *Amnesty International Togo and 7 others v The Togolese Republic*<sup>250</sup> case alleged the Togolese government violated their right to freedom of expression, right to information and media freedom as provided under the Constitution and international law.<sup>251</sup>

This complaint emerged after the Togolese government implemented an internet shutdown and network disruption measure between in September 2017 to pre-empt a protest. The internet shutdown was justified on the grounds of restoring public order, protecting national security, and controlling hate speech and incitement during the protests.<sup>252</sup> The government proceeded to draft a bill authorising it to shut down internet services without prior judicial approval.<sup>253</sup> There were also reports of disruption of Short Messaging Service (SMS) services. The internet shutdown negatively affected the economy and affected the applicants' right to work.<sup>254</sup>

In delivering its judgement, the ECOWAS Court of Justice first sought to determine the link between access to the internet and freedom of expression. In doing so, it concluded:

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 of the right to freedom of expression. Right to internet access is closely linked to the right of freedom of speech which can be seen to encompass freedom of expression as well. Since access to internet is complementary to the enjoyment of the right to freedom of expression, it is necessary that access to internet and the right to freedom of expression be deemed to be an integral part of human

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<sup>250</sup> *Amnesty International Togo v The Togolese Republic* suit ECW/CCJ/APP/61/18, ECOWAS Court of Justice, judgement, 6 July 2020 (*Amnesty Togo v Togo*) <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2020/07/JUD-ECW-CCJ-JUD-09-20-AMNESTY-INTERNATIONAL-TOGO-7-ORS-V.-REPUBLIC-OF-TOGO-of-6-july-2020.pdf> (accessed 8 November 2023).

<sup>251</sup> Arts 25 and 26 of the Togolese Constitution, art 9 of the African Charter, art 19 of the ICCPR and art 66 of the Revised ECOWAS Treaty.

<sup>252</sup> *Amnesty Togo v Togo* (n 250) para 16.

<sup>253</sup> *Amnesty Togo v Togo* (n 250) para 6.

<sup>254</sup> *Amnesty Togo v Togo* (n 250) paras 8, 9 & 19.

right that requires protection by law and makes its violation actionable. In this regard, access to internet being a derivative right and at the same time component part of each other, should be jointly treated as an element of human right to which states are under obligation to provide protection for in accordance with the law just in the same way as the right to freedom of expression is protected.

Given the Court's conclusion that access to the internet is a derivative right of freedom of expression, it had to determine whether the internet shutdown was a warranted restriction of freedom of expression.<sup>255</sup> While it acknowledged that the protection of national security was a legitimate aim to restrict certain rights, it emphasised that such derogation must be grounded on legislation. In the case of Togo, the government implemented the internet shutdown in the absence of such legislation. Therefore, this action violated the applicants' freedom of expression.<sup>256</sup> Therefore, the respondent's actions failed to meet the legality test, so the Court did not deem it necessary to explore the necessity and proportionality test.

Beyond internet shutdowns, the 2019 Declaration tasks states to ensure that economic measures, such as taxation, on the internet and other digital technologies do not interfere with 'universal, equitable, affordable and meaningful' access to the internet. These economic measures should also align with international human rights law and standards.<sup>257</sup>

The 2019 Declaration also provides for state responsibility in relation to internet intermediaries, the new players in regulating and influencing freedom of expression, and online media freedom. Principle 39(1) provides for the principle of net neutrality by requiring states to ensure that internet intermediaries provide equal access to all internet traffic. In the event that internet intermediaries have to moderate or filter online content, they should adopt a human rights-based approach that aligns with the realisation of freedom of expression. Internet intermediaries should ensure transparency with regard to requests for content removal, institute appeal mechanisms, and provide remedies in the event of infringement of human rights.<sup>258</sup> Additionally, while states are prohibited from requiring the removal of online content if they make such a request, it should be clear and unambiguous, by judicial order, follow due process,

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<sup>255</sup> *Amnesty Togo v Togo* (n 250) para 41.

<sup>256</sup> *Amnesty Togo v Togo* (n 250) para 45.

<sup>257</sup> Principle 38 (3) 2019 Declaration.

<sup>258</sup> Principle 39 (3) 2019 Declaration.

comply with international laws and standards, and be transparent and allow for the right to appeal.<sup>259</sup>

While this is a starting point to articulating the obligations of internet intermediaries, there is a need to refine the rights and responsibilities of internet intermediaries. The term is widely encompassing including Internet Service Providers (ISPs) such as Safaricom in Kenya; email services such as Gmail; Domain Name Service Providers like Google; search engines like Google and Yahoo; messaging apps like WhatsApp; and social media platforms such as Facebook and Twitter. This thesis is particularly concerned with online media freedom on social media platforms that draw millions of subscribers who rely on the platforms to consume and share news and engage in public debate. A gaping transparency and accountability deficit among social media companies becomes more glaring with respect to Africa.<sup>260</sup>

Further, the Declaration imposes an obligation to states to ensure the ‘development, use and application of artificial intelligence, algorithms and other similar technologies by internet intermediaries’ are in accordance with international human law and standards.<sup>261</sup> In 2021, the African Commission passed a Resolution for the study of human and peoples’ rights implications of artificial intelligence, robotics and other new and emerging technologies in Africa.<sup>262</sup> Further, the Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area,<sup>263</sup> and the Resolution on Business and Human Rights in Africa<sup>264</sup> seek to strengthen human rights-based approaches to businesses in Africa. This may extend to social media companies and other internet intermediaries who affect media rights

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<sup>259</sup> Principle 39 (4) 2019 Declaration.

<sup>260</sup> Z Takhshid ‘Regulating social media in the Global South’ 24 (1) (2022) *Vanderbilt Journal of Entertainment and Technology Law* (2022) 55 & O Madung ‘Opaque and overstretched, Part II: How platforms failed to curb misinformation during the Kenyan 2022 election’ <https://foundation.mozilla.org/en/campaigns/opaque-and-overstretched-part-ii/#case-study-labeling-failures> (accessed 8 November 2023).

<sup>261</sup> Principle 39(6) Declaration.

<sup>262</sup> Resolution on the need to undertake a study on human and peoples’ rights and artificial intelligence (AI), robotics and other new and emerging technologies in Africa - ACHPR/Res. 473 (EXT.OS/ XXXI) 2021 <https://achpr.au.int/index.php/en/adopted-resolutions/473-resolution-need-undertake-study-human-and-peoples-rights-and-art> (accessed 8 November 2023).

<sup>263</sup> See article 37 on investor liability of the Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area <https://www.tralac.org/documents/resources/cfta/4613-protocol-on-investment-to-the-agreement-establishing-the-afcfra-zero-draft-november-2021/file.html> (accessed 8 November 2023).

<sup>264</sup> Resolution on Business and Human Rights in Africa - ACHPR/Res.550 (LXXIV) 2023 <https://achpr.au.int/index.php/en/adopted-resolutions/550-resolution-business-and-human-rights-africa-achprres550-lxxiv-2023> (accessed 8 November 2023).

Outside the largely soft law parlance, article 27 of the African Charter on Democracy, Elections and Governance (ACDEG) calls for state commitment towards the development and utilisation of Information and Communication Technologies (ICTs),<sup>265</sup> as well as the call for development of the private sector through an enabling legislative and regulatory framework.<sup>266</sup> These provisions are relevant for promoting media rights during elections using digital technologies. The call for state and private sector dialogue and collaboration under article 28 is relevant in the internet age, where owners of digital technologies have significant influence on the exercise of freedom of expression and other rights online throughout the electoral cycle. This collaboration is essential to ensure that their policies, systems and procedures align with internationally recognised human rights law and standards.

State reporting obligations before the African Commission, to some extent, promote compliance with treaties and relevant soft laws. Article 62 of the African Charter obligates state parties to submit a report on the legislative and other measures implemented to give effect to the rights and freedoms contained therein every two years. This obligation is reiterated in soft laws such as the 2019 Declaration and 2017 Guidelines.<sup>267</sup> This reporting process is crucial to reinforcing the implementation and entrenching of soft law instruments in light of their non-binding nature. On its part, the African Commission in concluding observations made after considering state reports, has called for compliance with both treaty and soft law provisions on media rights offline and online including the 2019 Declaration.<sup>268</sup> Concluding observations have

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<sup>265</sup> Art 27(7) ACDEG.

<sup>266</sup> Art 27(6) ACDEG.

<sup>267</sup> Principle 43 2019 Declaration & Guidelines 31-34 2017 Guidelines.

<sup>268</sup> See Concluding observations on the combined 2nd and 3rd periodic report of the State of Eritrea under the African Charter on Human and Peoples Rights (2017-2020), ACHPR 78th Ordinary (Private) Session February / March 2024 12 <https://achpr.au.int/index.php/en/state-reports/combined-2nd-and-3rd-periodic-eritrea> (accessed 2 June 2024). The Commission made several recommendations to Eritrea with reference to the 2019 Declaration including amending Penal Code provisions that criminalise defamation in accordance with principles 21-23; ensuring compliance with the principle of reasonability and justifiability in limiting freedom of expression and access to information under principle 9; complying with principles 9 and 20 on protection of journalists; and respecting internet access rights under principle 37. After considering Egypt's state report, the Commission recommended that Egypt align relevant laws with the 2019 Declaration. See Concluding observations and recommendations - Egypt: 9th to 17th combined periodic report, 2001-2017, 31st Extraordinary Session 19 to 25 February 2021 para 54 <https://achpr.au.int/index.php/en/state-reports/concluding-observations-and-recommendations-egypt-9th-17th-combined-period> (accessed 2 June 2024).

also highlighted legislative gaps in protecting media rights offline and online as well as violations of digital rights.<sup>269</sup>

#### **4 Role of African civil society in international law norm development and enforcement**

International law and research have underscored the vital role of civil society in the development of the international human rights framework and in advocating for state compliance with human rights law obligations.<sup>270</sup> Given the state of human rights violations and abuses in Africa by state and non-state actors, the advocacy and oversight roles played by CSOs for good governance and democracy, including free and fair elections, are crucial. CSOs also undertake some functions that fall under peripheral journalism by creating and sharing content, undertaking public and civic education, and providing opportunities for public debate on issues of public interest. The participation of civil society is a manifestation of the right to public participation guaranteed under international law and integrated into national constitutions.

In the African context, the fingerprint of CSOs in international law norm development is seen in instruments that have bolstered protections for media rights and political participation in the dynamic age of the internet, such as the 2019 Declaration and the Guidelines on Access to Information and Elections in Africa.<sup>271</sup> Both instruments require states to report on compliance when undertaking state reporting obligations to the African Commission under article 62 of the African Charter.<sup>272</sup> Where states have failed to provide a complete picture of the level of

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<sup>269</sup> See Concluding observations and recommendations - Egypt: 9th to 17th Combined Periodic Report (n 268) para 54. The Commission called on Egypt to ensure open and free internet access and avoid abusing security justifications to limit the right. The Commission also recommended that Zimbabwe implement ‘appropriate legislative and other measures to adequately protect the right to access to internet services and social media platforms.’ For Zimbabwe, see Concluding observations and recommendations on the combined periodic report of the Republic of Zimbabwe on the implementation of the African Charter on Human and Peoples’ Rights (2007 – 2019), 69th Ordinary Session held virtually from 15 November – 05 December 2021 para 58 <https://achpr.au.int/index.php/en/state-reports/concluding-observations-and-recommendations-zimbabwe-11th-12th-13th-14th> (accessed 2 June 2024).

<sup>270</sup> For example, see article 27 (2) of ACDEG which obligates states to promote popular participation and collaboration with civil society. Article 28 further emphasises that states should ‘ensure and promote strong partnerships and dialogue between government, civil society and private sector’.

<sup>271</sup> See the introductory sections of the two documents.

<sup>272</sup> Principle 43 2019 Declaration & Guidelines 31-34 2017 Guidelines.

compliance, shadow reports submitted by organisations with observer status have complemented the reports and helped boost transparency and accountability.<sup>273</sup>

Research and advocacy efforts by civil society continue to play an instrumental role in shaping responses to digital opportunities and threats to human rights. Reports developed independently or with bodies such as the African Commission further illustrate the evolving human rights implications of digital technologies and the regulatory gaps. One such research output is the report series developed by the Centre for Human Rights, University of Pretoria, with the support of the African Commission Special Rapporteur on Freedom of Expression and Access to Information in Africa on state compliance with the Guidelines. As of 2023, the series had assessed South Africa (2019), Ghana (2020), Tanzania (2020), Uganda (2021), The Gambia (2021), and Kenya (2022) elections.<sup>274</sup> The organisation has conducted targeted electoral stakeholder engagements to encourage compliance with the recommendations and the enhancement of electoral transparency in countries such as South Africa. Yet another African Commission and CSO collaboration is the developing study on artificial intelligence (AI), robotics and other new and emerging technologies in Africa.<sup>275</sup> In light of calls for regulation of AI,<sup>276</sup> such a contextualised study is important to guide the African human rights bodies and states in formulating regulatory measures. Resolutions passed by the African Commission have also enjoyed civil society input.

It is worth mentioning the role of the NGO Forum in providing a platform to coordinate engagement between CSOs and the African Commission, especially during the sessions. This continued collaboration undeniably offers invaluable support to the Commission in undertaking its promotional and protection mandates. The vitalness of the collaboration becomes even more important in the face of poor or non-compliance by states with the decisions of the African

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<sup>273</sup> CHR ‘The state reporting process under the African Commission’ <https://www.maputoprotocol.up.ac.za/state-reporting> (accessed 8 November 2023).

<sup>274</sup> See the reports for South Africa, Kenya, Uganda and The Gambia at CHR ‘EIDR Unit resources’ <https://www.chr.up.ac.za/expression-information-and-digital-rights-unit-resources> (accessed 8 November 2023).

<sup>275</sup> Resolution on the need to undertake a study on human and peoples’ rights and artificial intelligence (AI), robotics and other new and emerging technologies in Africa - ACHPR/Res. 473 (EXT.OS/ XXXI) 2021 <https://achpr.au.int/index.php/en/adopted-resolutions/473-resolution-need-undertake-study-human-and-peoples-rights-and-art> (accessed 8 November 2023). The Centre for Human Rights, University of Pretoria is coordinating the technical team for the study.

<sup>276</sup> A Gregg, C Lima & G De Vynck ‘AI poses ‘risk of extinction’ on par with nukes, tech leaders say’ *The Washington Post* 30 May 2023 <https://www.washingtonpost.com/business/2023/05/30/ai-poses-risk-extinction-industry-leaders-warn/> (accessed 8 November 2023).

Commission and state interference with the work of the Commission.<sup>277</sup> CSO activism emerges as a crucial opposing and accountability measure. Other platforms, including the Pan African Parliament Civil Society Forum, and the Economic, Social and Cultural Council (ECOSOCC), allow for civil society engagement with state actors at the regional level to push forward their human rights agenda, including the protection of digital rights during elections.

Further, the African Declaration on Internet Rights and Freedoms (African Internet Declaration),<sup>278</sup> adopted by CSOs, aims to protect human rights and fundamental freedoms on the internet in Africa. Key among its principles is the availability of open, interoperable and affordable internet for Africans to facilitate full human development and the exercise and enjoyment of other rights.<sup>279</sup> The African Internet Declaration reiterates protections for media rights online, including recognition and protection of journalists and other content creators both offline and online,<sup>280</sup> lawful content restriction in compliance with the three-pronged limitations test under international law;<sup>281</sup> and alignment of state laws with international law and standards especially by abolishing criminal laws on expression.<sup>282</sup>

CSOs' contribution to international law normative development and enforcement is also enabled by CSO-hosted multistakeholder events that allow for knowledge sharing, discussions, debate and strategic interventions, including regulatory interventions to human rights issues in the digital age. State actors, including policymakers, regulators and law enforcement, and non-state actors, such as the private sector, tech community, international community, media, academia and CSOs who are key shapers of human rights regulation in the digital age, all come together in these spaces. The Digital Rights Inclusion Forum (DRIF) by Paradigm Initiative,<sup>283</sup>

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<sup>277</sup> F Viljoen 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights' (2013) 101 *Foreign and International Law* 411-430; J Biegon 'Compliance studies and the African human rights system: Reflections on the state of the field' in A Adeola (ed) *Compliance with international human rights law in Africa: Essays in honour of Frans Viljoen* (2022) 10-34 & M Killander & MG Nyarko 'Human rights developments in the African Union (January 2017-September 2018)' (2018) 18 *African Human Rights Law Journal* 741.

<sup>278</sup> African Declaration on Internet Rights and Freedoms <https://africaninternetrights.org/sites/default/files/African-Declaration-English-FINAL.pdf> (accessed 8 November 2023). This document was prepared by members of the African Declaration group, a Pan-African initiative to promote human rights standards and principles of openness in Internet policy formulation and implementation on the continent.

<sup>279</sup> African Internet Declaration 10-11.

<sup>280</sup> African Internet Declaration 18.

<sup>281</sup> African Internet Declaration 17

<sup>282</sup> African Internet Declaration 19.

<sup>283</sup> Paradigm Initiative 'DRIF' <https://drif.paradigmhq.org/> (accessed 8 November 2023).



and the Forum on Internet Freedom in Africa (FIFAfrica)<sup>284</sup> by the Collaboration on International ICT Policy for East and Southern Africa (CIPESA) are some examples of CSO-led initiatives. The African Internet Governance Forum (AFIGF)<sup>285</sup> and the regional caucuses under the stewardship of the AU and UN also feature wide CSO representation.

## 5. Assessing the impact of international law towards nurturing the public sphere

As indicated in the theoretical framework, this chapter sought to examine how laws, and in this case, international law, can protect the chimerical but desirable public sphere. The envisioned goal is to nurture the potential of the public sphere as a platform for meaningful public discourse that is critical, egalitarian, inclusive and substantive. Consequently, the public sphere contributes to the development of an informed electorate which can actively participate in democratic processes such as elections and push for free and fair processes. The role of international law is examined through the lens of the protection of media rights and political participation in the contemporary environment. The chapter sought to determine whether international law effectively protects traditional and online media that mediate engagement in the modern-day public sphere by looking at the protection of media rights. Historically, the political economy of the media was a key factor that weakened the ability of the media to play its role in the public sphere.<sup>286</sup> The examination of the international law framework and case law finds that normative-wise, international law articulated in hard and soft laws has largely provided fundamental protection for these rights and further strengthened this protection by elaborating on conceptualisation, providing guidelines to states on the development of protective frameworks at the national level, articulating the role of and responsibilities of offline and online media owners, practitioners and users, and adapting to the threats and opportunities presented by digital technologies to human rights. Further enunciated in international law is the interdependence between freedom of expression, media freedom and political participation with nuanced protection of these rights in the digital age. Admittedly, there are gaps that require redress, such

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<sup>284</sup> CIPESA 'FIFAfrica' <https://cipesa.org/fifafrica/> (accessed 8 November 2023).

<sup>285</sup> AFIGF <https://afigf.org/> (accessed 8 November 2023).

<sup>286</sup> J Habermas *The structural transformation of the public sphere* (translated by T Burger) (1989) 66; RC Holub *Jurgen Habermas: Critic in the public sphere* (1991) 6; O Negt & A Kluge *Public sphere and experience: Toward an analysis of the bourgeois and proletarian public sphere* (1993) 56-58 & P O'Mahony *The contemporary theory of the public sphere* 13.

as enhancing accountability for interment intermediaries such as social media companies through a strong binding instrument as opposed to soft laws. This is critical given the threats posed to the democratising potential of the internet in the public sphere by poor human rights considerations in the decisions of social media companies. On paper, the international law framework has great potential to temper the twin threats of politics and economy on the role of the media in facilitating meaningful discourse and participation in the public sphere. The weak link remains the enforcement of these rights and obligations at the state level and strong multistakeholder accountability frameworks at the international and state levels.

## **6. Conclusion**

This chapter discussed the international human rights framework under the UN and African systems and case law on media rights and the right to political participation. It finds that seminal international human rights instruments such as the ICCPR, Universal Declaration, and African Charter provide a good foundational basis for the protection of media rights both offline and online, as well as political participation. However, the development of soft law instruments and, to a smaller extent, hard laws at the international level has expanded the protection of media rights and the right to political participation in the digital age. Linking soft law instruments to binding treaties and established human rights principles, as well as imposing state reporting obligations under the soft law instruments reifies their normative capacity in protecting media rights and political participation. This evolving framework has considered various emerging issues, including the reconceptualization of media, emerging threats and opportunities, duties and responsibilities of conventional regulatory players such as states and new regulatory actors such as social media companies in online governance, and protection of offline and online journalists. While some legal gaps exist on issues such as social media transparency and accountability, the normative progress is laudable.

Synthesising the discussion above, a picture emerges of the great potential of international law in nurturing the public sphere by protecting media rights, political participation and the interdependence of these rights. The safeguards against the twin threats of politics and economy, to some extent, are manifest in the international law framework. The assessment also reveals that the UN, more so than the African framework, has comprehensively explored right-

based protections in the digital age. Importantly, the presence of a free and independent media that is enabled to effectively play its role in the public sphere contributes to free and fair elections. This thesis underscores the role of offline and online media in acting as a watchdog and facilitating public education and meaningful public discourse.

The thrust of this chapter is to show that international law forms a critical component of a human rights-based approach to media protection during elections in the digital age. Enforcement and compliance, however, remain an Achilles heel of international law, especially in African countries, including Kenya. Ideally, by the action of ratification, states are obligated to comply with international law. Even signatories to these instruments have a good faith obligation to act in accordance with the provisions therein. With the increased global interconnectedness of the digital age, universalism of human rights, as enabled by international law, has gained more prominence. Multistakeholder collaboration and advocacy with the participation of state and non-state actors, including civil society, is imperative in reinforcing human rights protections in the digital. This thesis will further refine the demarcations of a human rights-based approach to media regulation in the digital age towards enhancing meaningful political participation in the public sphere and free and fair elections in chapters four and five.

# **CHAPTER FOUR: KENYA'S LEGAL AND POLICY FRAMEWORK ON MEDIA FREEDOM AND POLITICAL PARTICIPATION IN THE DIGITAL AGE**

## **1 Introduction**

This chapter examines the normative framework for protecting media rights and political participation in the digital age in Kenya and its influence on the Kenyan public sphere. The chapter is divided into five parts. The first part is this introduction. The second part is the umbilical cord linking chapters three and four by examining the place of international law in Kenya. The third part delves into media freedom's constitutional and statutory protections, relevant jurisprudence and the framework's adaptability to the digital age. As a starting point, the chapter recognises the progressive nature of the Kenyan Constitution as a bulwark for protecting human rights and fundamental freedoms. It further analyses the effectiveness of the legal framework through a limitation of rights prism. This is not a pre-emption of a pessimistic view of the normative framework. Rather, the approach investigates whether the legislative dispensation is geared towards restricting or advancing media freedom. Contemporaneously, the part poses and answers the question of whether media regulation is enabling or restrictive. Thirdly, the part discusses the interdependent laws on access to information and data protection and their impact on media freedom and political participation. In examining the legislative and policy dispensation, the chapter explores whether it aligns with the Constitution and international laws and standards, which form the basis of a human rights-based approach. The fourth part of the chapter canvasses the normative framework on political participation in Kenya, highlighting how electoral laws also incorporate protections for media freedom. The fifth and final part is the conclusion.

## 2 The place of international law on media rights and political participation in the national legal and policy framework

The Constitution of Kenya strongly protects the interconnected rights of freedom of expression, media freedom and political participation.<sup>1</sup> This chapter observes that the definition and substance of these rights are similar to international law. This makes it necessary to explore how the Kenyan legal dispensation treats international law to determine Kenya's obligations Kenya in relation to the general rules of international law and relevant treaties and conventions discussed in chapter three of this thesis.

Articles 2(5) and 2(6) of the Constitution provide the place of international law in Kenya's legislative framework. Article 2(5) provides that 'the general rules of international law shall form part of the law of Kenya'. Article 2(6) of the Constitution adds that treaties and conventions that are ratified by Kenya are also part of the national laws. The articles are silent on the weight of soft law instruments in Kenya. However, international law is instructive on the largely non-binding nature of soft laws, which are aimed at guiding state action.

Kenya has ratified various seminal human rights instruments under the United Nations (UN) legal framework, including the International Covenant on Civil and Political Rights (ICCPR).<sup>2</sup> At the continental level, it has ratified the African Charter on Human and Peoples' Rights (African Charter)<sup>3</sup> and the African Charter on Democracy, Elections and Governance (ACDEG), among others. By ratifying these instruments, Kenya is bound by their provisions.

Before the promulgation of the 2010 Constitution, Kenya adopted a dualist approach in its application of international law, which required the parliament to domesticate treaties and conventions ratified by the executive arm of the government before they were considered binding.<sup>4</sup> As a result, Kenyan courts treated international law that had not been domesticated as

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<sup>1</sup> Arts 33, 34 & 35 of the Constitution of Kenya <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010> (accessed 8 November 2023).

<sup>2</sup> OHCHR 'Status of ratification interactive dashboard' <https://indicators.ohchr.org/> (accessed 8 November 2023) & ICCPR <https://www.ohchr.org/sites/default/files/ccpr.pdf> (accessed 8 November 2023).

<sup>3</sup> African Charter [https://au.int/sites/default/files/treaties/36390-treaty-0011\\_-\\_african\\_charter\\_on\\_human\\_and\\_peoples\\_rights\\_e.pdf](https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf) (accessed 8 November 2023).

<sup>4</sup> JO Ambani 'Navigating past the 'dualist doctrine': The case for progressive jurisprudence on the application of international human rights norms in Kenya' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 28-29.

non-binding and persuasive in determining cases.<sup>5</sup> For the judges who were willing to apply international law, there was an emphasis that it should not conflict with national laws.<sup>6</sup> In effect, the then jurisprudence did not fully benefit from the strong human rights protections agreed upon under international law. Fast-forward to post-2010, articles 2(5) and 2(6) of the Constitution departed from this approach, albeit with some ambiguity because the construction of the articles was not unequivocal on the status of international law in Kenya's legal dispensation. The contention emerged from two aspects: the phrasing of article 2(5) and the question of the hierarchy of laws in the event international law conflicts with national law.

Case law has been instructive in providing clarity on these aspects. As earlier indicated, article 2(5) dictates that the general rules of international law form part of Kenyan law. Justice DS Majanja, in the High Court case of *Kituo Cha Sheria others v Attorney General*, clarified that 'general rules of international law' means customary international law.<sup>7</sup> Guided by this, Kenyan courts can rely on general rules of international law, which includes customary international law, when determining issues under the Bill of Rights.

The second point of contention on the status of international law was on the hierarchy of international law when examined against the Constitution and other national laws.<sup>8</sup> Article 27 of the Vienna Convention on the Law of Treaties provides, 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'<sup>9</sup> On their part, international tribunals' decisions have elevated international law over national law in case of a conflict of laws.<sup>10</sup> In Kenya, the issue of the hierarchy of international law vis-à-vis national law has been

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<sup>5</sup> *Okunda v Republic* [1970] EA 512 & *Pattni & Another v Republic* [2001] eKLR, Miscellaneous Civil Application 322 & 810 of 1999 <http://kenyalaw.org/caselaw/cases/view/2051/> (accessed 8 November 2023).

<sup>6</sup> *Rono v Rono* (2005) AHRLR 107 (KeCA 2005) para 22 [https://www.cehurd.org/wp-content/uploads/2012/04/right%20to%20health%20data%20base/CASES/KENYA/Rono%20v%20Rono%20\(2005\)%20AHRLR%20107%20\(KeCA%202005\).pdf](https://www.cehurd.org/wp-content/uploads/2012/04/right%20to%20health%20data%20base/CASES/KENYA/Rono%20v%20Rono%20(2005)%20AHRLR%20107%20(KeCA%202005).pdf) (accessed 8 November 2023) & *RM v Attorney-General* (2006) AHRLR 256 (KeHC 2006) para 22 [https://www.cehurd.org/wp-content/uploads/2012/04/right%20to%20health%20data%20base/CASES/KENYA/RM%20v%20Attorney-General%20\(2006\)%20AHRLR%20256%20\(KeHC%202006\).doc](https://www.cehurd.org/wp-content/uploads/2012/04/right%20to%20health%20data%20base/CASES/KENYA/RM%20v%20Attorney-General%20(2006)%20AHRLR%20256%20(KeHC%202006).doc) (accessed 8 November 2023).

<sup>7</sup> *Kituo Cha Sheria & 8 Others v Attorney General* [2013] eKLR, High Court Petition 19 & 115 of 2013 para 71 <http://kenyalaw.org/caselaw/cases/view/84157> (accessed 8 November 2023).

<sup>8</sup> M Oduor 'The status of international law in Kenya' (2014) 2 *Africa Nazarene University Law Journal Africa Nazarene University Law Journal* 97.

<sup>9</sup> Article 27 provides that 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Vienna Convention on the Law of Treaties 1969 [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) (accessed 8 November 2023).

<sup>10</sup> See *Media Rights Agenda and Others v Nigeria* 105/93, 128/94, 130/94 and 152/96, ACHPR, judgement, 22-31 October 1998 (*Media Rights Agenda and Others v Nigeria*) para 40 <https://africanlii.org/akn/aa->

less definite when courts were faced with a conflict between a provision of an international convention or treaty and the Constitution or an Act of Parliament.<sup>11</sup> After Kenya adopted the 2010 Constitution, the High Court in *Re The Matter of Zipporah Wambui Mathara*<sup>12</sup> missed the opportunity to explore this question comprehensively. Justice Koome made a cursory acknowledgement that international treaties and conventions ratified by Kenya are part of Kenyan law as per article 2(6) of the Constitution. Justice Koome's commentary failed to seize upon a novel opportunity to give an in-depth analysis of the hierarchy of laws but rather seemed to place international law as superior to national law when the two laws are in conflict.<sup>13</sup> However, subsequent judgements have deviated from this position leaning more towards an interpretation that places international law on the same level as national legislation.

This was the case in the High Court matter *Diamond Trust Kenya Ltd v Daniel Mwema Mulwa*,<sup>14</sup> where Justice Njagi opined that while treaties and conventions form part of Kenyan law under article 2(6) of the Constitution, they rank subordinate to the Constitution but possibly at the same rank as an Act of Parliament. Therefore, when international law is in conflict with local legislation, the guiding framework should be that of the superior legislation, the Constitution.<sup>15</sup> Justice Njagi recognised the legislative dissonance that results from two instruments of equal status containing conflicting provisions. However, he avoided nullifying any of the conflicting provisions despite showing disfavour towards the impugned provisions of the national law. He threw the ball back to parliament to consider repealing the conflicting section in the national law if it contradicts the spirit of the Constitution. This indicated that

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[au/judgment/achpr/1998/3/eng@1998-10-31](http://judgment/achpr/1998/3/eng@1998-10-31) (accessed 8 November 2023). Also see E Denza 'The relationship between international and national law' in M Evans (ed) *International Law (5th edition)* (2018) 384.

<sup>11</sup> In the cases discussed, the main issue of contention was that article 11 of ICCPR was in conflict with Kenyan legislation. Kenya ratified the ICCPR in 1972. Article 11 of the ICCPR stipulates that 'No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation'. However, civil jail is provided as a punishment for breach of contract under the Bankruptcy Act.

<sup>12</sup> *Re The Matter of Zipporah Wambui Mathara* [2010] eKLR, High Court Bankruptcy Cause 19 of 2010 <http://kenyalaw.org/caselaw/cases/view/71032/> (accessed 8 November 2023).

<sup>13</sup> Oduor (n 8) 113-114. See D Majanja, 'Debtors and the law: A delicate balance of different legislations' (2010) 1 *Nairobi Law Monthly* 97. D Majanja penned this criticism of the judgement before he was appointed as a judge and confronted with the same question.

<sup>14</sup> *Diamond Trust Kenya Ltd v Daniel Mwema Mulwa* [2010] eKLR, High Court Civil Case No 70 of 2002 <http://kenyalaw.org/caselaw/cases/view/73663/> (accessed 8 November 2023).

<sup>15</sup> As above. The judge stated: 'In my view, Article 11 of the International Convention on Civil and Political Rights cannot rank *pari passu* with the Constitution. The highest rank it can possibly enjoy is that of an Act of Parliament. And even if it ranks in parity with an Act of Parliament, it cannot oust the application of Section 40 of the Civil Procedure Act. Nor, for that matter, can it render Section 40 unconstitutional. For that reason, for as long as Section 40 remains in the statute Book, it is not unconstitutional for a judgment-debtor to be committed to a civil jail upon his failure to pay his debts.'

parliament was the proper forum for such determination. However, Justice Njagi could have applied the powers accorded to the High Court to determine the constitutionality of laws.<sup>16</sup> A more decisive decision would have been to declare the provisions unconstitutional and order parliament to repeal the impugned provision.

Justice DS Majanja has thus far provided the strongest analysis on the place of international law as against the Constitution and national laws in the High Court decision in *Beatrice Wanjiku and Another v Attorney General and Another*.<sup>17</sup> He stated: ‘The use of the phrase “under this Constitution” as used in article 2(6) means that the international conventions and treaties are ‘subordinate’ to and ought to be in compliance with the Constitution’.<sup>18</sup> He further expressed his belief that the framers of the Constitution did not intend to place international law above national law in stature.<sup>19</sup> He called for a purposive interpretation in this analysis and was quick to caution against examining articles 2(5) and 2(6) against the spectrum of the hierarchy of laws but rather with an awareness and appreciation of Kenya’s jurisprudential background, which revealed a tendency for courts to avoid relying on international instruments.<sup>20</sup> Therefore, articles 2(5) and 2(6) represented a departure from the previous dualist approach to the application of international law in Kenya.<sup>21</sup>

The High Court also made reference to other constitutional provisions that supported the application of international law in cases. Article 19(3) of the Constitution recognises rights and freedoms contained in other laws other than the Bill of Rights and is consistent with the chapter.<sup>22</sup> Article 20(3)(b) of the Constitution requires courts to ‘adopt the interpretation that

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<sup>16</sup> Art 166 3(d) of the Constitution of Kenya (n 3).

<sup>17</sup> *Beatrice Wanjiku & another v Attorney General & another* [2012] eKLR, High Court Petition 190 of 2011 <http://kenyalaw.org/caselaw/cases/view/81477/> (accessed 8 November 2023).

<sup>18</sup> *Wanjiku & Another v AG & Others* (n 17) para 20.

<sup>19</sup> As above.

<sup>20</sup> *Wanjiku & Another v AG & Others* (n 17) para 21.

<sup>21</sup> *Wanjiku & Another v AG & Others* (n 17) para 17. Two doctrines are relevant to this discussion: monist v dualist. Under the monist doctrine: ‘...following French constitutional law, once a treaty has been ratified and published ‘externally’, it becomes part of internal law. At least in theory, no legislative action is needed to lower the second storey level of international law norms to the ground floor level of national law.’. This differs from the dualist doctrine where ratification is followed by another process that ‘transforms’, ‘domesticates’ or ‘incorporates’ into domestic law for it to have effect in that jurisdiction. Quote and further explanation from F Viljoen *International human rights law in Africa* (2007) 531. Also see MN Shaw *International law* (1997) 104.

<sup>22</sup> Art 19(3) of the Constitution of Kenya: The rights and fundamental freedoms in the Bill of Rights—

(a) belong to each individual and are not granted by the State;

(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and



most favours the enforcement of a right or fundamental freedom' when applying the Bill of Rights.<sup>23</sup> The Court also referred to the doctrine of separation of powers. Article 94 of the Constitution dictates that Parliament is the primary law-making body. This is important because the legislature is made of representatives of the will of the people, elected in presumably free and fair processes, through whom the people exercise their sovereignty.<sup>24</sup> The power to enter into binding treaties rests with the executive. Parliament thereafter considers and approves multilateral treaties ratified by the government.<sup>25</sup> Justice Majanja concluded that all the above considerations, including the uniqueness of the subject matter, are necessary when determining how and to what extent to apply international law.<sup>26</sup> Justice Majanja's interpretation has been affirmed by other courts, including the Court of Appeal and Supreme Court, thereby cementing the interpretation that international instruments ratified by Kenya are binding as long as they conform with the Constitution, which is the supreme law of the land.<sup>27</sup>

Based on the discussed cases, a reasonable conclusion is that while Kenya is certainly not a dualist state, it is also not strictly a monist state. On hierarchy, international law is at par with and not superior to domestic law, and the Constitution is superior to both and is the deciding

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(c) are subject only to the limitations contemplated in this Constitution.

<sup>23</sup> Art 20 (3) of the Constitution of Kenya: In applying a provision of the Bill of Rights, a court shall—

- (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and
- (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom

<sup>24</sup> See Art 1 of the Constitution of Kenya: Sovereignty of the people.

(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.

(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—

- (a) Parliament and the legislative assemblies in the county governments;
- (b) the national executive and the executive structures in the county governments; and
- (c) the Judiciary and independent tribunals.

(4) The sovereign power of the people is exercised at—

- (a) the national level; and
- (b) the county level.

<sup>25</sup> Sec 8 Treaty Making and Ratification Act No 45 of 2012 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2045%20of%202012> (accessed 8 November 2023).

<sup>26</sup> *Wanjiku & Another v AG & Others* (n 17) para 23.

<sup>27</sup> *Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others* [2015] eKLR, High Court Petition No 628 of 2014 para 424 <http://kenyalaw.org/caselaw/cases/view/106083/> (accessed 8 November 2023); *Royal Media Services Limited & 2 Others v Attorney General & 8 Others* [2014] eKLR, Court of Appeal Civil Appeal No 4 of 2014 paras 84, 124, & 131 <http://kenyalaw.org/caselaw/cases/view/96676> (accessed 8 November 2023) & *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR Supreme Court Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated) <http://kenyalaw.org/caselaw/cases/view/101689/> (accessed 8 November 2023).

basis in the event of a conflict. That being said, Kenya must perform its duties under ratified conventions and treaties.<sup>28</sup> As discussed in chapter three of this thesis, international law offers strong protections for media rights in the digital age, enabling a public sphere necessary for meaningful political participation and entrenching the human rights-based approach. Many international laws are prescriptive in obligating states to adopt measures to give effect to the rights contained in the instrument. For example, article 2 of the ICCPR and article 1 of the African Charter require states to adopt laws or other measures to give effect to the provisions therein. More recent soft law instruments adopted by the African Commission on Human and Peoples' Rights (African Commission), such as the 2019 Declaration on Principles of Freedom of Expression and Access to Information in Africa<sup>29</sup> and the Guidelines on Access to Information and Elections in Africa (the Guidelines)<sup>30</sup> go further by tasking states to adopt 'legislative, administrative, judicial and other measures'. By implication, state actors, including the executive, legislature and judiciary, have a role to play in implementing the instruments. Both instruments also require states to disseminate the laws underscoring the importance of capacity building for implementing and interpreting bodies and the general public. This is crucial towards promoting meaningful political participation of the electorate.

However, a tension between international and national law exists beyond the ambiguity in the hierarchy of laws that emanates from historical and socio-political forces. The deliberate and concerted application of international law to protect human rights, such as media freedom and political participation, was obstructed by a political context that thrived from a lack of accountability for human rights violations. The judicial reluctance to rely on international law was influenced by the culture of impunity within the government, given the likelihood of retaliation from powerful government officials against unfavourable judicial decisions.<sup>31</sup> As noted in chapter two, Kenya has been in a perpetual fight to claw its way from the pits of colonial and post-colonial political reverberations where constitutional amendments and

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<sup>28</sup> See article 6 Vienna Convention.

<sup>29</sup> Principle 43 2019 Declaration on Principles of Freedom of Expression and Access to Information in Africa [https://www.chr.up.ac.za/images/researchunits/dgdr/documents/ati/Declaration\\_of\\_Principles\\_on\\_Freedom\\_of\\_Expression\\_ENG\\_2019.pdf](https://www.chr.up.ac.za/images/researchunits/dgdr/documents/ati/Declaration_of_Principles_on_Freedom_of_Expression_ENG_2019.pdf) (accessed 8 November 2023).

<sup>30</sup> Guidelines 31-34 2017 Guidelines on Access to Information and Elections in Africa [https://www.chr.up.ac.za/images/researchunits/dgdr/documents/resources/guidelines\\_on\\_access\\_to\\_information\\_and\\_elections\\_in\\_africa\\_en.pdf](https://www.chr.up.ac.za/images/researchunits/dgdr/documents/resources/guidelines_on_access_to_information_and_elections_in_africa_en.pdf) (accessed 8 November 2023).

<sup>31</sup> JB Ojwang & JA Otieno-Odek 'The judiciary in sensitive areas of public law: Emerging approaches to human rights litigation in Kenya' (1988) 35 *Netherlands International Law Review* 29.

legislation were used to restrict rather than advance human rights.<sup>32</sup> The adoption of the 2010 Constitution and the recognition of the place of international law in the domestic legal system is crucial to addressing this chequered past and establishing the foundation for a human rights-based approach to laws and practice in Kenya. Although the 2010 constitutional dispensation sought to address this accountability and transparency deficit, some of the laws subsequently passed by the Kenyan Parliament have been challenged on grounds of constitutionality and contradiction with international law, as discussed further in this chapter.

Political expediency motivations that drove the adoption of some ill-conceived laws aside, one underlying cause of this conflict is ignorance and poor appreciation of international law obligations by parliamentarians when drafting legislation. A gap in parliamentary scrutiny also exists during the ratification of international treaties.<sup>33</sup> As some authors have pointed out, expert advice by international law lawyers, academics, civil society and other professionals well-knowledgeable in domestic and international law is vital during legislative drafting and deliberations.<sup>34</sup> Such issues can also be flagged during meaningful and inclusive public participation processes before the passage of a law. The input of international law lawyers, academics, civil society and other experts as petitioners or *amici curiae* is similarly vital in guiding courts on international law, especially in the evolving parlance of digital rights and elections. Further, this can help overcome the perception that in Kenya, even after the 2010 Constitution, courts apply a receptive as opposed to dialogic tenor to interpreting international law. A change in approach would improve the cross-fertilisation between international and domestic law.<sup>35</sup>

International law has been vital in enhancing the protection of rights in the digital age and can serve as a bulwark against contentious national laws that may have been passed to advance the selfish interests of the executive or other powerful state actors. The paradox emerging in this case with the executive arm of government responsible for entering into treaties and conventions is inescapable. However, given Kenya is a member of the UN, African Union (AU) and other

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<sup>32</sup> PLO Lumumba 'A journey through time in search of a new constitution' in MK Mbondenyi, PLO Lumumba & SO Odero *The Constitution of Kenya: Contemporary readings* (2011) 31-35.

<sup>33</sup> Denza (n 10) 384.

<sup>34</sup> Denza (n 10) 409.

<sup>35</sup> DM Ndambo 'The use of international human rights law by superior courts in Kenya and South Africa' PhD thesis, University of Pretoria, 2020 at 202.

international organisations, international pressures and obligations provide the necessary motivation to sign and ratify seminal human rights instruments even though they might not necessarily consolidate political power. International law protections are critical given the growing mischief in many countries, especially in Africa, in passing retrogressive laws geared more towards restricting rather than advancing human rights in the digital age, including restrictive laws on media rights that negatively impact meaningful political participation.<sup>36</sup> The misuse of these laws is especially prevalent during election periods.<sup>37</sup> As a result, the media is encumbered from effectively playing its institutional role towards nurturing a vibrant public sphere. The Constitution and international law have increasingly become strong countervailing forces against such actions. The discussion below looks at the Kenyan constitutional and legislative framework and relevant case law on media rights and political participation and how they have adapted to the digital age.

### **3 Legal and policy framework on media freedom in Kenya**

#### **3.1 Freedom of expression and media freedom in the Kenyan Constitution**

Notably, the Kenyan 2010 Constitution provides separate protections for freedom of expression, media freedom and access to information. This defers from the construction under the ICCPR, the Universal Declaration of Human Rights (Universal Declaration),<sup>38</sup> and the African Charter.<sup>39</sup>

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<sup>36</sup> Freedom House ‘Freedom in the world 2023: Marking 50 years in the struggle for democracy’ [https://freedomhouse.org/sites/default/files/2023-03/FIW\\_World\\_2023\\_DigitalPDF.pdf](https://freedomhouse.org/sites/default/files/2023-03/FIW_World_2023_DigitalPDF.pdf) (accessed 8 November 2023); Freedom House ‘Freedom in the world 2021: Democracy under siege’ (2021) <https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege> (accessed 8 November 2023); Freedom House ‘Freedom in the world 2020: A leaderless struggle for democracy’ (2020) (accessed 15 July 2021); Freedom House ‘Freedom in the world 2019: Democracy in retreat’ (2019) <https://freedomhouse.org/report/freedom-world/2019/democracy-retreat> (accessed 8 November 2023) & Freedom House ‘Freedom in the world 2018: Democracy in crisis’ (2018) <https://freedomhouse.org/report/freedom-world/2018/democracy-crisis> (accessed 8 November 2023).

<sup>37</sup> As above.

<sup>38</sup> Universal Declaration <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed 8 November 2023).

<sup>39</sup> Article 19 of the Universal Declaration: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 19 of the ICCPR: 1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 9 of the African Charter provides: 1. Every individual shall have the right to receive information.

The Independence Constitution and subsequent amendments to the Constitution prior to the 2010 Constitution were also differently phrased. In the 1963 Independence Constitution<sup>40</sup> and the 2001 revised version,<sup>41</sup> media freedom and the right to information were subsumed under general provisions for freedom of expression and had identical phrasing.<sup>42</sup>

The decision to provide more concrete and elaborate provisions under the 2010 Constitution aimed to entrench stronger protections for these rights.<sup>43</sup> This was informed by Kenya's historical background, given the violation of these rights during colonial times, before the liberalisation of airwaves in the 1990s, and subsequently in the course of a hostile relationship between the media and the state.<sup>44</sup> As elaborated in chapter two of this thesis, the enactment of repressive media laws under these regimes was centred on stifling media rights and giving the government control over information.<sup>45</sup> The parliament enacted several laws to control, restrain and punish the media rather than enable it to play its normative functions in a democracy.<sup>46</sup>

Kenyan case law has also contributed to jurisprudence on the indivisibility of freedom of expression and media freedom. In the case of *Nation Media Group Limited and 6 others v Attorney General and 9 others (NMG 2016)*,<sup>47</sup> the High Court underscored the importance of what it called the 'twin rights' of freedom of expression and media freedom in democratic development. In making this emphasis, the Court strongly relied on the persuasive judgment

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2. Every individual shall have the right to express and disseminate his opinions within the law.

<sup>40</sup> The Constitution of Kenya, 1963 [http://kenyalaw.org/kl/fileadmin/pdfdownloads/1963\\_Constitution.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/1963_Constitution.pdf) (accessed 8 November 2023).

<sup>41</sup> The Constitution of Kenya (Repealed) 2001 [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Constitution%20of%20Kenya%20\(Repealed\).pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Constitution%20of%20Kenya%20(Repealed).pdf) (accessed 8 November 2023).

<sup>42</sup> Articles 23(1) of the 1963 Constitution and 79(1) of the 2001 Constitution.

<sup>43</sup> *CCK & 5 Others v RMS & 5 Others* (n 27) para 148. Also see P Ochieng *I accuse the press* (2000) 62 & 155.

<sup>44</sup> As above. Also see M Ali *Globalization and the Kenya media* (2009) & MO Mak'Ochieng 'The making of an African public sphere: The performance of the Kenyan daily press during the change to multi-party politics' PhD thesis, Faculty of Human Sciences, University of Natal- Durban, 2000 at 111-115.

<sup>45</sup> See section 3 on the inchoate project of media liberalisation and the Kenyan public sphere.

<sup>46</sup> Ochieng (n 43) 62 & 155 & *CCK & 5 Others v RMS & 5 Others* (n 27) para 148.

<sup>47</sup> *Nation Media Group Limited & 6 others v Attorney General & 9 others* [2016] eKLR, High Court Judicial Review Miscellaneous App 30 & 31 of 2014 <http://kenyalaw.org/caselaw/cases/view/122358/> (accessed 8 November 2023).

from the Supreme Court of Uganda *Charles Onyango-Obbo and Another v Attorney General*<sup>48</sup> in which it reproduced a quote by stating:

The importance of freedom of expression including freedom of the press to a democratic society cannot be over-emphasised. Freedom of expression enables the public to receive information and ideas, which are essential for them to participate in their governance and protect the values of democratic government, on the basis of informed decisions. It promotes a market place of ideas. It also enables those in government or authority to be brought to public scrutiny and thereby hold them accountable.

Given the expanded definition of media in the digital age, with online citizen journalists and content creators developing and sharing public interest information and facilitating public debate on one hand, and the gaps in regulatory frameworks, including Kenya's, to effectively extend media freedom protections to the new crop of media practitioners, online media freedom can best be protected by relying on provisions on freedom of expression and media freedom.

Therefore, it begs the question of whether the separate provisions of freedom of expression, media freedom and right to information have, in fact, reinforced the protections for these rights post-2010 and in the context of political expression in the digital age. Arguably, they have since these provisions offer a more comprehensive reference point when these rights are abused, infringed on, or violated. Case law has confirmed that the Constitution is the supreme law of the land and conflicting legislation that contradicts constitutional provisions is null.

Freedom of expression is guaranteed under article 33(1) of the Constitution, which includes freedom to seek, receive or impart information or ideas; artistic creativity; and academic and scientific research freedom. The phrasing of the clause allows for its applicability regardless of the medium of expression, be it traditional media such as broadcast and print media or the internet. The explicit inclusion of artistic creativity and academic and scientific research freedom is laudable. Art has a compelling effect in inspiring dialogue on issues of public interest, including political expression, and has often been incorporated into popular communication formats such as street murals, *matatu* (Kenyan taxi) graffiti, cartoons, music, memes, and photoshopped images. However, reports of harassment, intimidation and arrests of citizen journalists, media and artists because of using art for activism have increased worldwide as

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<sup>48</sup> *Charles Onyango Obbo and Another v Attorney General* (Constitutional Appeal-2002/2) [2004] UGSC 81 (10 February 2004) <https://ulii.org/ug/judgment/supreme-court-uganda/2004/81> (accessed 8 November 2023).

authorities seek to silence artistic expression.<sup>49</sup> The same applies to academic freedom. A retrospection into Kenya's history reveals the persecution of educators and students who were key figures in pushing for multipartyism and democracy in Kenya.<sup>50</sup> The inclusion of these provisions provides a safeguard against the targeting of artists and academics for their expression.

Article 34(1) provides for the freedom of electronic, print and all other media types within the constitutionally recognised limitations of rights. Noteworthy is the fact that the constitutional protections for both freedom of expression and media freedom are adaptable to the digital age. Although article 34(1) does not explicitly refer to online media freedom, by openly phrasing the guarantee of media freedom to include 'electronic, print, and other types of media' this protection surpasses the traditional conceptualisation of media typified by television, radio and the press to include online media. Electronic media includes all electronic forms of communication, such as the internet; thereby, online freedom is constitutionally guaranteed.<sup>51</sup> The third leg of the right to freedom of expression, being access to information, is articulated under article 35(1), which confers on every citizen the right to access information held by the state or by another person, the access of which is necessary 'for the exercise or protection of any right or fundamental freedom'. The article further grants everyone the right to correct or delete incorrect or misleading information that affects them.<sup>52</sup> It also obligates the state to publish and publicise any information of public interest.<sup>53</sup>

### 3.1.1 Limitations on rights under the Constitution

Freedom of expression is not an absolute right and is subject to limitations. The restrictions imposed on the exercise of freedom of expression by the international community are similarly recognised under article 33(2) of the Constitution, which provides that freedom of expression

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<sup>49</sup> Art Watch Africa 'Monitoring freedom of creative expression arterial network report 2013' (2013) 10 [https://www.artwatchafrica.org/system/artwatch\\_promoteds/downloads/000/000/002/original/ArtwatchAfricaReport.pdf](https://www.artwatchafrica.org/system/artwatch_promoteds/downloads/000/000/002/original/ArtwatchAfricaReport.pdf) (accessed 8 November 2023).

<sup>50</sup> MN Amutabi 'Crisis and student protest in universities in Kenya: Examining the role of students in national leadership and the democratization process' (2002) 45(2) *African Studies Review* 157-177.

<sup>51</sup> The Cambridge Dictionary defines electronic media as ways of communicating information that are electronic rather than using paper, for example, television and the internet See <https://dictionary.cambridge.org/dictionary/english/electronic-media> (accessed 8 November 2023).

<sup>52</sup> Art 35(2) of the Constitution of Kenya.

<sup>53</sup> Art 35(3) of the Constitution of Kenya.

does not extend to propaganda for war; incitement to violence; hate speech; or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm; or is a prohibited ground for discrimination under article 27(4). These grounds include: ‘race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.’ In exercising the right to freedom of expression, a person also has an attendant obligation to respect the rights and reputations of others.<sup>54</sup> The exercise of media freedom is similarly subject to the limitations under article 33(2).<sup>55</sup> Unfortunately, the interpretational section of the Constitution does not define any of the concepts above, but hate speech has been defined by legislation, as discussed below.

The limitations on media rights must be read together with the general rights limitations clause articulated under article 24 of the Constitution. The article aligns with international law by requiring that such limitations shall be provided by law; and be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Other considerations include the nature of the right; the purpose, nature and extent of the limitation; the balanced protection of the rights of others; and the presence of a less restrictive means to achieve the purpose.<sup>56</sup> The limitation should also be clear and not defeat the core essence of the right or fundamental freedom.<sup>57</sup>

The implementation of the limitations of rights falls on the state. However, the Constitution provides safeguards against the misuse of these powers. Article 34(2) of the Constitution prohibits the state from controlling or interfering ‘with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium’, thereby including offline and online mediums. The state is also prevented from penalising someone for their opinion, view or information they broadcast, publish or disseminate subject to the limitations above.

The constitutional and international law requirements on the limitations of rights, particularly freedom of expression and online media freedom, were comprehensively explored in

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<sup>54</sup> Art 33(3) of the Constitution of Kenya.

<sup>55</sup> Art 34(1) of the Constitution of Kenya.

<sup>56</sup> Art 24(2)(a) of the Constitution of Kenya.

<sup>57</sup> Art 24(2) (b)(c) of the Constitution of Kenya.



the High Court case of *Jacqueline Okuta and Another v Attorney General and Others (Okuta)*.<sup>58</sup> This case arose from an alleged defamatory Facebook post that led to the petitioners being charged with the offence of criminal defamation under section 194 of the Penal Code. If found guilty under the section, the petitioners would be liable to serve a jail term of not more than two years, pay a fine, or both.<sup>59</sup> The petitioners challenged the section's constitutionality as it infringed upon freedom of expression under the Constitution and international law.<sup>60</sup>

In explicating the link between the limitations set out under articles 24 and 33 of the Constitution and situating it under the implications of criminal defamation, the Court stated:<sup>61</sup>

The right to uninhibited freedom of expression conferred by Article 33 is basic and vital for the sustenance of parliamentary democracy, which is a part of the basic structure of the Constitution... Article 24, being an exception to Article 34 needs to be construed narrowly and it cannot constrict the liberal interpretation warranted to be placed on Article 33 of the Constitution. The schematic intendment in Article 24 is founded on the fundamental tenet of interests of the State and the public in general and hence, regard being had to the nature of fundamental rights and scope of reasonable restrictions to be imposed thereon... Criminal defamation aims to protect individual interest while the limitations under article 24 seek to protect public interest as opposed to person or individual interests.

It is necessary to emphasise the Court's assertion that articles 24 and 33 of the Constitution cannot form the basis of the crime of defamation because the articles are broadly aimed at protecting the public as opposed to individual interest, and limitations should extend to expression that is 'intrinsically dangerous to public interest' which was not the case here.<sup>62</sup> In finding section 194 of the Penal Code on criminal defamation unconstitutional, the Court relied on the principles of limitations of rights, the provisions of articles 24 and 33 of the Constitution, and international law instruments. The criminal provision failed to meet the test of reasonableness and justifiability in a democratic society and the proportionality test. Given the centrality of free expression in a democratic society, criminal sanction on expression should only

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<sup>58</sup> *Jacqueline Okuta & Another v Attorney General & 2 Others* [2017] eKLR, High Court Petition No 397 of 2016 [https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2017/02/Petition\\_397\\_of\\_2016.pdf](https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2017/02/Petition_397_of_2016.pdf) (accessed 8 November 2023).

<sup>59</sup> *Okuta v AG* (n 58) 2.

<sup>60</sup> *Okuta v AG* (n 58) 3.

<sup>61</sup> *Okuta v AG* (n 58) 6.

<sup>62</sup> *Okuta v AG* (n 58) 6-7.

be permissible for the most egregious cases under article 33(2) in light of public interest and not personal considerations.<sup>63</sup>

It is encouraging to see courts recognising and embracing their role in interpreting the Constitution in a manner that reinforces it as the linchpin of democracy and the rule of law and doing so in a manner that is broad, liberal, and purposive as opposed to pedantic, narrow, restrictive.<sup>64</sup> Such an approach is crucial when confronted with the question of restricting human rights.

The increased reliance on international law to further reinforce such decisions is a further testament to the importance of articles 2(5) and 2(6) of the Constitution in enhancing the protection of human rights. It has given room to broad, liberal and purposive interpretations of the Bill of Rights in such a manner that its realisation, as opposed to its restriction, is the nucleus. While this is the constitutional standard, its elucidation depends on national laws, which are required to conform with the substance and spirit of the Constitution. Articles 24 and 33 provide guidance concerning the limitation of rights, which has been captured in several laws. From time to time, petitioners have challenged provisions that conflict with constitutional provisions, international laws and standards on media rights in Kenya's fragmented legislative landscape. The discussion below takes a thematic approach to examining legislation on media rights.

### **3.2 National legal and policy framework on media rights: A limitation or realisation of rights approach**

The three-part test of limitation of rights under international law and the limitation of rights clause under article 24 of the Constitution provide guidance on how legislation can limit media

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<sup>63</sup> *Okuta v AG* (n 58) 14.

<sup>64</sup> *Centre for Human Rights and Awareness v John Harun Mwau & 6 Others* Civil Appeal No 74 & 82 of 2012; [2012] eKLR; *Speaker of the Senate & Another v Attorney-General & 4 Others* Supreme Court Advisory Opinion No 2 of 2013; [2013] eKLR para 156; *Crispus Karanja Njogu v Attorney General* HC CR Application No 39 of 2000; *The Very Right Rev Dr. Jesse Kamau & Others v The Hon. Attorney General & Another* [2010] eKLR High Court Miscellaneous Civil Application 890 of 2004; *Njoya & 6 Others v Attorney General & another* [2004] eKLR & *In the Matter of the Kenya National Human Rights Commission* Supreme Court Advisory Opinion Reference No 1 of 2012 [2014] eKLR para 26. In *The Very Right Rev Dr Jesse Kamau & Others* case the Court stated: '...the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights...Restrictions on fundamental rights must be strictly construed.' The quote was originally derived from *Ndyanabo v Attorney General* [2001] EA 485 who quoted Mr Justice EO Ayoola, a former Chief Justice of the Gambia.

rights. Legislation must adhere to principles of legality, legitimate aim, and necessity and proportionality. The below discussion examines to what extent laws comply with the limitation of rights standard through the lens of legitimate aims pursued by these laws. This segues into assessing whether the laws are more geared toward limiting or realising human rights. The extent to which laws and policies enable media rights offline and online correlates with the media's ability to play its normative functions towards facilitating a vibrant public sphere to support meaningful political participation.

### 3.2.1 National security and public order laws

The protection of public order and national security is a legitimate aim for the limitation of media rights.<sup>65</sup> However, this does not justify enacting public order and national security laws that unreasonably and unjustifiably negate the exercise of other human rights and fundamental freedoms. International laws and standards condemn the misuse of laws on public order and national security to unreasonably and unjustifiably limit freedom of expression, especially that of critical voices such as the media.<sup>66</sup> There should be 'a real risk of harm to a legitimate interest' and a 'close causal link between the risk of harm and the expression'.<sup>67</sup> Some of Kenya's national security and public order laws have negative implications on media rights.

Historically, laws on national security and public order were used to harass, intimidate and silence the media and political activists in Kenya who questioned the excesses of government or called for multiparty democracy.<sup>68</sup> An analysis of the content and implementation of these laws and their effect on media rights is crucial given the history of both state and public-orchestrated political violence that has ravaged election periods in Kenya. Implementing public order and national security laws during elections affects how professional and peripheral journalists, Civil Society Organisations (CSOs), human rights defenders and even ordinary citizens can effectively exercise their media rights and other rights, such as freedom of association and peaceful assembly.

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<sup>65</sup> Art 19(3)(b) ICCPR & art 33(2) of the Constitution of Kenya.

<sup>66</sup> General Comment 34 para 30 & principle 22(5) 2019 Declaration.

<sup>67</sup> Principle 22(5) 2019 Declaration.

<sup>68</sup> ES Atieno-Odhiambo 'Democracy and the ideology of order' in MG Schatzberg *The political economy of Kenya* (1988) 177-201 & J Abuoga & A Mutere *The history of the press in Kenya* (1988).

Unfortunately, the relationship between the law enforcement agencies such as the police and journalists in Kenya has been antagonistic. During elections, journalists have suffered harassment, intimidation and even arrests for their coverage of security responses during protests.<sup>69</sup> There have also been reports of police officers confiscating the recording equipment of journalists and erasing content.<sup>70</sup> It is, therefore, crucial that laws governing law enforcement operations do not allow them to unreasonably and unjustifiably infringe on media rights. The laws should further ensure accountability for illegal actions. As a point of departure, the National Police Service Act (NPSA)<sup>71</sup> and the National Intelligence Service Act (NISA)<sup>72</sup> obligate the police and the National Intelligence Service (NIS) to respect the rule of law, democracy, human rights and fundamental freedoms.<sup>73</sup> However, there are provisions limiting media rights in a number of laws, including the Prevention of Terrorism Act (PTA),<sup>74</sup> the NPSA<sup>75</sup>, NISA<sup>76</sup> and the Penal Code.<sup>77</sup>

Contentious provisions in the PTA, a legislative response to national counter-terrorism measures, allowed for judicial interpretation on balancing national security aims and media rights. The *Coalition for Reform and Democracy and Others v Republic of Kenya and Others*<sup>78</sup>

<sup>69</sup> CPJ ‘Kenyan journalists harassed, detained reporting on election violence’ (2017) <https://cpj.org/2017/08/kenyan-journalists-harassed-detained-reporting-on/> (accessed 8 November 2023) & Article 19 ‘Kenya: Violations of media freedom May 2017 – April 2018’ (2018) <https://www.article19.org/wp-content/uploads/2018/05/Kenya-Report-1.pdf> (accessed 8 November 2023).

<sup>70</sup> As above.

<sup>71</sup> The National Police Service Act No 11A of 2011 [http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2011A%20of%202011#part\\_VII](http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2011A%20of%202011#part_VII) (accessed 8 November 2023). Secs 46 & 49 limit access to information on confidentiality grounds. Regulations made under the Access to Information Act expound on the limitations on access to information in relation to information held by police officers.

<sup>72</sup> National Intelligence Service Act No 28 of 2012 [http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2028%20of%202012#part\\_IV](http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2028%20of%202012#part_IV) (accessed 8 November 2023). See sec 37 on limitations to access to information.

<sup>73</sup> Secs 49(1) & 49 (10) NPSA and sec 3 NISA.

<sup>74</sup> PTA No 30 of 2012 [http://www.vertic.org/media/National%20Legislation/Kenya/KE\\_Prevention\\_Terrorism\\_Act.pdf](http://www.vertic.org/media/National%20Legislation/Kenya/KE_Prevention_Terrorism_Act.pdf) (accessed 8 November 2023).

<sup>75</sup> Secs 46 & 49 of the NPSA limit access to information on confidentiality grounds. Regulations made under the Access to Information Act expound on the limitations on access to information in relation to information held by police officers.

<sup>76</sup> See sec 37 NISA on limitations to access to information.

<sup>77</sup> Cap 63 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2063> (accessed 8 November 2023).

<sup>78</sup> *CORD & 2 Others v Republic of Kenya & 10 Others* (n 27).

case followed the enactment of the Security Laws (Amendment) Act (SLAA)<sup>79</sup> that was purposed to help combat the ‘war’ on terrorism in Kenya; therefore, in the interest of national security.<sup>80</sup> The Omnibus legislation amended 22 laws touching on issues of national security.<sup>81</sup> Relevant to this thesis are the contentious amendments that affected the exercise of media rights, which the petitioners argued were unreasonable and unjustifiable and infringed the provisions under articles 33 and 34 of the Constitution on media freedom and international law on limitation of rights.<sup>82</sup>

The impugned sections included section 12 of the SLAA that amended the Penal Code and introduced section 66A, which criminalised the publication of ‘insulting, threatening, or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public or disturb public peace...’. Section 66A(2) further prohibited the publication of content that would undermine investigations or security operations by the National Police Service or the Kenya Defence Forces. If found guilty under section 66A of the SLAA, one would be liable to a fine of not more than five million shillings or imprisonment for a term of not more than three years or both.

Section 30F of the PTA, which created the offence of unauthorised broadcasting of content information which ‘undermines investigations or security operations’ on terrorism or photographs of victims of a terrorist attack, also formed part of the petitioners’ case. The accompanying punishment was a jail term of not more than three years, a fine of five million shillings or both. Section 30F(3) proceeded to authorise the publication of ‘factual information of a general nature’. The petitioners argued that these provisions amounted to a prior restraint on freedom of expression and media freedom and would illegalise investigative journalism.<sup>83</sup>

The Court agreed with the petitioners in as much as the wording of section 66A was vague and imprecise and in violation of the Constitution and the principle of legality on

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<sup>79</sup> Security Laws (Amendment) Act, No 19 of 2014 [http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2014/SecurityLaws\\_Amendment\\_Act\\_2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2014/SecurityLaws_Amendment_Act_2014.pdf) (accessed 8 November 2023).

<sup>80</sup> See objects and purposes section of the Act.

<sup>81</sup> *CORD & 2 Others v Republic of Kenya & 10 Others* (n 27) para 2.

<sup>82</sup> *CORD & 2 Others v Republic of Kenya & 10 Others* (n 27) para 215.

<sup>83</sup> *CORD & 2 Others v Republic of Kenya & 10 Others* (n 27) paras 218 & 219.

limitations of rights.<sup>84</sup> Its phrasing superseded what the Constitution recognised as prohibited speech under article 33(2).<sup>85</sup>

The Court analysed the link between the limitation under section 66A and the purpose, which appeared to be its likelihood ‘to cause fear and alarm to the general public or disturb public peace’.<sup>86</sup> The Court was at pains to ascertain what parameters determine what would occasion such public fear, alarm or disturb the peace. More so, the connecting factor between the limitation and its purpose being combating terrorism and protecting national security was absent.<sup>87</sup> In this vein, the Court agreed that sections 12 of the SLAA and 66A of the Penal Code presented an unjustifiable limitation to freedom of expression and media freedom.<sup>88</sup> The Court’s reasoning that predicated the annulment of section 12 of the SLAA was also relevant to section 64 of the SLAA that amended section 30F of the Prevention of Terrorism Act.<sup>89</sup> However, the Court noted the importance of combating terrorism but emphasised that the approaches should be constitutional and not infringe on media freedom.<sup>90</sup> It further called for media professionalism and self-regulation when publishing sensitive stories.<sup>91</sup>

Laws on treason are also grounded on national security considerations and are found in the Penal Code. Treason laws should similarly ensure that they meet the limitations test.<sup>92</sup> Treason is criminalised under section 40(1) of the Penal Code, which defines it as the compassing, imagining, inventing, devising or intending ‘the death, maiming or wounding, or the imprisonment or restraint, of the President’; or the unlawful overthrow of the president or government by someone owing allegiance to Kenya. Publications or actions that fall under this definition are considered treasonous. Vaguely crafted treason laws have been used to sustain despotic governments who have used the law to legitimise their extended stay in power through one-party regimes, ‘third terminism’ and flawed elections. For section 40(1) of the Penal Code, the criminalisation of imagination is incompatible with international law and standards and unconstitutional. The section offends freedom of thought, a non-derogable right and, by

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<sup>84</sup> *CORD & 2 Others v Republic of Kenya & 10 Others* (n 27) paras 263,

<sup>85</sup> *CORD & 2 Others v Republic of Kenya & 10 Others* (n 27) paras 256, 257, 259 & 260.

<sup>86</sup> *CORD & 2 Others v Republic of Kenya & 10 Others* (n 27) para 264.

<sup>87</sup> *CORD & 2 Others v Republic of Kenya & 10 Others* (n 27) paras 264 & 265.

<sup>88</sup> *CORD & 2 Others v Republic of Kenya & 10 Others* (n 27) para 272.

<sup>89</sup> *CORD & 2 Others v Republic of Kenya & 10 Others* (n 27) para 273.

<sup>90</sup> *CORD & 2 Others v Republic of Kenya & 10 Others* (n 27) para 281.

<sup>91</sup> *CORD & 2 Others v Republic of Kenya & 10 Others* (n 27) para 457.

<sup>92</sup> Principle 22(5) 2019 Declaration.

extension, media rights. The section may also stifle legitimate debate on executive accountability.

Section 52 of the Penal Code empowers the Cabinet Secretary<sup>93</sup> to prohibit the importation of publications to protect public order, health or morals, and the security of Kenya. Reasonable grounds and justifiability in a democratic society should inform such a decision. A Prohibited Publications Review Board<sup>94</sup> is tasked with reviewing such publications and advising the Cabinet Secretary on exercising these powers; the Cabinet Secretary is bound to follow their advice.<sup>95</sup> Engaging with prohibited materials carries a penalty of an imprisonment term not exceeding three years.<sup>96</sup>

Prohibiting certain publications may contradict media rights under the Constitution and international law. The use of this section to ban publications critical of government was more common during the post-independence era clocking the regimes of President Jomo Kenyatta and President Daniel Arap Moi compared to later governments.<sup>97</sup> While the section seeks to underpin this criminal offence on reasonable grounds, it has a paternalistic undertone in determining what foreign publications are available to the public and, in so doing, influence public thought, opinion and discourse. Limiting access to certain publications, especially those encouraging liberal and critical thinking and conscientious and informed citizens, is a favoured tool of propaganda-pushing authoritarian leaders. Such restrictions, which are enhanced by penal consequences, are inapposite in a just and democratic society. Further, implementing this section becomes especially difficult in the digital age where information from across the world is available online and opens a risky opportunity of using punitive measures such as internet shutdowns to limit access.

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<sup>93</sup> The Penal Code does not specify which docket but this may fall under CS of ICT or Internal Security and Coordination of National Government.

<sup>94</sup> Members of the Board under sec 52(3) include: 'the Attorney-General or his representative, who shall be the chairman; the Director of Public Prosecutions or his representative; the Commissioner of Police or his representative; the Director of Medical Services or his representative; two persons from the religious community, to be appointed by the Minister; and two other persons of integrity, good character and good standing to be appointed by the Minister.'

<sup>95</sup> Sec 52(5)(8) Penal Code.

<sup>96</sup> Sec 53 Penal Code.

<sup>97</sup> Read more under part 3 of chapter two of this thesis. Also see Mak'Ochieng (n 44) 142-143.

### 3.2.2 Respect for the rights and reputations of others: Defamation laws

In Othello, the Shakespearean tragedy, the Iago character asserts:

Good name in man and woman, dear my lord, Is the immediate jewel of their souls: Who steals my purse steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands: But he that filches from me my good name Robs me of that which not enriches him And makes me poor indeed.

This passionate speech provides a glimpse into the importance of protecting a person's reputation from time immemorial, which has justified its legal protections. The idea behind freedom of expression allowing for a marketplace of ideas acknowledges that some of these ideas can be truths, half-truths, white lies, blatant fabrications, and misconceptions. The thin line separating truth and lie becomes blurrier during contentious and emotive processes such as elections, and more so in the digital age that has opened up frontiers for communication under anonymous and pseudo-monikers. Where false information touches on the reputation of others, the question remains whether to hold the offending party accountable and, if so, the reasonable and justifiable punishment.

Journalists, media houses, and peripheral journalists are susceptible to defamation charges, especially when their articles or posts are critical of the establishment or influential persons. This risk increases during election periods when the level of discourse is heightened, and furthermore, people can easily create and share information with vast audiences in the digital age. The *Okuta*<sup>98</sup> decision was a jurisprudential milestone since it declared unconstitutional section 194 of the Penal Code that criminalised defamation. This is in line with international law.<sup>99</sup> Civil sanctions are a more appropriate remedy and should be necessary and proportionate. Section 67 of the Penal Code should also be amended, given it criminalises the defamation of foreign dignitaries with 'intent to disturb peace and friendship between Kenya and the foreign country'. It carries an imprisonment term of not more than two years, a fine, or both.<sup>100</sup> The provision conflicts with the *Okuta* decision and international law.<sup>101</sup> It also offends the right to

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<sup>98</sup> *Okuta v AG* (n 58).

<sup>99</sup> General Comment 34 para 47; principles 21 & 22 2019 Declaration & *Federation of African Journalists and 4 others v The Gambia*, suit ECW/CJJ/APP/36/15, ECOWAS Court of Justice, judgment, 13 March 2018 (*FAJ & 4 others v The Gambia* paras 40-41 <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2016/04/FAJ-and-Others-v-The-Gambia-Judgment.pdf> (accessed 8 November 2023)).

<sup>100</sup> Sec 36 Penal Code.

<sup>101</sup> See *Colombani & Others v France* (25 June 2002) ECHR 51279/99 <https://hudoc.echr.coe.int/eng?i=001-60532#%22itemid%22:%22001-60532%22> (accessed 8 November 2023).



equality before the law and equal protection and benefit of the law protected under article 27 of the Constitution and international law. This principle has been further affirmed in *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*.<sup>102</sup>

Kenya has a Defamation Act that is largely guided by common law principles of defamation.<sup>103</sup> The legislation grants absolute privilege to fair and accurate newspaper publications of judicial proceedings in Kenya as long as the publication is not blasphemous, seditious or indecent.<sup>104</sup> However, the Act fails to define what falls under the parameters of blasphemous, seditious or indecent that risks subjective interpretation. Newspapers also enjoy qualified privilege for fair and accurate reporting of certain proceedings, including those of the legislature, international organisations, public meetings, public company meetings, and associations.<sup>105</sup> This privilege does not extend to malicious publications; the refusal or neglect by the paper to publish a reasonable explanation or contradiction upon the request of the allegedly defamed party; and prohibited publications or materials that are not of public concern or benefit.<sup>106</sup> A person or body aggrieved by the factual inaccuracy of allegedly libellous material has a right to reply. The newspaper must publish the correction in the next edition, free of charge and with similar prominence as the original piece.<sup>107</sup> The publication may be liable for damages for failing to publish the correction.<sup>108</sup> Last amended in 1992, the Act is a tad unattuned to the evolving dynamics of defamation in the digital age. The duties and privileges extended to media envision a traditional media landscape with print and broadcast media.<sup>109</sup> However, beyond that, the Act can be used to prosecute defamation in online spaces.

Although the courts have discretion to determine damages, the Defamation Act further sets a minimum threshold for damages for libel of KES 400 000 if the publication involves an

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<sup>102</sup> *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, communication 102/93, ACHPR, judgement, 1998 <http://hrlibrary.umn.edu/africa/comcases/102-93.html> (accessed 8 November 2023).

<sup>103</sup> Defamation Act, Cap 36 (enacted 1970) <http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=CAP.%2036> (accessed 8 November 2023).

<sup>104</sup> Sec 6 Defamation Act.

<sup>105</sup> Sec 7 Defamation Act and Schedule of the Act.

<sup>106</sup> As above.

<sup>107</sup> Sec 7A Defamation Act.

<sup>108</sup> Sec 7A (6) & (7) Defamation Act.

<sup>109</sup> See sec 2 on the definition of newspaper as ‘any paper containing public news or observations thereon, or consisting wholly or mainly of advertisements, which is printed for sale, and which is published in Kenya either periodically or in parts or numbers at intervals not exceeding thirty-six days. Also see wireless broadcasting definition.

offence punishable by an imprisonment term of not less than three years and KES 1 000 000 if it involves an offence punishable by death.<sup>110</sup> While penalties serve as a deterrent against reckless, negligent or malicious interference with the rights and reputations of others while exercising media rights, courts need to exercise restraint when applying this discretion, given the impact of exorbitant fines in curtailing media rights. Excessive damages, especially in cases involving high-profile political actors, may force the media to self-censor and, in some cases, bankrupt media houses, especially smaller media houses or independent journalists. Powerful political actors in the Jomo Kenyatta and Moi era exploited defamation sanctions to clamp down on critical news, and the complacency by courts buckling under the weight of executive interference made for a highly restrictive operating context.<sup>111</sup> International laws call on public officials to exercise restraint in the face of public criticism, as is the norm by the nature of their offices.<sup>112</sup>

### 3.2.3 Hate speech

Hate speech has been one of the precipitating and perpetuating factors of election violence in Kenya, most notably during the 1992 and 2007 elections.<sup>113</sup> The dissemination of hate speech on traditional and online media aggravated the scale of the 2007-2008 post-election violence (PEV). This media milieu was a severe indictment on Kenyan media that continues to influence news framing during elections in Kenya. While there is no consensus on the definition of hate speech under international law, the UN Strategy and Plan of Action on Hate Speech takes a stab at this by defining it as ‘any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent,

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<sup>110</sup> Sec 16A Defamation Act.

<sup>111</sup> See cases such as *Kipyator Nicholas Kiprono Biwott v George Mbuguss & Kalamka Ltd* [2002] eKLR, Civil Case 2143 of 99[1] <http://kenyalaw.org/caselaw/cases/view/1855> (accessed 8 November 2023).

<sup>112</sup> Principle 21(1)(b) 2019 Declaration. Also see *Konate v Burkina Faso*, application 4/2013, AfCHPR, judgement, 5 December 2014 (*Konate v Burkina Faso*) para 155 <https://www.african-court.org/en/images/Cases/Judgment/Judgment%20Appl.004-2013%20Lohe%20Issa%20Konate%20v%20Burkina%20Faso%20-English.pdf> (accessed 8 November 2023).

<sup>113</sup> MW Mungai ‘Soft power’, popular culture and the 2007 elections’ K Kanyinga & D Okello *Tensions and reversals in democratic transitions* (2010) 217-219; N Nyabola *Digital democracy, analogue politics* (2018) 157-178 & S Hirsch ‘Putting hate speech in context: Observations on speech, power, and violence in Kenya’ (2013) 2 <https://www.usmmm.org/m/pdfs/20100423-speech-power-violence-hirsch.pdf> (accessed 8 November 2023).

gender or other identity factor.’<sup>114</sup> The lack of international law consensus on the definition means states are largely left to set the standards for hate speech legislation. Reference, however, can be drawn from article 20 of the ICCPR and the Rabat Plan of Action that prohibits ‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’.<sup>115</sup>

In Kenya, enacting the National Cohesion and Integration (NCIC) Act, which among other things, promotes national cohesion and integration, was a regulatory offshoot of the 2007 PEV.<sup>116</sup> It is rooted in article 33 of the Constitution, which prohibits hate speech and advocacy for hatred that constitutes ethnic incitement, vilification or incitement to cause harm or based on a prohibited ground of discrimination. Section 13 of the NCIC Act does not expressly define hate speech but provides for the constituents of the offence. It does, however, define ethnic hatred as ‘hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.’ It further proscribes expression intended to stir up ethnic hatred or contextually likely to stir up ethnic hatred.<sup>117</sup> A proposed amendment sought to introduce provisions specific to hate speech on social media platforms, but this was unsuccessful.<sup>118</sup>

Critics have decried the ambiguity in the above provisions of the Act and the implications on media rights.<sup>119</sup> The description of the offence of hate speech conflicts with article 20 of the ICCPR by failing to provide for both the intention to promote hatred and imminence, as opposed

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<sup>114</sup> UN Strategy and Plan of Action on Hate Speech <https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf> (accessed 8 November 2023).

<sup>115</sup> The Rabat Plan of Action on ‘the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to hostility, discrimination or violence’ <https://www.istanbulprocess1618.info/rabat-plan-of-action/#:~:text=The%20Rabat%20Plan%20of%20Action%20endorses%20the%20Camden%20Principles%20on,eac h%20have%20to%20combat%20intolerance> (accessed 8 November 2023).

<sup>116</sup> Act No 8 of 2008 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2012%20of%202008> (accessed 8 November 2023).

<sup>117</sup> Also see section 77 of the Penal Code which includes hate speech under subversive activities <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%202063> (accessed 8 November 2023).

<sup>118</sup> Tech against terrorism ‘The online regulation series | Kenya’ <https://www.techagainstterrorism.org/2020/11/03/the-online-regulation-series-kenya/> (accessed 8 November 2023).

<sup>119</sup> ACCORD ‘South Africa and Kenya’s legislative measures to prevent hate speech’ (2017) <https://www.accord.org.za/conflict-trends/south-africa-kenyas-legislative-measures-prevent-hate-speech/> (accessed 8 November 2023).

to the likelihood of discrimination, violence or hostility.<sup>120</sup> The risk that offensive speech, which is legally protected, may be misinterpreted as hate speech has already materialised.<sup>121</sup> The section has enabled politically motivated harassment of political opposition.<sup>122</sup>

Section 62 also criminalises ethnic or racial contempt characterised as uttering words ‘intended to incite feelings of contempt, hatred, hostility, violence or discrimination against any person, group or community on the basis of ethnicity or race’. Hate speech is punishable with a fine of not more than one million shillings or an imprisonment term of not more than three years or both. Ethnic and racial hatred attracts a fine of not more than one million shillings for a person or media enterprise, or imprisonment for a term not exceeding five years, or both for a person. The criminalisation of hate speech is justifiable where it can be shown that it represents a severe case as required under international law.<sup>123</sup> The NCIC Plan of Action to engage with traditional and new media to combat hate speech, including capacity building and encouraging self-regulation, is arguably more proactive than the current equivocal criminalisation in the NCIC Act.

Towards promoting free and fair elections, the Electoral Code emphasises preventing election-related violence and tacitly acknowledges the role of hate speech in perpetuating election violence.<sup>124</sup> Subscribers of the Electoral Code are required to, among other things, avoid hate speech and expression and actions that may perpetuate violence or intimidation.<sup>125</sup>

Negative ethnicity has historically blighted the socio-political context during Kenyan elections and elicited public debate. Both traditional and online media should be mindful of sections 13 and 62 of the NCIC Act when publishing news and content. Traditional media walk on a tightrope in framing an issue that is of significant interest in Kenya’s socio-political context but in such a way that it does not violate the law. Online media platforms are more susceptible to

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<sup>120</sup> Article 19 ‘Commentary on the regulation of “hate speech” in Kenya’ (2010) <https://www.refworld.org/pdfid/4c4feb242.pdf> (accessed 8 November 2023).

<sup>121</sup> Article 19 ‘Kenya: Use of “hate speech” laws and monitoring of politicians on social media platforms’ (2020) <https://www.article19.org/resources/kenya-use-of-hate-speech-laws/> (accessed 8 November 2023).

<sup>122</sup> R Otieno, V Nzuma & J Mondoh ‘CORD accuses government of using hate speech charges to muzzle leaders’ *The Standard* 4 July 2017 [https://www.standardmedia.co.ke/article/2000207443/cord-accuses-government-of-using-hate-speech-charges-to-muzzle-leaders%20\(3](https://www.standardmedia.co.ke/article/2000207443/cord-accuses-government-of-using-hate-speech-charges-to-muzzle-leaders%20(3) (accessed 8 November 2023).

<sup>123</sup> Article 20 ICCPR & principle 23 2019 Declaration.

<sup>124</sup> Sec 6 Electoral Code of Conduct under schedule 2 of the Elections Act No 24 of 2011 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2024%20of%202011> (accessed 8 November 2023).

<sup>125</sup> As above.

hate speech violations because of limited journalistic ethics and strictures, ignorance of what may be considered hate speech, and the use of anonymous and pseudo accounts. However, the Media Council of Kenya (MCK) has provided some guidance for professional and non-professional journalists as part of self-regulatory practices. It published a Code of Conduct prohibiting journalists from publishing quotes with ‘derogatory remarks based on ethnicity, race, creed, colour and sex’.<sup>126</sup> The Code of Conduct for digital media practitioners has similar provisions.<sup>127</sup>

### 3.3 False information

There has been a worrying trend of criminalising communications such as false information, which has escalated in the networked age.<sup>128</sup> False expression is protected expression under article 19 of the ICCPR as long as it is not propaganda for war and incitement to discrimination, hostility or violence.<sup>129</sup> It can be restricted by the law if it offends a legitimate aim and is necessary and proportionate. Disinformation, for example, is a harmful and potentially illegal expression that should be restricted. Erroneously, Kenya’s 2020 Information and Communications Technology (ICT) policy includes the propagation of falsehoods as a limitation to freedom of expression on social media without clarifying the boundaries of this limitation and linking it to a real threat of harm.<sup>130</sup> Often states justify false news provisions to protect public order, national security and the rights and reputations of others.<sup>131</sup> While these are legitimate aims, the substance of some laws on false information and the sanctions attached can be faulted

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<sup>126</sup> Sec 26 MCK ‘Code of conduct for the practice of journalism in Kenya’ <https://mediacouncil.or.ke/~mediaco7/sites/default/files/downloads/MCK-code%20of%20conduct.pdf> (accessed 8 November 2023).

<sup>127</sup> MCK ‘Code of Conduct for Digital Media Practitioners’ <https://mediacouncil.or.ke/~mediaco7/sites/default/files/downloads/Code%20of%20Conduct%20for%20Media%20Practitioners.pdf> (accessed 8 November 2023).

<sup>128</sup> LEXOTA <https://lexota.org/> (accessed 8 November 2023).

<sup>129</sup> Also see UN HRC ‘Reinforcing media freedom and the safety of journalists in the digital age’ A/HRC/50/29 (20 April 2022) paras 10 <https://www.ohchr.org/en/documents/thematic-reports/ahrc5029-reinforcing-media-freedom-and-safety-journalists-digital-age> (accessed 14 July 2021).

<sup>130</sup> Sec 6.2.3 National Information, Communications and Technology (ICT) Policy Guidelines, 2020 3074 <https://www.ca.go.ke/sites/default/files/CA/Statutes%20and%20Regulations/National-ICT-Policy-Guidelines-2020.pdf> (accessed 8 November 2023).

<sup>131</sup> D Funke & D Flamini ‘A guide to anti-misinformation actions around the world’ <https://www.poynter.org/ifcn/anti-misinformation-actions/> (accessed 8 November 2023).

when examined against the requirements of legality, necessity and proportionality.<sup>132</sup> The abuse of false news provisions is prevalent during processes that elicit public interest and debate, such as elections and threaten meaningful public debate crucial for decision-making by the electorate and general public.<sup>133</sup>

In Kenya, the national statute books contain worrying provisions that criminalise the publication of false news. Increasingly, the government has used these provisions to clamp down on criticism and dissent.<sup>134</sup> Unfortunately, professional and peripheral journalists and human rights activists have been the most targeted groups. Professional media has the right to use technology to exercise their functions, but this comes with a responsibility to represent facts objectively and not distort reality or sensationalise events.<sup>135</sup> Such actions can fall under the purview of false news and lead to sanctions. If this happens, redress should comply with constitutional and international law and standards on media rights. While courts have often offered recourse, targeted crackdown and the personal inconveniences it imposes even when a person is not charged with an offence engenders self-censorship and stifles media rights. Principle 22(2) of the revised 2019 Declaration calls on states, including Kenya, to repeal laws that criminalise false news.<sup>136</sup>

The management of the spread of false news has also become a favoured justification for internet shutdowns in various countries, often in the absence of laws authorising such shutdowns.<sup>137</sup> Noteworthy is that Kenya has never implemented an internet shutdown, unlike its

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<sup>132</sup> Mail & Guardian ‘Kenyan authorities are cracking down on social media ahead of elections’ 20 July 2017 <https://mg.co.za/article/2017-07-20-kenyan-authorities-are-cracking-down-on-social-media-ahead-of-elections/> (accessed 8 November 2023) & K Macharia ‘Government will not shut down internet during elections, Mucheru assures’ 23 January 2017 <https://www.capitalfm.co.ke/business/2017/01/government-will-not-shut-internet-elections-mucheru-assures/> (accessed 8 November 2023).

<sup>133</sup> MA Simiyu ‘Freedom of expression and African elections: Mitigating the insidious effect of emerging approaches to addressing the false news threat’ (2022) 22 *African Human Rights Law Journal* 76-107.

<sup>134</sup> Article 19 ‘Kenya: Release and cease attacks on Edwin Mutemi wa Kiama’ (8 April 2021) <https://www.article19.org/resources/kenya-cease-attacks-on-and-release-edwin-mutemi-wa-kiama/> (accessed 8 November 2023).

<sup>135</sup> Sec 4(2)(c) Code of Conduct under the Media Council Act No 46 of 2013 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2046%20of%202013> (accessed 8 November 2023).

<sup>136</sup> Principle 22(2) Declaration & LEXOTA ‘Kenya’ <https://lexota.org/country/kenya/> (accessed 8 November 2023).

<sup>137</sup> Access Now ‘The return of digital authoritarianism: Internet shutdowns in 2021’ (2022) <https://www.accessnow.org/wp-content/uploads/2022/05/2021-KIO-Report-May-24-2022.pdf> (accessed 8 November 2023) & DD Aydin ‘Five excuses governments use to justify internet shutdowns’ <https://www.accessnow.org/five-excuses-governments-abuse-justify-internet-shutdowns/> accessed 8 November 2023).

neighbours Uganda and Tanzania, which have enforced internet shutdowns, including during elections.<sup>138</sup> However, certain comments from state officials supporting the likelihood of an internet shutdown to manage online hate speech and threats to public order and national security during the 2017 and 2022 general elections have raised concern.<sup>139</sup> Such a move will not only gravely inhibit media rights in contradiction of the constitution and international laws and standards, but it will also incapacitate the administration of the elections given the use of internet-dependent election technology. The discussion below examines the legal framework of false news in Kenya. A central criticism is the broad and vague wording and the imposition of disproportionate sanctions that conflict with the legality, necessity and proportionality test for limitations of rights.

### ***Penal Code***

For instance, section 66 of the Penal Code prohibits the publication of ‘any false statement, rumour or report which is likely to cause fear and alarm to the public or disturb the public peace’ without due diligence to ascertain its accuracy. This offence carries a jail term of not more than two years, a fine, or both. The phrases ‘cause public fear and alarm’ and ‘disturb the public peace’ are broad and vulnerable to subjective interpretation. Further, there is no requirement for an intention to cause harm. The provision of imprisonment is a disproportionate sanction and contradicts international law on freedom of expression.

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<sup>138</sup> Access Now ‘Internet shutdowns and elections handbook’ (2021) <https://www.accessnow.org/cms/assets/uploads/2021/04/KeepItOn-Internet-shutdowns-and-elections-handbook-1.pdf> (accessed 8 November 2023).

<sup>139</sup> Nation Correspondent ‘IEBC says internet shutdown would affect results transmission’ *Nation Daily* 21 July 2017 <https://nation.africa/kenya/news/IEBC-Internet-shutdown-affect-results-transmission/1056-4026734-b7484tz/index.html> (accessed 8 November 2023); N Wangari ‘Kenyans fear a possible internet shutdown during 2017 presidential election’ <https://advox.globalvoices.org/2017/01/12/kenyans-fear-a-possible-internet-shutdown-during-2017-presidential-election/> (accessed 8 November 2023); K Macharia ‘Government will not shut down internet during elections, Mucheru assures’ *Capital Business* 23 January 2017 <https://www.capitalfm.co.ke/business/2017/01/government-will-not-shut-internet-elections-mucheru-assures/> (accessed 8 November 2023) & D Miriri ‘Kenya orders Meta’s Facebook to tackle hate speech or face suspension’ *Reuters* 29 July 2022 <https://www.reuters.com/world/africa/kenyas-cohesion-watchdog-gives-meta-7-days-comply-with-regulations-2022-07-29/> (accessed 8 November 2023).

### ***Kenya Information and Communications Act***

Section 29 of the Kenya Information and Communications Act (KICA)<sup>140</sup> similarly criminalises the transmission of information via a licensed telecommunication system ‘that is grossly offensive or of an indecent, obscene or menacing character; or knows to be ‘false for the purpose of causing annoyance, inconvenience or needless anxiety to another person.’ This crime carries a fine of not more than KES 50 000, an imprisonment term of not more than three months, or both.

The constitutionality of section 29 of the KICA was challenged in *Geoffrey Andare v Attorney General and Others (Andare)* because it offended the principle of legality with its vague wording. It also did not attach a mental element to the crime.<sup>141</sup> The suit was inspired by criminal proceedings brought against the petitioner under section 29(1)(b) of the KICA for an allegedly defamatory Facebook post. The Court was in agreement with the petitioner on the vagueness and broadness of the section given that the impugned terms ‘grossly offensive’, ‘indecent’, ‘obscene’ or ‘menacing character’, ‘annoyance’, ‘inconvenience’, ‘needless anxiety’ were not defined under the Act. Indeed, this gave room for subjective interpretation by enforcement officers worrying, given the penal consequences.<sup>142</sup> The vagueness, broadness and uncertainty inherent in this section also did not provide proper guidance on what conduct could be considered illegal.<sup>143</sup> The Court also found the provision exceeded the limitations of rights scope under article 33(2) of the Constitution.<sup>144</sup>

Further, the Court stated that the objective of the Act was to regulate the telecommunication sector, and it applied to telecommunication licensees as opposed to social or mobile phone users like the petitioner.<sup>145</sup> On the availability of a less restrictive means to achieve the intended purpose of the section, the High Court stated that libel laws were a more appropriate recourse.<sup>146</sup> To add to the Court’s reasoning, libel laws provide less restrictive means and should

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<sup>140</sup> Act No 2 of 1998 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%20%20of%201998> (accessed 8 November 2023).

<sup>141</sup> *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR, High Court Petition No 149 of 2015 para 10 <http://kenyalaw.org/caselaw/cases/view/121033/> (accessed 8 November 2023).

<sup>142</sup> *Andare v AG & 2 Others* (n 141) para 77, 78-80 & 95.

<sup>143</sup> *Andare v AG & 2 Others* (n 141) paras 78-80.

<sup>144</sup> *Andare v AG & 2 Others* (n 141) para 98.

<sup>145</sup> Section 24 KICA (n 150) & *Andare v AG & 2 Others* (n 141) para 93-94

<sup>146</sup> *Andare v AG & 2 Others* (n 141) paras 98.



not carry criminal sanctions but rather reasonable and proportionate civil sanctions. This provision is still in the statute books and should be removed following this judgment.

### *Computer Misuse and Cybercrimes Act, 2018*

Kenya joined the ranks of countries with cybersecurity and cybercrimes legislation in 2018 with the Computer Misuse and Cybercrimes Act (CMCA).<sup>147</sup> In line with the 2020 ICT policy, it seeks to address the digital challenges of cybercrime and enhance cybersecurity.<sup>148</sup> The Act protects digital rights, including privacy, freedom of expression and access to information.<sup>149</sup> The Act establishes a National Computer and Cybercrimes Co-ordination Committee whose functions largely revolve around issues of national security linked to computers and cybercrimes.<sup>150</sup> Its composition, in line with the designated functions, largely consists of public officers in dockets relating to national security and regulators. This membership may, however, compromise the independence of the Committee from government control.<sup>151</sup> Given that the Act aims to protect constitutional rights, the Committee should include diverse representation with members from civil society and online publishers.<sup>152</sup>

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<sup>147</sup> Computer Misuse and Cybercrimes Act, 2018 Act No 5 of 2018 <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%205%20of%202018> (accessed 8 November 2023).

<sup>148</sup> Secs 5.5 & 6.2.4 ICT Policy Guidelines, 2020.

<sup>149</sup> Sec 3 CMCA. Other objects include: protect the confidentiality, integrity and availability of computer systems, programs and data; prevent the unlawful use of computer systems; facilitate the prevention, detection, investigation, prosecution and punishment of cybercrimes; and facilitate international co-operation on matters covered under this Act.

<sup>150</sup> Sec 6 CMCA.

<sup>151</sup> Sec 7 CMCA. The members of the Committee include: the Principal Secretary responsible for matters relating to internal security or a representative designated and who shall be the chairperson; the Principal Secretary responsible for matters relating to information, communication and technology or a representative designated in writing by the Principal Secretary responsible for information, communication and technology; the Attorney-General or a representative designated in writing by the Attorney-General; the Chief of the Kenya Defence Forces or a representative designated in writing by the Chief of the Kenya Defence Forces; the Inspector-General of the National Police Service or a representative designated in writing by the Inspector-General of the National Police Service; the Director-General of the National Intelligence Service or a representative designated in writing by the Director-General of the National Intelligence Service; the Director-General of the Communications Authority of Kenya or a representative designated in writing by the Director-General of the Communications Authority of Kenya; the Director of Public Prosecutions or a representative designated in writing by the Director of Public Prosecutions; the Governor of the Central Bank of Kenya or a representative designated in writing by the Governor of the Central Bank of Kenya; and the Director who shall be the secretary of the Committee and who shall not have a right to vote.

<sup>152</sup> MCK ‘Media sector legislative review’ (2020) 51 [https://mediacouncil.or.ke/sites/default/files/downloads/MEDIA%20SECTOR%20LEGISLATIVE%20REVIEW%202021\\_1.pdf](https://mediacouncil.or.ke/sites/default/files/downloads/MEDIA%20SECTOR%20LEGISLATIVE%20REVIEW%202021_1.pdf) (accessed 8 November 2023).

A concerning offence under the Act that is incongruous with the objective of protecting freedom of expression is the criminalisation of the publication of false news. Section 22 makes it an offence to intentionally publish ‘false, misleading or fictitious data’ or spread disinformation. This offence is punishable with a fine not exceeding five million shillings, imprisonment for a term not exceeding two years, or both. Section 22(2) links this section's limitation of freedom of expression to the standards set under article 24 of the Constitution. Section 23 of the CMCA also criminalises the publication of false information, which is defined as the intentional publication of false in ‘print, broadcast, data or over a computer system, that is calculated or results in panic, chaos, or violence among citizens of the Republic, or which is likely to discredit the reputation of a person...’. Upon conviction, someone charged under this section is liable to a fine not exceeding five million shillings, imprisonment for a term not exceeding ten years, or both.

The constitutionality of the CMCA was the subject of litigation in the *Bloggers Association of Kenya (BAKE) v Attorney General Others (BAKE 2020)*.<sup>153</sup> Among the concerns raised in the petition was the unconstitutional limitation of freedom of opinion and expression under sections 22 and 23 of the CMCA.<sup>154</sup> On the constitutionality of section 23, the petitioners made reference to previous decisions. They contended that this section was similar in wording to section 29 of the KICA, which the High Court declared unconstitutional in the *Andare* decision.<sup>155</sup> Similarly, it introduced the crime of criminal libel that had been declared unconstitutional in the *Okuta* decision.<sup>156</sup> The petitioners also argued that the sections predicated on exercising freedom of expression on truth, which is not provided under articles 32 and 33 of the Constitution.<sup>157</sup> The petitioners feared the chilling effect of the vague section 23 on the expression and work of media, whistle-blowers, bloggers, CSOs, academics, and political opposition, among others.<sup>158</sup>

In assessing the limitation's legitimacy, reasonableness and proportionality, the Court acknowledged that the limitation introduced under section 22 of the CMCA on the offence of

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<sup>153</sup> *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties)* [2020] eKLR, Petition 206 of 2019 <http://kenyalaw.org/caselaw/cases/view/191276/> (accessed 8 November 2023).

<sup>154</sup> *BAKE v AG* (n 153) para 10.

<sup>155</sup> *Andare v AG & 2 Others* (n 141).

<sup>156</sup> *BAKE v AG* (n 153) para 27 & *Okuta v AG* (n 58).

<sup>157</sup> *BAKE v AG* (n 153) para 31.

<sup>158</sup> *BAKE v AG* (n 153) para 63.

false publication sought to protect the public interest.<sup>159</sup> The Court felt that the petitioners had failed to prove that the limitation was excessive when examined against the objective it sought to achieve. Further, they failed to show whether there was a less restrictive means to achieve this objective.<sup>160</sup> The High Court underscored two aspects in its reasoning, the digital revolution and criminal libel. The Court highlighted that the revolution brought by the internet in relation to the dissemination of information, particularly the speed at which information, especially false information, spreads through the internet, has lasting, if not indelible, consequences. These ramifications included public fear and panic with the risk of causing chaos and uncertainty and threatening national security. The Court made reference to the gravity of this threat given Kenya's fragility, particularly during elections, where the spread of false information may escalate tensions. The Court pointed to the 2007-2008 post-election violence that was intensified by the spread of hate speech and negative ethnicity. In the Court's opinion, this context warranted legislation regulating and controlling the spread of false information that was inimical to national security.<sup>161</sup>

The High Court also distinguished the *BAKE 2020* case from the *Andare* decision declaring section 29 of the KICA unconstitutional. Firstly, section 29 of the KICA targeted telecommunications licensees, while section 23 of the CMCA targeted all persons who publish false information over a computer system and not generally the publication of false information.<sup>162</sup> Unlike section 29 KICA words, ambiguity was not an aspect that plagued section 23 of the CMCA, according to the Court.<sup>163</sup> Further, section 23 of the Act differed from section 194 of the Penal Code since the former sought to protect public interest while the latter sought to protect individual interest. Section 23 was, therefore, in consonance with article 24(1)(d) and 33(b) of the Constitution on limitations of rights.<sup>164</sup> Additionally, the sections required both an action and mental element by requiring the intentional publication of false news to prove the offence.<sup>165</sup>

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<sup>159</sup> *BAKE v AG* (n 153) para 39 & 41.

<sup>160</sup> *BAKE v AG* (n 153) paras 41- 42

<sup>161</sup> *BAKE v AG* (n 153) paras 44-45.

<sup>162</sup> *BAKE v AG* (n 153) paras 46-47.

<sup>163</sup> *BAKE v AG* (n 153) paras 47-48.

<sup>164</sup> *BAKE v AG* (n 153) para 65.

<sup>165</sup> *BAKE v AG* (n 153) para 65.

On the reintroduction of criminal libel under the Act, the Court relied on two foreign decisions that justified the criminalisation of libel; the South African Supreme Court of Appeal decision in *Hoho v The State*<sup>166</sup> that emphasised the importance of protecting the reputation of public figures given how this influences public decision-making including the exercise of the right to vote.<sup>167</sup> It also favoured the South African High Court decision in *Motsepe v The State*,<sup>168</sup> where the Court determined that prosecuting the media for criminal defamation was not inconsistent with the South African Constitution.<sup>169</sup> The Court in *BAKE 2020* then proceeded to distinguish cyber libel and justify the need for its criminalisation, given the way the internet has facilitated speedy and easy dissemination of information to a large audience, anonymity of the sender, and the resultant harm.<sup>170</sup>

Indeed, the internet is a double-edged sword. Its inherent interoperability character that allows for spatial, speedy, and easy dissemination of information means that it can influence different emotions and actions at the click of a button and within a large audience. Hence, it is unsurprising that questions on its effective regulation have dominated national and international conversations. That being said, regulators should always remain cognizant of rights-based approaches in formulating laws and policies, with the Constitutions and international laws and standards as the guiding beacon. This decision made scarce mention and reliance on international law and the normative guidance specifically relating to regulating false news. The nod to international law was in reference to article 19 protections in the ICCPR and the Universal Declaration for freedom of expression and the provisions on limitations of rights. The lawyers in this case should also have guided the Court on this evolving normative space. The petitioner crucially missed the opportunity to rely on the African Court precedence in *Konate v Burkina Faso*,<sup>171</sup> and develop jurisprudence on the 2019 Declaration, General Comment 34 and other soft laws which require states to amend criminal laws on false news and defamation and adopt

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<sup>166</sup> *S v Hoho* (493/05) [2008] ZASCA 98; [2009] 1 All SA 103 (SCA); 2009 (1) SACR 276 (SCA) (17 September 2008) <http://www.saflii.org/za/cases/ZASCA/2008/98.html> (accessed 8 November 2023). Also see *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 201 referenced under *Hoho v The State*.

<sup>167</sup> *BAKE v AG* (n 153) paras 53-55.

<sup>168</sup> *Motsepe v The State* (A 816/2013) [2014] ZAGPPHC 1016; 2015 (2) SACR 125 (GP); 2015 (5) SA 126 (GP) (5 November 2014) <http://www.saflii.org/za/cases/ZAGPPHC/2014/1016.html> (accessed 8 November 2023).

<sup>169</sup> *BAKE v AG* (n 153) para 60.

<sup>170</sup> *BAKE v AG* (n 153) para 56.

<sup>171</sup> *Konate v Burkina Faso* (n 112).

reasonable and proportionate civil sanctions.<sup>172</sup> Imprisonment should be a measure of last resort and only in the most serious cases regarding prohibited speech.<sup>173</sup> Both sections 22 and 23 of the CMCA are in contradiction with international law and precedence. The sanctions imposed by these sections are alarmingly severe and disproportionate. By the weight of these sanctions, the third leg in determining whether limitations to rights are justified and reasonable crumbles since the sanctions are not necessary and proportionate in a democratic society.

The High Court also rationalised criminal cyber libel on the basis of Kenya's historical and electoral context of Kenya. The High Court further erroneously places cyber libel on a pedestal to justify the need for tougher sanctions for cyber libel compared to libel committed through traditional forms of media. On the former premise, it is important to rein in prohibited speech that may aggravate tensions during elections and cause violence. However, as captured in chapter two, while irresponsible and unprofessional media reporting, largely on local language radio stations, played a role in stoking ethnic fires, the wider media fraternity was instrumental in restoring peace.<sup>174</sup> Contemporaneously, the Court ignored another contentious aspect of Kenya's history with dire human rights implications, the misuse of such laws to curtail media rights and the resultant impact on meaningful political participation. Already, the government has misused the CMCA to justify harassing, intimidating and arresting online voices that are critical of the establishment.<sup>175</sup> Further, many progressive jurisdictions have recognised the grave threat of criminal defamation laws and their incongruence with international laws. Even with the Court's reliance on South African cases, it failed to consider that the Supreme Court of Appeal in South Africa recognised that there were few criminal defamation cases in the country because of, among other reasons, the high standard of proof required, being beyond reasonable doubt.<sup>176</sup> While the standard of proof is the same in Kenya, this has not deterred the application of these

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<sup>172</sup> Principle 22 (2-4) 2019 Declaration & General Comment 34 para 47. Also see *Konate v Burkina Faso* (n 112) para 165.

<sup>173</sup> Principle 23 2019 Declaration (n 36) & General Comment 34 (n 1) para 47.

<sup>174</sup> Sec 3.2.1 chapter two of this thesis.

<sup>175</sup> Article 19 'Kenya: Human rights groups voice outrage over ruling against activist' <https://www.article19.org/resources/kenya-human-rights-groups-voice-outrage-over-ruling-against-activist/> (accessed 8 November 2023); S Cece 'Kenya: Blogger Alai Charged for Publishing 'Alarming' Claims On Coronavirus' *The Nation* 23 March 2020 <https://nation.africa/kenya/news/blogger-alai-to-be-charged-over-alarming-coronavirus-post--280580> (accessed 8 November 2023) & F Monyango 'Mask or muzzle: The impact of COVID-19 measures on digital rights in Kenya' <https://africaninternetrights.org/sites/default/files/Francis%20Monyango.pdf> (accessed 8 November 2023).

<sup>176</sup> *S v Hoho* (n 166) paras 33-35.

laws. History shows criminal defamation laws are at risk of misuse in Kenya.<sup>177</sup> There have also been attempts to introduce legislation decriminalising defamation in South Africa, but these have not been successful as of 2023.<sup>178</sup> Noteworthy, criminal defamation laws, like sedition and treason laws, were oppressive tools of imperialism. The United Kingdom, Kenya's coloniser, decriminalised defamation in 2009, although it has not applied criminal defamation laws since the 1970s.<sup>179</sup> Kenya is clinging to a vestige of colonial oppression that it should have jettisoned decades back. While previous judgements have sought to do just that, the *BAKE* 2020 decision seeks to reverse these gains in the digital age.

More so, the Kenyan Court failed to consider UN and African internet resolutions that affirm that 'the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and *through any media of one's choice*' (own emphasis).<sup>180</sup> Therefore, it follows that cyber libel does not draw special protections that negate the precedence set that nullified criminal sanctions for libel. Although a court with similar status rendered the *Okuta* decision, its precedence aligns with international law and the enforcement of media rights under article 20(3) of the Constitution. Courts should follow this precedence. It, however, remains to be seen what jurisprudential route the Court of Appeal will take in this case as of November 2023.

Lastly, the Court underscored the characteristics of the internet, such as its ease of communication, virality, and interoperability, to justify harsher sanctions on cyber libel. In doing so, the Court ignored the other side of the coin. These very qualities serve as both advantages and disadvantages. While by the click of a button, the internet can easily defame, by the same click of that button, amplified by many other clicks, false, misleading and inaccurate information can be corrected. The internet has been characterised as self-correcting and crowd-correcting.<sup>181</sup> One is only to look at the comments sections to see the diversity in opinions in posts. Often

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<sup>177</sup> See IFEX 'Court sets aside award to presidential aide in libel suit against newspaper' <https://ifex.org/court-sets-aside-award-to-presidential-aide-in-libel-suit-against-newspaper/> (accessed 8 November 2023) & *Biwott v Mbuguss & Kalamka Ltd* (n 111).

<sup>178</sup> PEN International 'Stifling dissent, impeding accountability criminal defamation laws in Africa' (2017) 3.

<sup>179</sup> Refworld 'United Kingdom: Defamation decriminalised' <https://www.refworld.org/pdfid/4b0112c90.pdf> (accessed 8 November 2023) & L Eko 'Globalization and the diffusion of media policy in Africa: The case of defamation of public officials' (2016-2017) 22 *Africa Policy Journal* 1, 17 & 19.

<sup>180</sup> UN HRC 'The promotion, protection and enjoyment of human rights on the Internet' A/HRC/38/L.10/Rev.1 [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/47/L.22](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/47/L.22) (accessed 8 November 2023).

<sup>181</sup> W Jong & M Dücker 'Self-correcting mechanisms and echo-effects in social media: An analysis of the 'gunman in the newsroom' crisis' (2016) 59 *Computers in Human Behavior* 334-341.

factual inconsistencies or falsities are pointed out in the comments section, with others going a step further to provide links to more factual information. Social media companies can also take down false content if they determine that it violates their policies regarding unprotected expression. Fact-checking organisations also play a countermanding role online to promote the quality of information. In a nutshell, several existing countervailing measures are less restrictive, which mitigate the negative impact of false news that negate the need to resort to criminal cyber libel. Chapter 5 of this thesis will delve further into this aspect by examining the effectiveness of policies and actions of social media companies in moderating content during elections to support the conclusion that criminal sanctions are an unsuitable means of achieving this aim and in dissonance with the values of a just and democratic society.

#### **4 Approaches to media regulation in Kenya: Enabling or restrictive?**

Beyond provisions on rights limitations, the national legal and policy framework also determines the conduciveness of the media operating environment to enable it to play its normative functions in the public sphere and promote meaningful political participation. Importantly, laws and policies should temper political and economic interference on media independence that impairs performance. Article 34 of the Constitution provides the foundational basis for regulating media in Kenya in alignment with the goal of promoting media freedom. Media owners are free to establish broadcasting and other electronic media subject to licensing procedures necessary for regulating the airwaves and other forms of signal distribution.<sup>182</sup> The licensing procedures should further be independent of control by government, political interests or commercial interests.<sup>183</sup> Parliament is mandated to establish a body to set media standards and regulate and monitor compliance.<sup>184</sup> To facilitate the operation of this body, Parliament should ensure the independence, diversity and inclusivity of the body.<sup>185</sup>

These constitutional provisions on media freedom seek to confront political and economic interference hurdles that have long stifled media freedom in Kenya. Nevertheless, a number of provisions in the media laws and regulations enacted post the 2010 Constitution are

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<sup>182</sup> Art 34(3)(a) of the Constitution of Kenya.

<sup>183</sup> Art 34(3)(b) of the Constitution of Kenya.

<sup>184</sup> Art 34(5)(c) of the Constitution of Kenya.

<sup>185</sup> Art 34(5)(a) & (b) of the Constitution of Kenya.

retrogressive and in conflict with the Constitution and international law and standards on media freedom.<sup>186</sup> Having to refer to various legislation on provisions affecting media is also a source of confusion and reflects a tendency to regulate the media overly.<sup>187</sup> Contentious provisions include those that compromise the independence of media regulatory bodies and disproportionate penalties.<sup>188</sup> While the regulatory environment on media is fragmented, the main legislation governing media activities are the Media Council Act (MCA) and the Kenya Information and Communications Act. The two Acts are analysed further below.

An assessment of the legal framework shows that the media regulatory approach in Kenya is co-regulatory, with both the government and the media industry sharing regulatory responsibilities. According to Cishecki, co-regulation involves ‘government, independent regulatory agencies, industry, independent self-regulatory agencies, civil society organization and citizens’.<sup>189</sup> The co-regulatory approach deviated from the traditional bifurcated perspective of state and self-regulatory models. Some argue that self-regulation is the ideal model for media regulation.<sup>190</sup> Proponents of self-regulation in the media industry point to the perceived benefits of reduced government interference and enhanced media freedom, media accountability, and access to information.<sup>191</sup> Self-regulation of the media is defined as a ‘combination of standards setting out the appropriate codes of behaviour for the media that are necessary to support freedom of expression, and process how those behaviours will be monitored or held to account.’<sup>192</sup> Staving off government involvement in regulation has long motivated industries,

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<sup>186</sup> S Valentine & T Rhodes ‘Broken promises: How Kenya is failing to uphold its commitment to a free press’ (2015) 21; Article 19 EA ‘The impact of Kenya’s legal and institutional frameworks on media freedom’ (2014) 5 & C Mwita ‘The Kenya media assessment 2021’ (2021) 12.

<sup>187</sup> O Nyanjom ‘Factually true, legally untrue: Political media ownership in Kenya’ (2012) 73 [https://internews.org/wp-content/uploads/legacy/resources/Internews\\_FactuallyTrue\\_Legally\\_Untrue-MediaOwnership\\_Kenya2013-01.pdf](https://internews.org/wp-content/uploads/legacy/resources/Internews_FactuallyTrue_Legally_Untrue-MediaOwnership_Kenya2013-01.pdf) (accessed 8 November 2023).

<sup>188</sup> As above.

<sup>189</sup> M Cishecki ‘Co-regulation: A new model of media regulation’ (2002) 10 <https://static.un.org/womenwatch/daw/egm/media2002/reports/EP3Cishecki.PDF> (accessed 8 November 2023).

<sup>190</sup> H Miklós ‘The media self-regulation guidebook’ (2008) 12 <https://www.osce.org/files/f/documents/1/d/31497.pdf> (accessed 8 November 2023) & J Obuya ‘Self-regulation as a tool for ensuring media accountability: The Kenyan experience’ (2012) 18(2) *Pacific Journalism Review* 131.

<sup>191</sup> AJ Campbell ‘Self-regulation and the media’ (1999) 51 *Federal Communications Law Journal* 715-717; Article 19 ‘Self-regulation and ‘hate speech’ on social media platforms’ (2018) 9-11 [https://www.article19.org/wp-content/uploads/2018/03/Self-regulation-and-%E2%80%98hate-speech%E2%80%99-on-social-media-platforms\\_March2018.pdf](https://www.article19.org/wp-content/uploads/2018/03/Self-regulation-and-%E2%80%98hate-speech%E2%80%99-on-social-media-platforms_March2018.pdf) (accessed 8 November 2023) & Miklós (n 190) 12.

<sup>192</sup> UNESCO Brasilia Office ‘The importance of self regulation of the media in upholding freedom of expression’ (2011) 12 <https://unesdoc.unesco.org/ark:/48223/pf0000191624> (accessed 8 November 2023). Also see Miklós (n 190) 12.



including the media, to self-regulate.<sup>193</sup> Where technical expertise is required in the formulation of rules, self-regulation by the holders of this esoteric knowledge has its perks.<sup>194</sup> Therefore, the intercepting and coercive force of governments and legislation is absent in a self-regulatory system. Rather, the industry or profession internally develops, monitors and enforces its rules or codes of conduct.

Campbell argues that self-regulation does not necessarily mean the complete absence of the state.<sup>195</sup> The state and industry may share one or more of the functions in norm development, monitoring and enforcement.<sup>196</sup> Self-regulatory norms can be required by statute or supplement legislation. This impure form of self-regulation ideally establishes a system of checks and balances that may cure the shortcomings of a purely self-regulatory model. Critics of self-regulatory models question the industry's enforcement capabilities and whether it would prioritise public over private interest.<sup>197</sup>

Statutory regulation, on the other hand, is interventionist, with a public body formulating, monitoring compliance and enforcing the sector's rules.<sup>198</sup> This model is resisted because of fears of government overreach with dire implications for media freedom.<sup>199</sup> These concerns are amplified in hybrid democracies and authoritarian contexts where state capture of the media is a real threat. Others have cautioned against state involvement in media self-regulation in undemocratic contexts, given the heightened risk of government control and censorship.<sup>200</sup> Cischek's co-regulatory model is tenable in the face of this assessment.

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<sup>193</sup> R Corn-Revere 'Self-regulation and the public interest, in digital broadcasting and the public interest' in CM Firestone & AK Garmer (eds) *Digital Broadcasting and the Public Interest* (1998) 63 & MA Cusumano, A Gawer & DB Yoffie 'Social media companies should self-regulate now' (2021) *Harvard Business Review* <https://hbr.org/2021/01/social-media-companies-should-self-regulate-now> (accessed 8 November 2023).

<sup>194</sup> C Michael 'Federal agency use of audited self-regulation as a regulatory technique,' (1995) 47 *Administrative Law Review* 181-182 [https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1317&context=law\\_facpub](https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1317&context=law_facpub) (accessed 8 November 2023).

<sup>195</sup> Campbell (n 191) 715.

<sup>196</sup> P Swire 'Markets, Self-regulation, and government enforcement in the protection of personal information, in privacy and self-regulation in the information age by the U.S. Department of Commerce' (1997) *SSRN Electronic Journal* 13. Also see Campbell (n 191) 717-718.

<sup>197</sup> As above.

<sup>198</sup> Campbell (n 191) 715.

<sup>199</sup> Miklós (n 190) & Campbell (n 191) 714-717

<sup>200</sup> A Hulin 'Statutory media self-regulation: Beneficial or detrimental for media freedom?' (2014) *Working Paper, EUI RSCAS, 2014/127*.

As noted above, Kenya has a media co-regulatory version. The Media Council of Kenya was initially established as a self-regulatory media body in 2004 but transformed into a statutory self-regulatory body with the enactment of the Media Council Act 2007. This change was affirmed by the 2013 amended version to conform the Act to the 2010 Constitution.<sup>201</sup> Statutory media regulation is primarily enunciated by the Kenya Information and Communication Act, establishing the Communication Authority of Kenya (CA). The Film and Stage Plays Act established a third body, the Kenya Film and Classification Board (KFCB).<sup>202</sup>

#### 4.1 Statutory self-regulatory framework for media in Kenya

The Media Council Act primarily articulates the self-regulatory framework for media in Kenya. Enacted in 2013, the MCA established the Media Council of Kenya, whose functions include promoting and protecting media freedom and independence; prescribing standards for journalists, media practitioners and media enterprises; setting media standards and regulating and monitoring compliance; and dispute resolution within media and between the government, the public and the media.<sup>203</sup> An examination of the functions of the Media Council supports the conclusion that this is the self-regulatory body envisioned under article 34(5)(c) of the Constitution.

Media is defined under the Act as ‘the production of electronic and print media for circulation to the public, but does not include book publishing’.<sup>204</sup> While not explicitly stated in the definitional section, electronic media includes the internet.<sup>205</sup> The legislation also defines a journalist as ‘any person who is recognised as such by the Council upon fulfilment of a criteria set by the Council’.<sup>206</sup> In light of the expanding definition of media and journalists in the digital age that has seen an increase in peripheral journalism through online citizen journalists and other digital media practitioners, this is a narrow definition of who can be a journalist and enjoy the

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<sup>201</sup> Media Council of Kenya 'Origins of the Council' <https://mediacouncil.or.ke/~mediaco7/index.php/about-us/origins-of-the-council> (accessed 8 November 2023). Also see J Otieno ‘Regulation of media content in Kenya: In search of a paradigm in the era of convergence’ (2017) 2(7) *Saudi Journal of Humanities and Social Sciences* 557.

<sup>202</sup> Cap 222 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20222> (accessed 8 November 2023).

<sup>203</sup> Sec 6 MCA.

<sup>204</sup> Sec 2 MCA.

<sup>205</sup> The Cambridge Dictionary defines electronic media as ways of communicating information that are electronic rather than using paper, for example, television and the internet See <https://dictionary.cambridge.org/dictionary/english/electronic-media> (accessed 8 November 2023).

<sup>206</sup> Sec 2 MCA.

protections under the Act. Arguably, the definition of what amounts to journalism is more alive to nascent realities.<sup>207</sup> Journalism is defined as ‘the collecting, writing, editing and presenting of news or news articles in newspapers and magazines, radio and television broadcasts, in the internet or any other manner as may be prescribed’.<sup>208</sup> This wide-encompassing definition may include persons who lack the necessary professional prerequisites acquired from journalism schools but contribute to public interest news production and dissemination. Future amendments to the Act should consider the dissonance in the definition of media and journalism against that of journalists in light of the metamorphosis in the media ecology. Given that the Act applies to media enterprises, journalists, media practitioners, foreign journalists accredited under this Act, and consumers of media services, such clarification is important to determine to what extent the duties and protections apply to traditional and new media practitioners. Noteworthy, in undertaking its functions, the MCK has collaborated with other stakeholders to develop standards for both professional and non-professional journalists, such as the Code of Conduct for Digital Media Practitioners.<sup>209</sup>

In assessing the legitimacy and independence of the Council, its composition is relevant and meets the requirements of diversity under article 34(5)(b) of the Constitution. The MCK comprises a chairperson, a nominee by the Cabinet Secretary (CS) of Information, Communications and Technology and seven other council members.<sup>210</sup> The MCA provides for a transparent, meritorious and competitive appointment process for the council members that are selected by a 13-member panel with representatives from the Kenya Union of Journalists;<sup>211</sup> Media Owners Association;<sup>212</sup> Kenya Editor’s Guild;<sup>213</sup> Law Society of Kenya;<sup>214</sup> Kenya Correspondents Association;<sup>215</sup> Public Relations Society of Kenya;<sup>216</sup> National Gender and

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<sup>207</sup> MCK (n 152) 19.

<sup>208</sup> Sec 2 MCA.

<sup>209</sup> MCK Code of Conduct for Digital Media Practitioners (n 127).

<sup>210</sup> Sec 7(1) MCA.

<sup>211</sup> A membership organization that seeks to improve working of conditions of journalists <https://kuj.or.ke/about-us/> (accessed 8 November 2023).

<sup>212</sup> An association of media owners in Kenya.

<sup>213</sup> A membership ‘professional association for editors in Kenya, including senior print, broadcast and online editors, and scholars of journalism and media studies’. <https://www.kenyaeditorsguild.org/about-us/> (accessed 8 November 2023).

<sup>214</sup> A membership association for all practicing advocates. <https://lsk.or.ke/> (accessed 8 November 2023).

<sup>215</sup> A membership organisation for a platform for ‘media correspondents to interact, build solidarity and enhance their profile and recognition in the media industry’ <https://www.devex.com/organizations/kenya-correspondents-association-kca-65268> (accessed 8 November 2023).

Equality Commission;<sup>217</sup> Association of Professional Societies in East Africa;<sup>218</sup> Consumers Federation of Kenya;<sup>219</sup> Ministry of ICT; Kenya News Agency;<sup>220</sup> and two nominees from recognised private and public universities with schools of journalism. Future amendments to the legislation should consider including a representative from the online media community, such as the Digital Broadcasters Association and BAKE, in the selection panel. The selection panel and the CS of ICT are required to ensure the recruitment delivers a Council that holistically reflects the society's interests and is inclusive, considering persons with disabilities and other marginalised groups and gender balance.<sup>221</sup> The qualifications of the members of the Council include their educational and professional backgrounds and conflicting interests, such as membership to a political party, holding a political office, personal integrity and character, and bankruptcy history.<sup>222</sup> The CS of ICT has the power to terminate the membership of a Council Member but strictly as dictated by a tribunal appointed for such purpose. In making this decision, the tribunal shall be guided by the principles of fair administrative justice under article 47 of the Constitution.<sup>223</sup>

The Media Council and media enterprises, journalists, media practitioners, foreign journalists accredited under this Act, and consumers of media services<sup>224</sup> are mandated to safeguard: freedom of expression within constitutional limits; the exercise of media freedom and independence in a manner that respects the rights and reputations of others; the protection of national security, public order, public health and public morals; and comply with any other

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<sup>216</sup> A professional membership organisation for persons in public relations <https://www.prsk.co.ke/prsk-overview/> (accessed 8 November 2023).

<sup>217</sup> A chapter 15 constitutional commission that focuses on 'Special Interest Groups, which include women, youth, persons with disabilities (PWDs), children, the older members of society, minorities and marginalized groups. <https://www.ngeckkenya.org/home/about> (accessed 8 November 2023).

<sup>218</sup> 'A corporate membership organization and an umbrella body of professionals in East Africa...' <https://apsea.or.ke/> (accessed 8 November 2023).

<sup>219</sup> 'An 'independent, self-funded, multi-sectorial, non-political and apex non-profit Federation committed to consumer protection, education, research, consultancy, litigation, anti-counterfeits campaign and business rating on consumerism and customer-care issues.' <https://www.devex.com/organizations/consumers-federation-of-kenya-cofek-64224> (accessed 8 November 2023).

<sup>220</sup> It was formed under the department of information as one of the mediums for publicizing government's development agenda <https://www.kenyanews.go.ke/about-us/> (accessed 8 November 2023).

<sup>221</sup> Section 7(14) MCA.

<sup>222</sup> Sec 8(1) & (2) MCA.

<sup>223</sup> Section 14 MCA.

<sup>224</sup> Under sec 4 of the MCA these include media enterprises; journalists; media practitioners; foreign journalist accredited under this Act; and consumers of media services.

written law.<sup>225</sup> However, in the case of *Nation Media Group and Others v Attorney General and Others* (NMG 2016), the Court determined that saddling persons bound by the Act with the duty to ensure the protection of national security, public order, public health and public morals was an onerous responsibility and the provision was declared unconstitutional.<sup>226</sup> Also argued in the case was the legitimacy of section 3(2) of the MCA<sup>227</sup> that required media enterprises, journalists, media practitioners, foreign journalists and media consumers to exercise their freedom of expression to reflect the interests of the whole society. The petitioners argued that this was an impossibility, given the diversity of society.<sup>228</sup> The High Court agreed that a requirement of such uniformity of thought and opinion to reflect the interests of the whole society, which is by its nature diverse, was an unjustifiable limitation to freedom of expression. The Court therefore declared section 3(2)(a) unconstitutional.<sup>229</sup>

The Constitution emphasises the independence of media regulatory bodies. In effect, section 11 of the MCA includes a declaration of the independence of the Council from control by government, political or commercial interests. Implementing this section is a vital safeguard against the political economy of the media. However, the verity of this statutory independence is questionable. One area of concern is the involvement of the CS of ICT, albeit in consultation with the Council, in developing regulations under the Act and the CS's involvement in the operations of the Council.<sup>230</sup> Arguably, the involvement of the CS of ICT in making further regulations under the Act provides room for government interference in what should be principally a self-regulatory framework for media.

Financial control is also a critical determinant of the level of independence of media regulatory bodies. The revenue sources of the Council include disbursements from the National

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<sup>225</sup> Sec 6(2) of the MCK.

<sup>226</sup> *NMG & 6 Others v Attorney General & 9 Others* (n 47) paras 160-163, 165 & 173.

<sup>227</sup> In exercise of the right to freedom of expression, the persons specified under section 4 shall— a. reflect the interests of all sections of society; b. be accurate and fair; c. be accountable and transparent; d. respect the personal dignity and privacy of others; e. demonstrate professionalism and respect for the rights of others; and f. be guided by the national values and principles of governance set out under Article 10 of the Constitution.

<sup>228</sup> *NMG & 6 Others v Attorney General & 9 Others* (n 47) para 153-157. See also *Cantwell v Connecticut* 310 US 296 (1940).

<sup>229</sup> *NMG & 6 Others v Attorney General & 9 Others* (n 47) paras 157-159.

<sup>230</sup> Sec 6(1)(j) MCA (n 144) on the CS's mandate to table reports from the MCK to Parliament on their behalf; 6(3) on regulations to facilitate compliance with section 6(2); sec 45(2), on amendments to the journalists' code of conduct; sec 46, on accreditation fees payable by foreign journalists; sec 50, on regulations to facilitate implementation of the Act.

Assembly; accreditation or registration fees for journalists; assets and receipts received in exercising its functions; loans; and donations.<sup>231</sup> The Council recommends constitutional or statutory provisions for a media council fund derived from the Consolidated Fund to enhance its financial independence.<sup>232</sup> The Council should be allowed to create its budget for consideration at the National Assembly instead of leaving it on parliamentary disbursements under the CS's prerogative.<sup>233</sup> The Council also recommends that providing it with recognition as a constitutional commission under chapter 15 of the Constitution will enhance its protections and privileges, including stronger guarantees for its operational and financial independence.<sup>234</sup>

On the standard-setting function of the Council, the Act provides a Code of Conduct for journalists, media practitioners, foreign journalists and media enterprises.<sup>235</sup> The reporting principles under the Code include accuracy and fairness, independence, integrity, accountability, non-discrimination, and reasonable confidentiality.<sup>236</sup> As noted above, the MCK has also developed a code for digital content creators despite the traditional definition of journalists therein.

The implementation of the mandate of the MCK during elections has been witnessed in activities such as collaborating with the Independent Electoral and Boundaries Commission (IEBC) to promote the accreditation of journalists to access polling and tallying centres and other venues for election activities; supporting the work of journalists; election monitoring; hosting the Presidential, Deputy President, Nairobi Governor and select county debates in partnership with other media bodies; developing and implementing an election safety plan for journalists and media practitioners; and media monitoring.<sup>237</sup> A missed opportunity of the MCK was sustained partnering with voluntary membership organisations for online content producers, such as BAKE, given their finding that some bloggers were key disseminators of misinformation during

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<sup>231</sup> Sec 23 MCA.

<sup>232</sup> MCK (n 152) 21.

<sup>233</sup> MCK (n 152) 22.

<sup>234</sup> MCK (n 152) 23.

<sup>235</sup> Sec 1 Code of Conduct, Schedule 2 MCA.

<sup>236</sup> Secs 2-5 Sec 1 Code of Conduct MCA.

<sup>237</sup> MCK 'Hits and misses media performance & press freedom violations pre, during & post the August general election in Kenya' (2022) <https://mediacouncil.or.ke/sites/default/files/downloads/REPORT%20ON%20MEDIA%20PERFORMANCE%20DURING%20THE%202022%20GENERAL%20ELECTION.pdf> (accessed 8 November 2023).

the elections.<sup>238</sup> However, MCK partnered with BAKE, Digital Broadcasters Association, and notable digital content creators in 2022 to develop the Code of Conduct for Digital Media Practitioners.<sup>239</sup>

## 4.2 Government regulation of media

### 4.2.1 Regulation of the information and communication sector

The national government is also mandated to regulate media in Kenya and primarily does so through the KICA. Critics of the legislation view it as another government approach to controlling and stifling media freedom.<sup>240</sup> The KICA established the Communications Authority of Kenya, which is mandated to licence and regulate the postal, information and communication sectors.<sup>241</sup> Concerning the media, this broad formulation extends the licensing and regulatory powers of the CA over offline and online media. In its lifespan, the KICA has undergone a raft of amendments. Its 2013 version was aimed at, among other things, ostensibly enhancing the independence of the licensing and regulatory body and insulating it from government, political and economic control.<sup>242</sup> The CA must also comply with articles 34(1) and 34(2) of the Constitution on media freedom.<sup>243</sup> On one hand, the KICA declares the independence of the CA, but on the other hand, the Board's composition comprises government appointees.<sup>244</sup> These include the Chairperson who the president appoints; the three principal secretaries from media, finance and internal security; and seven other members appointed by the CS of ICT. With such a heavy government presence on the Board, the affirmation of independence from government and political influence under the Act rings untrue, more so in Kenya's political context. Among the functions of the CA are developing media standards and regulating and monitoring compliance with those standards.<sup>245</sup> These provisions duplicate the functions of the Media Council.<sup>246</sup> It also

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<sup>238</sup> MCK (n 237) 2-3.

<sup>239</sup> Code of Conduct for Digital Media Practitioners (n 127) 14.

<sup>240</sup> LL Wanyama 'Media control in Kenya: The state of broadcasting under the new Kenya Information and Communication Act of 2013' (2015) 33 *New Media and Mass Communication* 17-18.

<sup>241</sup> Sec 3 & 5 KICA.

<sup>242</sup> Most recently the Kenya Information and Communications (Amendment) Act of 2009; the Kenya Information and Communications Regulations, 2009; the Kenya Information and Communications Amendment Act, 2013 and Statute Law Miscellaneous (Amendment) Act, No.18 of 2018. See sec 5A KICA.

<sup>243</sup> Sec 5B KICA.

<sup>244</sup> Secs 6, 6A & 6D KICA.

<sup>245</sup> Secs 46A (g), (j) and (k) KICA.

<sup>246</sup> Also see MCK (n 152) 27.

risks engendering state control on broadcasting and generally the dissemination of information by any medium.

Prior to the establishment of these bodies, the subject of regulation of the media industry by bodies that are free from government and political control was argued in the case of *Communications Commission of Kenya and others v Royal Media Services Limited and others*<sup>247</sup> (CCK 2014) following the government directive to implement digital migration. The Court of Appeal determined that the Communications Commission of Kenya (CCK), as it was then, had no authority to grant BSD licences because it lacked the independence contemplated by articles 34(3)(b) and 34(5) of the Constitution and international law.<sup>248</sup> This was because the CCK was composed of persons in or appointed by the executive arm of government.<sup>249</sup>

On appeal, the Supreme Court of Kenya (SCOK) appreciated Kenya's historical background and the unrelenting struggle to protect and promote media freedom against state control. The struggles emerged from the government's efforts to control the media sector through restrictive and repressive legislation and acquiring a significant stake in the industry through the public broadcaster that cemented its presence in the broadcast and press sector.<sup>250</sup> The state's central motivation was aptly captured as below:<sup>251</sup>

The State often identified the media as power tools in the hands of those engaged in political processes and sought to counter their influence through a legal and regulatory licensing regime that sought to diminish the influence of economic, religious, social, political and other interests that the State could control, manipulate, or co-exist with its material interests. The refusal to license other operators in the broadcast sector emanated from the desire to limit avenues and revenues of expression for political and economic interests outside the Government.

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<sup>247</sup> *CCK & 5 Others v RMS & 5 Others* (n 27).

<sup>248</sup> *RMS & 2 Others v AG and 8 Others* (n 27) para 152. (Justice RN Nambuye). It should be noted that at the time of this appeal, the president has already consented to the Kenya Information and Communications (Amendment) Act, 2013 that amended the Kenya Information and Communications Act, 1998 and established the new regulatory body renamed as the Communications Authority of Kenya that was differently constituted. See para 125 Maraga J judgement.

<sup>249</sup> Sec 6 of KICA, 2009 on the composition of CCK: The Chairman appointed by the President; the Director-General appointed by the Minister responsible for Communications; the Permanent Secretary in the Ministry for the time being responsible for information and communications or his representative; the Permanent Secretary in the Ministry for the time being responsible for finance or his representative; the Permanent Secretary in the Ministry for the time being responsible for internal security or his representative; and at least seven other persons, not being public officers, appointed by the Minister. See also *RMS & 2 Others v AG and 8 Others* (n 27) para 133 DK Musinga & paras 139-145 & 151 (Justice RN Nambuye).

<sup>250</sup> *CCK & 5 Others v RMS & 5 Others* (n 27) para 148 & Ochieng' (n 49).

<sup>251</sup> *CCK & 5 Others v RMS & 5 Others* (n 27) para 150.



Even with the punctuated and non-committal liberalisation of airwaves in the 1990s, the government's upper hand in the legal and regulatory environment allowed it to interfere with the media sector, particularly when its narrative did not conform with the government's.<sup>252</sup> The broadcast media licensing regime before the 2010 Constitution was one characterised by arbitrariness, 'corruption, cronyism and State patronage'.<sup>253</sup> The 2010 Constitution, therefore, is meant to provide a foundation to change course from the uncertain, restrictive and arbitrary regulatory approach.<sup>254</sup> To quote the Court: 'The 2010 Constitution seeks to end this corruption in public affairs, this opaqueness in the licensing of a natural resource, and the operation of a "banditry" economy in the name of a liberalized economy'.<sup>255</sup>

Notably, there was a new institutional dispensation for media regulation during the determination of both the Court of Appeal and Supreme Court Appeal through the 2013 amendments to the KICA and MCA, although the Acts were yet to take effect when the appeal was being determined at the Court of Appeal. Justice DK Musinga noted the newly constituted CA licensing body under the Kenya Information and Communication (Amendment) Act 2013 was in conformity with the purpose and spirit of article 34(5) in guaranteeing the independence of the licensing authority.<sup>256</sup> However, the overruling precedent of the Supreme Court deferred with the conclusion that the CA was the body contemplated under article 34(5), as discussed further below.

The Supreme Court recognised that the independence of a regulatory body is enabled through appointment, composition, operation and the personal conviction of the members of such bodies.<sup>257</sup> On a comparative examination of regulation, the Court noted that countries either adopt a self-regulatory approach, which could be statutorily provided or not, or a government regulatory approach. Often, government regulation is avoided to prevent government interference in media activities.<sup>258</sup>

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<sup>252</sup> *CCK & 5 Others v RMS & 5 Others* (n 27) para 151 & 152.

<sup>253</sup> *CCK & 5 Others v RMS & 5 Others* (n 27) para 152.

<sup>254</sup> *CCK & 5 Others v RMS & 5 Others* (n 27) para 155.

<sup>255</sup> As above.

<sup>256</sup> *RMS & 2 Others v AG and 8 Others* (n 27) Justice Musinga paras 147 & 148.

<sup>257</sup> *CCK & 5 Others v RMS & 5 Others* (n 27) para 170 & 180.

<sup>258</sup> *CCK & 5 Others v RMS & 5 Others* (n 27) para 174.

In clarifying the functions of the CCK vis a vis the Media Council, the Court referred to the designation of the CCK as a licensing and regulatory body, not a standard-setting one.<sup>259</sup> It affirmed that the Media Council and not the CCK was the body contemplated by article 34(5) of the Constitution. More so, it is expressly stated in the title of the Act that the Media Council Act is enacted for the purposes of giving effect to article 34(5) of the Constitution.<sup>260</sup>

However, on the constitutionality of the CCK, as it was then, the Supreme Court differed from the Court of Appeal. It determined that promulgating the 2010 Constitution did not render the CCK unconstitutional.<sup>261</sup> Its establishing legislation, the KICA, should be interpreted considering the requirement to align it with the Constitution as per the transitional provisions.<sup>262</sup> However, the Supreme Court's determination can be faulted for giving short shrift to the independence conundrum brought by the composition of the CA, which is still made up of persons under the control of the government. This is in direct conflict with the requirement in article 34(3) that licensing procedures for electronic media should be free from control by government, political, and commercial interests.

The Supreme Court seemed to tacitly acknowledge the independence conundrum by referencing previous case law on the same that found the need to realign section 5A of the KICA on the composition of the Board with the Constitution.<sup>263</sup> One can reasonably infer that, as it stands, the section conflicts with the Constitution's provisions on the regulatory body's independence. However, the Supreme Court seemed to restrain itself from making an unequivocal order to parliament to facilitate this through an amendment of the KICA 2013. Unsurprisingly, the provision remains in the statute books, and the Board is still composed of government appointees.<sup>264</sup> This leaves the issue of independence largely resting on the belief of integrity of the board members to comply with the Constitution and the law without the added reinforcing factors mitigating government control. Given the history of government efforts to interfere in media regulation, this is a shaky ground to stand on.

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<sup>259</sup> *CCK & 5 Others v RMS & 5 Others* (n 27) para 177.

<sup>260</sup> Also see *CCK & 5 Others v RMS & 5 Others* (n 27) para 175.

<sup>261</sup> *CCK & 5 Others v RMS & 5 Others* (n 27) para 198.

<sup>262</sup> *CCK & 5 Others v RMS & 5 Others* (n 27) paras 206 & 209.

<sup>263</sup> *NMG & 6 Others v Attorney General & 9 Others* (n 47) & *CCK & 5 Others v RMS & 5 Others* (n 27) para 204.

<sup>264</sup> CA 'Board of Directors' <https://ca.go.ke/board-directors> (accessed 8 November 2023).

As was the case in the *CCK 2014* case, the petitioners in *NMG 2016* queried the independence of the regulatory bodies.<sup>265</sup> They argued that the mode of appointment of members of the Communications Authority jeopardised their independence. The petitioners also challenged the role of the Cabinet Secretary in issuing policy guidelines and regulations that would affect the operations of the MCK and the CA, albeit, in the case of the Council, this would be with their approval. The petitioners also questioned the autonomy and independence of the complaint's mechanism of the Media Council. They also contended that the laws 'established concurrent and conflicting mechanisms for media regulation'.<sup>266</sup>

The Court determined that powers granted to the CS of ICT for matters affecting their docket were constitutional. Additionally, the requirement for consultation under the Council mitigated the abuse of this power.<sup>267</sup> This is further enhanced by the Statutory Instrument Act provisions that require stakeholder consultation and public participation.<sup>268</sup> The Court differed with the petitioners on the challenge of the independence of the appointment process of board members for the CA under sec 6B of the KICA. While the President and the CS made the final appointments, this would follow recommendations by a diverse selection panel with membership from various sectors of the society, with the government only represented once. The process is also guided by constitutional principles.<sup>269</sup> The Court, however, underscored section 6B (10), which dictated that the President and CS would select, shortlist and appoint the chairperson and members of the Board. This was contrary to their actual role, which was to appoint the members from recommendations by the selection panel.<sup>270</sup> That aside, the government's involvement in appointing the board of the media regulatory body is one modelled from practices from other established democracies, and the appointment process under section 6B of the KICA was in alignment with article 34(5) of the Constitution.<sup>271</sup>

However, section 6B, which anchored the Court's support of the independence of the Board of the Authority, was deleted by Act No 18 of 2018 and, in doing so, weakened the

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<sup>265</sup> *NMG & 6 Others v Attorney General & 9 Others* (n 47).

<sup>266</sup> *NMG & 6 Others v Attorney General & 9 Others* (n 47) paras 151, 166-168, 182-190.

<sup>267</sup> *NMG & 6 Others v Attorney General & 9 Others* (n 47) para 169.

<sup>268</sup> Act No 23 of 2013 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2023%20of%202013> (accessed 8 November 2023) & *NMG & 6 Others v Attorney General & 9 Others* (n 47) para 171.

<sup>269</sup> *NMG & 6 Others v Attorney General & 9 Others* (n 47) para 203.

<sup>270</sup> *NMG & 6 Others v Attorney General & 9 Others* (n 47) para 204.

<sup>271</sup> *NMG & 6 Others v Attorney General & 9 Others* (n 47) paras 205-207

protections against government control of the Authority through the appointment process of the Board. Parliament needs to amend this law to include a competitive meritorious process for the Board that enhances the independence of the Authority, particularly from government, political or commercial interference.

Another challenge that arose in the *NMG 2016* case was the duplication of duties between the Communications and Multimedia Appeals Tribunal under section 102A of the KICA and the Complaints Commission under section 34 of the MCA.<sup>272</sup> The petitioners further challenged the impact of the jurisdiction of the state-controlled Communications and Multimedia Appeals Tribunal to hear appeals from the Complaints Commission of the Council. In their opinion, this unfairly subjected journalists and media bodies to two disciplinary processes. Further, situating the state-controlled Communications and Multimedia Appeals Tribunal as an appeal body elevated its stature above the Complaint Commission and compromised the independence of the latter body.<sup>273</sup>

In examining sections 102A of the KICA, the Court concluded that the Communications and Multimedia Appeals Tribunal was given broad powers on the decisions of the MCK, the CA and licensees.<sup>274</sup> They also agreed that there was a duplication of duties between the two complaint mechanisms that may engender confusion.<sup>275</sup> However, this did not violate the rights of fair trial under article 50(2)(o) of the Constitution.<sup>276</sup> While the Court called for clarity on the duties of the two bodies, it did not conclude the setting up of the two bodies amounted to an infringement of article 34(5).<sup>277</sup>

The petitioners also raised contention with sections 38(1)(f) and (h) of the MCA and sections 102E(1)(f) and (h) of the KICA since they violated the freedom of the media.<sup>278</sup> The sections provided for penalties for media malpractices after a hearing. The Court determined that the prescription of sanctions for media malpractices did not violate the Constitution.<sup>279</sup> However, in reality, fines of up to KES 500 000 for journalists and KES 20 000 000 for media enterprises;

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<sup>272</sup> *NMG & 6 Others v Attorney General & 9 Others* (n 47) para 208.

<sup>273</sup> *NMG & 6 Others v Attorney General & 9 Others* (n 47) paras 184 & 185, 209.

<sup>274</sup> *NMG & 6 Others v Attorney General & 9 Others* (n 47) para 214.

<sup>275</sup> *NMG & 6 Others v Attorney General & 9 Others* (n 47) para 216.

<sup>276</sup> *NMG & 6 Others v Attorney General & 9 Others* (n 47) para 218.

<sup>277</sup> *NMG & 6 Others v Attorney General & 9 Others* (n 47) para 219.

<sup>278</sup> *NMG & 6 Others v Attorney General & 9 Others* (n 47) para 228.

<sup>279</sup> *NMG & 6 Others v Attorney General & 9 Others* (n 47) para 233-235.

while on one hand, may encourage professional journalism, they can also stifle expression and engender self-censorship as persons would be fearful of exorbitant penalties in the event of politically motivated cases. When media freedom and public interest conflict, enforcement authorities should carefully balance the application in a rights-based manner.

#### 4.2.2 Regulation of the state broadcaster

The Constitution requires that the state-owned media has editorial independence, is impartial, and presents divergent views.<sup>280</sup> The Kenya Broadcasting Corporation (KBC) Act is the legislation that should actualise these requirements.<sup>281</sup> First enacted in 1989, the legislation has undergone several amendments, with the most recent in 2009. Interestingly, the 2020 ICT policy envisions the restructuring of the KBC as a public broadcaster, but it is yet to be seen whether the corporation has shed the yoke of state interference.<sup>282</sup> The legislative environment does not inspire much confidence in this.

The functions of the state broadcaster reflect its constitutional mandate, including the provision of ‘independent and impartial broadcasting services’ in English, Kiswahili, and other selected languages and showcasing diverse viewpoints.<sup>283</sup> Relevant to political expression, the state broadcaster shall provide a fair opportunity to represent different political perspectives.<sup>284</sup> Further, it shall work with the Election Management Body (EMB) to allocate free airtime to participating political parties.

While section 8(1)(a) provides for the independence and impartiality of the public broadcaster, it is questionable whether the legislation effectively enables this independence in compliance with the Constitution. For instance, the Corporation is managed by a Board of Directors that sets the standards for its programs.<sup>285</sup> The Board is largely made up of persons appointed by the President and the CS of ICT.<sup>286</sup> The CS appoints the Managing Director of the

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<sup>280</sup> Art 34(4) of the Constitution of Kenya.

<sup>281</sup> KBC Act Cap 221 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20221> (accessed 8 November 2023).

<sup>282</sup> 6.2.3.10 2020 ICT Policy Guidelines.

<sup>283</sup> Sec 8(1) KBC Act.

<sup>284</sup> Sec 8(1)(j) KBC Act.

<sup>285</sup> Sec 10 KBC Act.

<sup>286</sup> Sec 4 KBC Act. They include: a chairman of the Board appointed by the President; the managing director of the Corporation; the Permanent Secretary of ICT; the Permanent Secretary in the Office of the President; the Permanent

Board after consulting the Board, and the CS dictates their terms of service.<sup>287</sup> The legislation fails to provide a meritorious and competitive process for appointing the Board and its Managing Director. Even with the token consultative process, no provision binds the CS to the recommendations made by the Board. Among the responsibilities of the Managing Director, with the guidance of the Board, is to plan, regulate and control the content and balance of all broadcasts by the Corporation.<sup>288</sup> The Act is silent on removing and replacing a Board member, but it can be reasonably inferred that these duties fall under the purview of the President and the CS. Section 14(1) of the Act also obligates the Corporation to ‘broadcast announcements or programmes of national importance’ upon the written request of the CS or other authorised person. Section 14(3) allows the government ‘to submit to the Corporation items of general interest or utility’ for broadcasting at the discretion of the Corporation. With such provisions, the state broadcaster runs the risk, as has been the case historically, of being perceived as partial to the government’s interests and propaganda.<sup>289</sup> Audience statistics reveal that the state broadcaster in Kenya attracts lower viewership than private media.<sup>290</sup> This is a testament to the level of public trust accorded to the state broadcaster, which is influenced by perceptions of government control.

On the Corporation's financial independence, its main funding source is the government.<sup>291</sup> It can subsidise this allocation with other fees, loans applied with the approval of the Minister of Finance, and investment returns by the Corporation.<sup>292</sup> Waihenya writes that funding remains an Achilles heel of the public broadcaster, and its heavy reliance on a

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Secretary of Finance; not more than seven members appointed by the Minister, not being employees of the Corporation, of whom not more than three shall be public officers and of whom—

- (i) at least one shall have specialization or experience in matters connected with radio communication and radio communication apparatus;
- (ii) at least one shall have specialization or experience in radio or television programme production;
- (iii) at least one shall have specialization or experience in the print media;
- (iv) at least one shall have specialization or experience in financial management and administration.

<sup>287</sup> Sec 5 KBC Act.

<sup>288</sup> Sec 11 KBC Act.

<sup>289</sup> MCK (n 152) 35.

<sup>290</sup> CA ‘Audience measurement and industry trends report Q2 2019-2020’ (2020) 10 [https://ca.go.ke/wp-content/uploads/2020/03/Audience-Measurement-and-Broadcasting-Industry-Trends-Report-Q2-2019-2020\\_compressed-min.pdf](https://ca.go.ke/wp-content/uploads/2020/03/Audience-Measurement-and-Broadcasting-Industry-Trends-Report-Q2-2019-2020_compressed-min.pdf) (accessed 8 November 2023).

<sup>291</sup> Sec 37 KBC Act.

<sup>292</sup> Sec 8 & 39 KBC Act.

government that does not pay it much heed means that the ideal of attaining financial and editorial independence from the government remains elusive.<sup>293</sup>

The assessment above is a poor indictment of the independence of the state broadcaster, given its vulnerability to government, political and economic interference. This greatly compromises its freedom and perceptions of reliability as an independent media source. This is unfortunate given its potential as a public educator and information source in rural and marginalised areas that may be secluded from conventional sources of information and vulnerable to the rural-urban digital divide. More so during electoral periods, the provision of free coverage provides critical publicity for the less-moneyed political parties and candidates. Its collaboration with the EMB further impacts the dissemination of public education. All these measures are weakened given the state broadcaster's poor level of independence and administration. Legislation that conforms with the Constitution and international law is crucial to transforming state-controlled broadcasters into accountable public service broadcasters.<sup>294</sup>

### 4.2.3 Regulations of films, stage plays and posters

The Films and Stage Plays Act regulates the production and exhibition of films and licensing of stage plays, cinemas, and theatres. Relevant to the regulatory discussion, it establishes a third media regulatory body in the Kenya Film Classification Board.<sup>295</sup> A 2016 attempt to amend the Bill by the KFCB to extend its powers was unsuccessful. The moral conservative stance of the Bill and criticism of censorship plagued it and drew widespread condemnation as it was removed from the globalised modern era.<sup>296</sup> Ndanyi likened the Bill to the colonial Stage Plays and Cinematography Exhibitions Ordinance of 1912, which sought to control the behaviours of the native population by regulating access to 'undesirable content'.<sup>297</sup> For example, the Bill required an officer present during the filming of certain productions and empowered them to intervene to obstruct filming if they felt it violated the Act.<sup>298</sup> The thirst to rein in and control online media

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<sup>293</sup> W Waihenya *Sisyphus task: The battle for the soul of Kenya Broadcasting Corporation* (2020) 1-7.

<sup>294</sup> Principle 11(2) 2019 Declaration.

<sup>295</sup> Sec 11 FSPA.

<sup>296</sup> Otieno (n 201) 562.

<sup>297</sup> SK Ndanyi 'Film censorship and identity in Kenya' (2021) 42(2) *Ufahamu: A Journal of African Studies* 26-27.

<sup>298</sup> Sec 26 Films, Stage Plays and Publications Bill 2016 <https://www.asclibrary.nl/docs/407814213.pdf> (accessed 8 November 2023).

freedom was also seen in provisions requiring user registration by Internet Service Providers (ISPs), onerous obligation on ISPs to monitor content on their platforms, and content limitations outside internationally recognised harmful and illegal content.<sup>299</sup>

## 5 Media regulation in other laws

### 5.1 Access to information laws

The right of access to information forms the third leg of the rights subsumed under the wider umbrella of freedom of expression and inextricably linked to each other.<sup>300</sup> The work of the media, especially during the electoral cycle, would be crippled without access to information. This right is guaranteed to every citizen under article 35 of the Constitution. It pertains to information held by the State; or information held by another person and required to exercise or protect any right or fundamental freedom. The State is further obligated to publish information of public interest.<sup>301</sup> The term ‘state’ is defined as ‘the collectivity of offices, organs and other entities, comprising the government of the Republic of Kenya’.<sup>302</sup> Before the Access to Information (ATI) Act was enacted,<sup>303</sup> implementing actors interpreted the term citizen to exclude juridical persons.<sup>304</sup> However, section 2 of the ATI Act now defines a citizen as ‘any individual who has Kenyan citizenship, and any private entity that is controlled by one or more Kenyan citizens’. Arguably, restricting the right to only citizens is too limiting in its application.

The ATI Act was enacted to give effect to the right of access to information and provide a framework for proactive disclosure of information by public and private bodies, among other things.<sup>305</sup> Proactive disclosure of information is a key principle under the Guidelines on Access to Information and Elections in Africa, which strongly links it to meaningful participation in

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<sup>299</sup> Sec 39 Films, Stage Plays and Publications Bill 2016.

<sup>300</sup> *Brummer v Minister for Social Development* 2009 (II) BCLR 1075 (CC) & General Comment 34 para 18.

<sup>301</sup> Art 35(3) of the Constitution of Kenya.

<sup>302</sup> Art 260 of the Constitution of Kenya.

<sup>303</sup> Access to Information Act No 31 of 2016 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2031%20of%202016> (accessed 8 November 2023).

<sup>304</sup> *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others* [2013] eKLR Petition No. 278 of 2011 para 61 & 81 <http://kenyalaw.org/caselaw/cases/view/88569/> (accessed 8 November 2023). This aligns with a previous judgement by Justice Majanja in *Famy Care Limited v Public Procurement Administrative Review Board & Another* High Court Petition No 43 of 2012.

<sup>305</sup> Sec 3 ATI Act.



democratic processes such as elections.<sup>306</sup> The media and media regulatory bodies are identified as electoral stakeholders who should facilitate proactive disclosure of information throughout the electoral cycle. While the Act does not define the concept of proactive disclosure, the proposed ATI (General) Regulations 2021 describe it as ‘routine and systematic dissemination of information, in the absence of a request for it.’<sup>307</sup> Every citizen has a right to access public interest information regardless of the reason, which information should be availed expeditiously and at a reasonable cost.<sup>308</sup> Section 5 of the ATI Act provides a non-exhaustive list of the information that public entities should proactively disclose.

The right of access to information is also subject to limitations, including national security; due legal process; the safety, health or life of another; right to privacy; commercial interests such as intellectual property rights; public management of the economy; the pending decision-making of a public or private body; and professional confidentiality.<sup>309</sup> Notwithstanding the limitations, the legislation emphasises disclosure when the public interest ‘outweighs the harm to protected interests’.<sup>310</sup> In assessing what falls under the purview of public interest, courts shall be guided by constitutional principles that promote public sector accountability, oversight of public spending, informed debate on public interest matters, public education issues of public and environmental health or safety, and oversight over the effective discharge of duties by statutory bodies.<sup>311</sup> Through a court process, these provisions can remedy the wide net cast by the limitations to the right that may be in conflict with the very article 24 of the Constitution that it claims to have been its basis.

It is encouraging to see the developing case law enforcing access to information, particularly during elections. In the case of *Katiba Institute v Presidents Delivery Unit &*

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<sup>306</sup>

2017

Guidelines

[https://www.africanplatform.org/fileadmin/user\\_upload/Guidelines on Access to Information and Elections in Africa.pdf](https://www.africanplatform.org/fileadmin/user_upload/Guidelines_on_Access_to_Information_and_Elections_in_Africa.pdf) (accessed 8 November 2023).

<sup>307</sup> Sec 7(1) ATI (General) Regulations 2021 [https://www.ombudsman.go.ke/sites/default/files/2023-09/ATI%20%20REGULATIONS%202021%20-FOR%20PUBLIC%20PARTICIPATION%2025-05-2021\\_0.pdf](https://www.ombudsman.go.ke/sites/default/files/2023-09/ATI%20%20REGULATIONS%202021%20-FOR%20PUBLIC%20PARTICIPATION%2025-05-2021_0.pdf) (accessed 8 November 2023). The Regulations were to take effect on 17 August 2023 but Parliament postponed the date.

<sup>308</sup> Sec 4(2) & (3) ATI Act.

<sup>309</sup> Sec 6(1) ATI Act.

<sup>310</sup> Article 6(4) ATI Act.

<sup>311</sup> Sec 6(6) ATI Act.

*Others*,<sup>312</sup> the petitioner instituted the case after the respondents, including the Presidential Delivery Unit, ignored a request for information on the modalities of advertisements undertaken by the government during the 2017 election period.<sup>313</sup> The petitioners asserted that the failure or refusal of the respondents to avail of this information violated their right of access to information. It was also an election offence, given that the government was prohibited from advertising their achievements during the election period.<sup>314</sup>

In its determination, the High Court made reference to the South African case *President of Republic of South Africa and Others v M & G Media*,<sup>315</sup> where the Court discussed the importance of the right of access information to the right to vote and meaningful public participation. It stated:

The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.

Therefore, the ATI Act has provided a framework that seeks to promote transparency and accountability and abandon the culture of secrecy that cloaked public operations. Its extension to private bodies appreciates that certain private bodies, including media, may also hold information that is relevant to public interest and necessary for the exercise or protection of a right or fundamental freedom. For example, in the context of elections, private bodies such as procurement suppliers of election technology and materials or even social media owners may possess public interest information. This law provides a crucial legislative foundation to promote the development of an informed electorate and the general public.

However, despite the legislative advancement on access to information, other laws in the statute books, such as the Official Secrets Act and the Public Archives and Documentation

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<sup>312</sup> *Katiba Institute v Presidents Delivery Unit & 3 others* [2017] eKLR Constitutional Petition No 468 of 2017 <http://kenyalaw.org/caselaw/cases/view/144012/> (accessed 8 November 2023).

<sup>313</sup> *Katiba Institute v Presidents Delivery Unit & 3 others* (n 312) paras 4-7.

<sup>314</sup> *Katiba Institute v Presidents Delivery Unit & 3 others* (n 312) para 8 & sec 14(2) of the Elections Offences Act No 37 of 2016 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2037%20of%202016> (accessed 8 November 2023).

<sup>315</sup> *President of Republic of South Africa and Others v M & G Media* (CCT 03/11) [2011] ZACC 32; 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC) (29 November 2011) & *Katiba Institute v Presidents Delivery Unit & 3 others* (n 312) para 37.

Service, have implications for access to information. It is crucial that in their implementation, they do not curtail access to public interest information. Notably, both statutes were amended by the ATI Act, which requires, for example, that the Official Secrets Act conforms with article 35 of the Constitution and the ATI Act.<sup>316</sup>

The Books and Newspapers Act<sup>317</sup> is another contentious statute rooted in colonial times, first enacted in 1960 for the registration, deposit and printing of books and newspapers. Some of its provisions largely lean towards the restrictive paternalistic colonial mentality and are incongruous with the spirit of the Constitution and international law about media rights. The statute's definition of books and newspapers largely points to a traditional understanding. A newspaper, for example, is defined as any printed matter containing, among other things, news. Print is described as producing or reproducing words or pictures in visible form in any mode. The definition may extend the Act's applicability to online newspapers. Last amended in 2002, the legislation fails to reflect the digital literary landscape with books and newspapers published online. Many provisions of the Act are not enforced, which questions its continued existence.<sup>318</sup>

The Act imposes a duty on newspaper publishers to execute a bond with the Registrar to the amount of KES 1 000 000, with one or more sureties, as a condition to their operation. The bond acts as security for prospective legal penalties.<sup>319</sup> A first-time offender under the section attracts a penalty of a fine of not more than one million shillings, imprisonment of not more than three years, or both. A repeat offender can be jailed for up to five years in addition to a prohibition order against printing or publishing any newspaper in Kenya. The requirement of executing such bonds may limit the ability of small media houses to operate.<sup>320</sup> The imprisonment sanctions are also unreasonable and disproportionate in a just and democratic society.

Section 19 of the Books and Newspapers Act also empowers police officers to seize publications that they reasonably believe have been published in contravention of the Act. A police officer can obtain a search warrant for premises that they reasonably believe stores

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<sup>316</sup> See schedule constitutional amendments sec 4 ATI Act.

<sup>317</sup> Books and Newspapers Act Cap 111 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20111> (accessed 8 November 2023).

<sup>318</sup> MCK (n 152) 30-31.

<sup>319</sup> Sec 11 Books and Newspapers Act.

<sup>320</sup> MCK (n 152) 31.

publications that contravene this Act or where an offence is being or may be committed in contravention of the Act and seize evidence in this regard. Such evidence should be promptly presented before a magistrate who may order its forfeiture or destruction. These powers may be subject to abuse and create an uncondusive operating environment for publishers. Case in point, although no charges were brought, in 2005, the then First Lady, Lucy Kibaki, demanded the arrest of a Nation Media journalist for an unfavourable newspaper story.<sup>321</sup> In 2006, Standard Media Group and Kenya Television Network (KTN) offices were raided after they published a news piece critical of the government.<sup>322</sup>

## 5.2 Data protection

Given the increasing reliance on the internet for communication and a platform for public debate, data protection has emerged as another concern to ensure that the use of these platforms does not lead to the infringement of privacy that may also jeopardise free expression. Big Data, defined as ‘sets of information that are too large or too complex to handle, analyse or use with standard methods’,<sup>323</sup> has been greatly enabled by digital technologies, catapulting data as the most valuable resource globally.<sup>324</sup> Planning and decision-making in the digital age are increasingly premised on data, whose influence has also seeped into the political arena.<sup>325</sup> Increasingly, political campaigns and advertising are designed based on Big Data.<sup>326</sup> The weaponization of information through targeted political ads and disinformation and propaganda campaigns, particularly online, are also facilitated by Big Data, eliciting discourse around the manipulation of voters during elections and the impact on meaningful political participation.<sup>327</sup> This

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<sup>321</sup> M Gaitho ‘The day I came face to face with Mama Lucy fury’ *Daily Nation* 27 April 2016 <https://nation.africa/kenya/news/the-day-i-came-face-to-face-with-mama-lucy-fury-1193534> (accessed 8 November 2023).

<sup>322</sup> B Rambaud ‘Caught between information and condemnation: The Kenyan media in the electoral campaigns of December 2007’ (2008) 38 *The East African Review* 58.

<sup>323</sup> Oxford English dictionary definition <https://www.oxfordlearnersdictionaries.com/definition/english/big-data> (accessed 8 November 2023).

<sup>324</sup> The Economist ‘The world’s most valuable resource is no longer oil, but data’ (2017) <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data> (accessed 8 November 2023).

<sup>325</sup> As above.

<sup>326</sup> IOA ‘‘Big Data’ and Africa’s political campaigns: The growth (pains) of Africa’s technological democracy’ <https://www.inonafrica.com/2020/09/16/big-data-and-africas-political-campaigns-the-growth-pains-of-africas-technological-democracy/> (accessed 8 November 2023).

<sup>327</sup> YN Harari *21 Lessons of the 21<sup>st</sup> Century* (2019) 56-88.

discussion was canvassed during Kenya's 2017 general election in the context of the Cambridge Analytica data mining scandal.<sup>328</sup> This thesis looked at this more comprehensively in chapter two of the discussion.<sup>329</sup>

The gravitas of the discussion on data protection in this context emanates from the risk posed by the misuse of personal data to engineer manipulated public discourse, consent and action online during elections, particularly and generally in a democracy. Fears of misuse of data, manipulation or unchecked and illegal online surveillance may cause some people to avoid engaging in online public discourse on issues of public importance. Measures to ensure safe access and use of online platforms without compromising personal data are necessary to protect online media rights.

Kenya enacted the Data Protection Act in 2019<sup>330</sup> to, among other things, 'regulate the processing of personal data' and protect the right to personal privacy.<sup>331</sup> The guiding principles for the collection and processing of data include the right to privacy of the data subject; the lawful, fair and transparent processing of data; and the adequacy, relevancy, accuracy and security of the data.<sup>332</sup> However, these principles do not apply in cases where the data is processed for publication of literary or artistic material, in the public interest, and when compliance is incompatible with the special purposes.<sup>333</sup> This data should be processed according to the industry's code of ethics and prescribed guidelines issued by the Data Commissioner.<sup>334</sup>

The Office of the Data Protection Commissioner, established in 2021, is tasked with enforcing the Act.<sup>335</sup> It was called to take action after Kenyans discovered that they had been registered as members of political parties without their consent before the 2022 elections.<sup>336</sup> Such

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<sup>328</sup> IOA (n 326).

<sup>329</sup> See sec 3.4.3 of chapter two.

<sup>330</sup> Data Protection Act, Act 24 of 2019  
[http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2024%20of%202019#part\\_IV](http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2024%20of%202019#part_IV) (accessed 8 November 2023).

<sup>331</sup> Sec 3 DPA.

<sup>332</sup> Sec 25 DPA.

<sup>333</sup> Sec 52 DPA.

<sup>334</sup> Sec 52 (2) DPA.

<sup>335</sup> Secs 5-8 DPA. Also see ODPC 'Home' <https://www.odpc.go.ke/> (accessed 8 November 2023).

<sup>336</sup> J Otieno 'Kenyans protest registration as party members without consent' 19 July 2021 *The Star* <https://www.the-star.co.ke/news/2021-06-19-kenyans-protest-registration-as-party-members-without-consent/> (accessed 8 November 2023).

incidents and the Cambridge Analytica scandal show that misuse of personal information for political purposes threatens Kenyans and needs to be redressed lest it affects online media freedom, meaningful political participation, and free and fair elections.

## **6 Constitutional and legislative framework on political participation and attendant media freedom guarantees**

Article 38 of the Constitution guarantees political rights to every Kenyan citizen. The political choices of citizens include the right to form, participate in or campaign for a political party.<sup>337</sup> Every citizen also has a ‘right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors...’.<sup>338</sup> The article further guarantees the right to register as a voter, vote by secret ballot in elections and referendums, and run for public office or political party elections.<sup>339</sup> These political rights also extend to Kenyans in the diaspora and with dual citizenship. The Diaspora policy recognises the need to enhance the participation of Kenyans in the diaspora, particularly by broadening voter registration avenues.<sup>340</sup> In 2022, the IEBC facilitated voting for Kenyans residing in only 12 foreign countries, meaning that for most Kenyans in the diaspora, public debate on issues of public interest is an invaluable form of public and political participation primarily facilitated by digital media.<sup>341</sup> Therefore, the freedom of offline and online media has implications for the participation of citizens in and out of Kenya. Beyond public debate in the public sphere, political participation in Kenya is increasingly mediated by technology with voter registration, voter identification and results transmission dependent on election technology.<sup>342</sup> Curtailment of online media freedom through measures such as internet shutdowns and other forms of network disruptions would grind election processes to a standstill in Kenya.

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<sup>337</sup> Article 38 (1) Constitution of Kenya.

<sup>338</sup> Article 38 (2) Constitution of Kenya.

<sup>339</sup> Article 38 (3) Constitution of Kenya.

<sup>340</sup> GOK ‘Kenya Diaspora Policy’ (2014) <https://repository.kippira.or.ke/handle/123456789/600> (accessed 8 November 2023).

<sup>341</sup> These were Tanzania, Uganda, Burundi, Rwanda, South Africa, South Sudan, United Arab Emirates, Qatar, Canada, Germany, United Kingdom, and United States of America. IEBC ‘Statistics of voter 2022’ [https://www.iebc.or.ke/registration/?Statistics\\_of\\_Voter\\_2022](https://www.iebc.or.ke/registration/?Statistics_of_Voter_2022) (accessed 8 November 2023).

<sup>342</sup> Sec 44 Elections Act.

Article 38 reiterates political rights as part of the principles of the electoral system.<sup>343</sup> These principles include protection for disadvantaged groups, including women and Persons with Disabilities (PWDs) and that not more than two-thirds of the members of elective public bodies shall be of the same gender.<sup>344</sup> The elections should also respect the principles of universal and equal suffrage.<sup>345</sup> The standard for free and fair elections under the article requires that they are: ‘by secret ballot; free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner’.<sup>346</sup> The media plays a key watchdog function in assessing and promoting the achievement of this standard.

The electoral rules and regulations also protect the right to political participation. The importance of the media as a platform for public education, debate, as well as public watchdog emerges from provisions of the Elections Act.<sup>347</sup> The 2009 Media Policy Guidelines also recognise the importance of free and independent media in democratic development and good governance.<sup>348</sup> However, the 2009 Media Policy is outdated, with a large focus on traditional media. Little reference is made to online media, but there is a laudable clause prohibiting special restrictions on internet media.<sup>349</sup>

The IEBC is mandated to publish and may publicise notices of impending presidential, parliamentary, county governor and county assembly elections and referendum in the Gazette as well as electronic and print media with nationwide circulation. Notably, the definition of electronic media includes broadcast, print, and internet media.<sup>350</sup> However, the term ‘with nationwide circulation’ elicits a reasonable conclusion that it refers to media stations and newsprints with nationwide circulation. Regulations published by the IEBC recognise the use of

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<sup>343</sup> Art 81 (a) Constitution of Kenya.

<sup>344</sup> Art 81 (b) & (c) Constitution of Kenya.

<sup>345</sup> Art 81 (d) Constitution of Kenya.

<sup>346</sup> Art 81 (e) Constitution of Kenya.

<sup>347</sup> Elections Act.

<sup>348</sup> Sec 1 The Kenya Media Policy Guidelines, 2009 Gazette Notice 12071 <https://mediacouncil.or.ke/sites/default/files/downloads/MEDIA%20POLICY%20GUIDELINES%20-%20KENYAN%20GAZZETTE%20NOTICE%20OF%2011%20NOVEMBER.pdf> (accessed 8 November 2023).

<sup>349</sup> Sec 2.4.10 2009 Media Policy Guidelines.

<sup>350</sup> Secs 15, 16, 17, 19, 20, 49 & 50 Election Act & Reg 12(1) Elections (General) Regulations, 2012 [http://kenyalaw.org:8181/exist/kenyalex/sublegview.xql?subleg=No.%2024%20of%202011#KE/LEG/EN/AR/E/N.O.24%20OF%202011/SUBLEG/HC\\_LN1262012](http://kenyalaw.org:8181/exist/kenyalex/sublegview.xql?subleg=No.%2024%20of%202011#KE/LEG/EN/AR/E/N.O.24%20OF%202011/SUBLEG/HC_LN1262012) (accessed 8 November 2023).

other appropriate forums to publicise information, including its own website.<sup>351</sup> Consequently, the IEBC regularly publishes gazette notices and other developments around electoral and organisational activities on its social media pages and website.<sup>352</sup> In 2017 and 2022, the IEBC had an online presidential election results portal, which performed better in 2022. Election observers praised the use of the technology, including the results portal, as a good step towards improving transparency and facilitating access to information during elections.<sup>353</sup> Through this portal, media, organisations and ordinary Kenyans tabulated the presidential race results ahead of the official announcement by the IEBC in 2022.

Equitable access to media is essential for political campaign purposes. A participating political party can access state-owned media during the campaign period. Principles of impartiality and non-discrimination guide the state broadcaster in publishing electoral information.<sup>354</sup> All other broadcasting media should accord reasonable airtime to participating political parties and candidates.<sup>355</sup> The IEBC monitors equitable airtime allocation in state-owned media during the election campaign period with input from relevant political parties, independent candidates and media.<sup>356</sup> All media houses and persons reporting on elections are guided by the Code of Conduct in the MCA, failure of which may result in the IEBC prohibiting them from transmitting election-related news.<sup>357</sup>

The IEBC has further powers to issue written directives on access to and obligations of the media during elections.<sup>358</sup> However, the Elections Act does not indicate what recourse media and journalists have in the event they are aggrieved with the decisions of the IEBC. Given the concomitant functions of the Complaints Commission under the MCA and the Communications

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<sup>351</sup> Reg 5, 12(2), & 21(2) The Elections (Voter Education) Regulations, 2017; Reg 9(2), & 26(5) the Elections (Technology) Regulations, 2017; Regs 7(1)(g), & 33, Elections (Registration of Voters) Regulations, 2012 & Reg 7, 9(1) & 10(1), 56, 60 Elections (General) Regulations, 2012.

<sup>352</sup> IEBC ‘Gazette notices’ [https://www.iebc.or.ke/electionlaws/?Gazette\\_Notices](https://www.iebc.or.ke/electionlaws/?Gazette_Notices) (accessed 8 November 2023). Also see their verified accounts on Facebook, Twitter and Instagram under the handle IEBCKenya.

<sup>353</sup> The results were previously available at IEBC ‘Forms’ <https://forms.iebc.or.ke/> (accessed 19 June 2023) but the link was down as of July 2023. Also see EU EOM ‘Kenya 2022 final report’ (2022) [https://www.eeas.europa.eu/sites/default/files/documents/EU\\_EOM\\_Kenya\\_2022\\_EN.pdf](https://www.eeas.europa.eu/sites/default/files/documents/EU_EOM_Kenya_2022_EN.pdf) (accessed 8 November 2023) & Carter Centre ‘Preliminary report. The Carter Center election expert mission’ (2022) [https://www.cartercenter.org/resources/pdfs/news/peace\\_publications/election\\_reports/kenya/2022/kenya-preliminary-report-2022.pdf](https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya/2022/kenya-preliminary-report-2022.pdf) (accessed 8 November 2023).

<sup>354</sup> Sec 41 (2) & 41(3) Elections Act.

<sup>355</sup> Sec 108 Elections Act.

<sup>356</sup> Sec 41 (2) Elections Act.

<sup>357</sup> Sec 41 (6) Elections Act.

<sup>358</sup> Sec 41 (5) Elections Act.



and Multimedia Appeals Tribunal under the KICA in settling media-related disputes, aggrieved persons may have their choice of forum for such complaints. While IEBC can prohibit media houses from transmitting election-related news because of violating the Media Code of Conduct, exercising these powers becomes difficult in the digital age with the proliferation of information from mixed and variegated sources, including professional and non-professional journalists and ordinary citizens. However, as mentioned above, there is a Code of Conduct for digital practitioners, but its enforcement and compliance are uncertain. If the goal is to ensure that IEBC interventions enhance the quality and accuracy of election-related information necessary for meaningful political participation, the EMB should remain active and vigilant in proactively updating the public on election-related information to ensure access to information and counter misinformation, disinformation and propaganda. Encouragingly, the IEBC regularly holds media briefings in the lead-up to and during elections and updates its website and social media pages.

The IEBC is also empowered to accredit media representatives who shall be bound by guidelines issued by the EMB for fair elections; these guidelines should conform with international standards.<sup>359</sup> The regulatory powers of the IEBC additionally extend to the conduct of media when conducting civic and voter education.<sup>360</sup> Collaboration between the media and IEBC is crucial to nurture a public sphere where an informed electorate actively and meaningfully participates in elections throughout its cycle. An in-depth analysis by the IEBC of the electoral information ecosystem and the threats posed by electoral information disorder and ignorance in the pre-election phase will allow it to counter these challenges effectively. IEBC should integrate media and information literacy in voter and civic education curriculums. This strategy should be done in liaison with media and national and local CSOs to ensure national coverage and impact.

The Electoral Code of Conduct under the Elections Act aims to promote an environment conducive to the conduct of free and fair elections.<sup>361</sup> All registered political parties and other persons bound by this Electoral Code shall endeavour to promote the objectives of the Electoral Code to enable free political campaigning and open public debate in all parts of Kenya during an

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<sup>359</sup> Sec 42 Elections Act & Reg 95 Elections (General) Regulations.

<sup>360</sup> Sec 109 Elections Act.

<sup>361</sup> Sec 3 Electoral Code of Conduct.

election period.<sup>362</sup> Political parties, candidates and referendum committees that subscribe to the Electoral Code commit themselves to, among other things: adhering to the values and principles of the Constitution; promoting voter education campaigns, gender equality; ethnic tolerance, cultural diversity and fair representation; and generally affirm the rights of all participating political parties and candidates to engage in all activities of election campaigns freely.<sup>363</sup>

The IEBC may penalise a candidate or body that infracts the Electoral Code, including a ban from using allotted public media time on television and radio for electoral purposes.<sup>364</sup> The Commission may also issue other orders restricting the offending party, candidate or referendum committee from engaging in certain campaign activities.<sup>365</sup> Failure to abide by the IEBC's orders may cause the offending party to lose their right to run in the next election.<sup>366</sup> The IEBC may further institute High Court proceedings for violations of the Code which may lead to other orders that can disqualify the political party or candidate from participating in the election.<sup>367</sup>

Political parties, candidates and referendum committees are obligated to respect the role of the media throughout the election and referendum cycle. As such, they shall facilitate media access to their public political activities and reasonably ensure the safety of journalists from harassment, intimidation or physical assault by their agents or supporters.<sup>368</sup>

On the other hand, the media shall ensure professional coverage of political campaigns, activities, and demonstrations and respect election laws and regulations. It shall also refrain from publishing exit polls for elections and referendums during polling hours.<sup>369</sup> The media also comprise a special category of persons and groups with special access to and can cover election procedures and locations. Accredited media representatives have access to voter registration centres,<sup>370</sup> polling stations, and constituency and national tallying centres during the vote counting.<sup>371</sup>

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<sup>362</sup> Sec 4 Electoral Code of Conduct.

<sup>363</sup> Sec 5 Electoral Code of Conduct.

<sup>364</sup> Sec 7 Electoral Code of Conduct.

<sup>365</sup> Sec 7(vi) Electoral Code of Conduct.

<sup>366</sup> Sec 7(b)(ii) Electoral Code of Conduct.

<sup>367</sup> Sec 9 Electoral Code of Conduct.

<sup>368</sup> Sec 13 Electoral Code of Conduct.

<sup>369</sup> Sec 14 Electoral Code of Conduct.

<sup>370</sup> Reg 44(4) Elections (Registration of Voters) Regulations.

<sup>371</sup> Reg 62(g), 74(4)(f), 85(1)(h) Elections (General) Regulations.

The media provisions in the Electoral Code of Conduct extend special privileges to professional journalists with regard to access to venues where crucial and sensitive election-related activities are undertaken. Arguably, this special privilege ensures that reporting on electoral activities is guided by principles of truth, accuracy and fairness that are required by journalism ethics. These principles may be lacking in peripheral journalists such as citizen journalists. This argument should not be interpreted as excluding peripheral journalists from election reporting. Electoral news will be further dispersed through the wider offline and online media under different frames to protect the plurality of voice crucial for media rights in the transformative digital age. That being said, the Electoral Code should be amended to outline electoral stakeholder engagement with online media.

On election campaign financing and the media, the responsibility falls on the IEBC to regulate and administer campaign financing, including media coverage issues.<sup>372</sup> Consequently, the IEBC shall publish a gazette notice 12 months before an election prescribing spending limits that will include limits for media coverage for paid advertisements and free spots on broadcasts or coverage in the print media.<sup>373</sup> Pursuant to this, the IEBC published campaign funding regulations with the spending limits for the 2022 elections in August 2021. The maximum expenditure for advertising and media coverage was set at KES 1 843 087 307.84.<sup>374</sup> However, the proposal for spending limits was rejected by parliament, leaving room for runaway campaign spending.<sup>375</sup> Therefore, the Commission did not release further guidelines on monitoring media coverage to ensure proper enforcement of the media limits. Future regulations should cover oversight over online spending for political advertisements. Although the Act does not expressly mention the internet as an advertising platform, limits on paid-up advertisements can be seen to extend to online political ads. This requires collaboration with social media platforms to transparently publish the cost of political ads and spending amounts by political parties and

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<sup>372</sup> Sec 3, 12, 18 & 19 Election Campaign Financing Act No 42 of 2013 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2042%20of%202013> (accessed 8 November 2023); Art 88 (4) (i) of the Constitution of Kenya & sec 4 (i) of the Independent Electoral and Boundaries Commission Act No 9 of 2011 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%209%20of%202011> (accessed 8 November 2023).

<sup>373</sup> Sec 12, 18 & 20 Election Campaign Financing Act.

<sup>374</sup> IEBC ‘Gazette notice no 8024’ <https://www.iebc.or.ke/uploads/resources/zlihakwnoa.pdf> (accessed 8 November 2023).

<sup>375</sup> G Ndirangu ‘No limits: Campaign spending spikes ahead of Kenyan elections’ *Aljazeera* 22 June 2022 <https://www.aljazeera.com/features/2022/6/22/no-limits-campaign-spending-spikes-ahead-of-kenyan-elections> (accessed 8 November 2023).

candidates. Concurrently, political parties and candidates should release accurate details on online political spending. This limitation is essential given the ability of more affluent political parties to overwhelm the information ecosystem and gain an unfair political advantage compared to less moneyed political parties and candidates. Failure to abide by the Act is an offence, and the IEBC can prohibit media coverage of the offending party.<sup>376</sup>

## 7 Conclusion

As with international law, protecting media rights at the national level reinforces the media's role to play its normative functions and promote a functioning and vibrant public sphere where free and equal citizens engage in meaningful public and political participation. The legal and policy framework on media rights and political participation in Kenya can be described as comprehensive and, to some extent, responsive to the developments of the digital age. It is disputable whether it is effective as a guarantee for protecting these rights in substance and implementation. As a point of departure, the Constitution and media laws are largely adaptable or adapting to the digital media ecosystem with provisions that protect media rights offline and online. Importantly, the constitutional guarantee of media freedom extends to digital media and all media types, including online media. The conceptualisation of media and journalism in media laws also recognises the role of peripheral actors in the digital space who undertake journalistic functions outside the traditional definition of journalism. However, the statutory and self-regulatory parlance of the media still has a large focus on traditional media compared to online media. A legislative and policy gap exists with regard to new governors of online media, including internet intermediaries such as social media companies, that will be further explored in the next chapter. A more concerted focus on protecting online media freedom to leverage opportunities and address challenges is imperative to ensure traditional and new media are effectively protected and dovetail to undertake normative functions towards enhanced meaningful participation and free and fair elections. These gaps in the protection of media freedom in the digital age underscore the importance of discussing it distinctly in some circumstances and under the broader umbrella of freedom of expression where the situation

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<sup>376</sup> Sec 21(5)(e) Election Campaign Financing Act.

requires it. Protecting this symbiotic relationship is crucial to realising the twin rights in a democracy.

An enduring concern is the restrictive over-regulation of the media instead of enabling regulation. This issue dates back to post-independence and is much influenced by Kenya's history and prevailing geo-political context, as discussed in chapter two. This limiting approach is also seen in regulations on using the internet for expression, such as the CMCA and KICA. While the Constitution provides a firm foundation for protecting these rights, dissonance emerges from contentious statutory provisions that have severally met judicial challenges. Positively, the courts have often emerged as reliable vanguards of the Constitution in resolving constitutional questions, applying international law, and nullifying statutory provisions conflicting with the Constitution and international laws and standards. The vigilance of the Kenyan civil society, media sector, human rights defenders and even ordinary Kenyans in instituting legal challenges in the face of contentious laws and actions deserves a worthy nod.

Ultimately, the legislative framework elicits some pessimism, given worrying provisions that unjustifiably and unreasonably limit rights on legitimate grounds of public order, national security, and protecting the rights and reputations of others. Parliament should amend these laws more precisely to ensure a balance between protecting legitimate aims in a way that protects and promotes human rights. Legislative clarity is vital to reduce subjective interpretation. Disproportionate sanctions are another concern with the presence of exorbitant fines and criminal sanctions on expression as opposed to reasonable civil sanctions. The misuse of some of these laws to intimidate, harass and silence critical voices is incongruous with a just and democratic society. The independence of media regulatory bodies from political and economic control is also in jeopardy despite grave implications for the political economy of the media.

The ensuing state of affairs engenders an uncondusive environment for the operation of professional and non-professional journalists and the realisation of freedom of expression for all Kenyans. Given the centrality of media rights to facilitate meaningful political participation, promote free and fair elections, and militate against flawed elections, this adversely affects the electoral process. The role of free and independent media (traditional and new) in mediating the public sphere remains pivotal. However, the Kenyan public sphere is unstable and compromised by a relatively restrictive political context, interference from economic forces, and some

unfavourable media laws. Strategic litigation and relatively progressive judicial decisions have largely offered guidance on legislative amendments that require further parliamentary action. This chapter builds upon the thesis argument that the synergy between the progressive Kenyan Constitution and international law provides the basis for a human rights-based approach to media regulation in the digital age to allow it to effectively undertake its normative functions towards meaningful political participation and free and fair elections in the Kenyan public sphere.

## **CHAPTER FIVE: A FRAMEWORK FOR SOCIAL MEDIA ACCOUNTABILITY FOR THE PROTECTION OF MEDIA FREEDOM AND MEANINGFUL POLITICAL PARTICIPATION IN KENYA**

### **1 Introduction**

Chapters three and four examined the protection of media and meaningful political participation of the electorate at the international level and how it has adapted to the digital. A shortcoming across the two frameworks was the effective regulation of internet intermediaries, particularly social media. Online governance is largely self-regulatory and dominated by social media companies and has elicited concerns about accountability and transparency.<sup>1</sup> In building the argument for a contextually relevant rights-based approach to media protection in the digital age, this chapter examines social media regulation and its impact on meaningful political participation and free and fair elections using the 2017 and 2022 Kenyan elections as a frame of reference. Part one is this introduction. Part two examines the effectiveness of self-regulation by assessing the substance of social media policies on illegal and harmful online content, election integrity, and transparency, and their implementation by Facebook, YouTube, Twitter, and TikTok. It discusses the inconsistent implementation of these policies, focusing on the Kenyan experience in the 2017 and 2022 elections. Part three explores co-regulation approaches, drawing lessons from interventions by the United States of America (USA), the European Union (EU), and selected African countries. Part four discusses human rights-based interventions for social media accountability. Part five is the conclusion.

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<sup>1</sup> K Klonick ‘The new governors: The people, rules, and processes governing online speech’ (2018) 131 *Harvard Law Review* 1598.

## 2 Self-regulation of social media companies: Tension between on ‘paper’ versus in practice

Social media companies have emerged as the dominant shapers of online governance.<sup>2</sup> The design of their products and policies, and actions significantly influence the exercise of media rights online and the interrelated right of political participation that is enabled by these rights.<sup>3</sup> This online marketplace of ideas where people seek and receive information, engage in debate, formulate opinions, develop identities, make decisions, and generate income is a central aspect of contemporary socio-economic and political dynamics with varied actors competing for influence. Giant social media platforms such as Facebook, Twitter,<sup>4</sup> YouTube and TikTok attract billions of global subscribers and contribute to shaping the global democratic trajectory. Case in point, a study on disinformation and the role of big tech in Kenya found that social media is the second most popular source of general news after television (TV), with TV, social media and radio boosting a 71%, 64% and 50% audience attraction respectively.<sup>5</sup> Therefore, the quality of the online information ecosystem and the digital public sphere, influenced by the self-policing of social media companies, affect the rights of millions of Kenyans online and, indirectly, the offline community through cross-pollination of information.

Self-regulatory practices in social media companies can be gleaned from their varied terms and conditions of service, community guidelines, and policies available on their websites (this chapter refers to these collectively as policies). The continuous and rapidly evolving nature of digital technologies favours an argument for self-regulation of online media, given the comparatively slower rate of development of relevant legislation. The knowledge of the technicalities of the Internet of Things (IoT) and machine learning in mediating online communications is also disproportionately held by technology companies. However, despite the collection of policies developed by social media companies, they have often come under fire for poor monitoring of compliance and enforcement of these policies and the reverberating effect on

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<sup>2</sup> As above.

<sup>3</sup> L Munn ‘Angry by design: Toxic communication and technical architectures’ (2020) 7 *Humanities and Social Sciences Communications* 2.

<sup>4</sup> As of July 2023, the platform has been rebranded to X. However, for the purposes of this thesis, it will be referred to with the long-recognized brand name.

<sup>5</sup> CRSM & TIFA Research ‘National 2022 report on disinformation & the role of big tech in Kenya’ 11 [https://accountablebigtech.com/wp-content/uploads/2023/01/Public-Opinion-Research-on-Disinformation-Big-Tech-Harms-DISSEMINATED-REPORT\\_Final-1.pdf](https://accountablebigtech.com/wp-content/uploads/2023/01/Public-Opinion-Research-on-Disinformation-Big-Tech-Harms-DISSEMINATED-REPORT_Final-1.pdf) (accessed 8 November 2023).



civil and political rights and democracy.<sup>6</sup> What emerges correlates with the disadvantages of self-regulation, where private and public interests are at odds, causing and/or contributing to weak frameworks and poor compliance and enforcement.<sup>7</sup> The will for proper enforcement is hindered by the negative profit implications that set the stage for what some authors have termed the ‘tragedy of the commons’.<sup>8</sup> This manifests where the selfish prioritisation of private over public interests destroys the entire system that sustained it in the first place.

Increased online engagement habits are linked to negative, incendiary and divisive content consumption, and social media companies have shrewdly exploited this human folly.<sup>9</sup> These companies have sacrificed social capital, safety, and information integrity for increased revenue. The pursuit for increased as opposed to meaningful audience engagement is intractably tied to profit margins, which exposes the disingenuity behind developing and enforcing policies to moderate illegal and harmful content on these platforms.

The lack of or poor consideration of human rights implications in the actions of social media companies atrophies the democratising potential of the online space and the public sphere. Just as the commercialisation of traditional mass media distorted meaningful public discourse and informed decision-making in the Habermas public sphere,<sup>10</sup> similar economic manipulations are a foot in the digital public sphere, the modern ‘space for accumulation’.<sup>11</sup> However, increased stakeholder scrutiny of social media policies and actions, bad press, and reinforced calls for accountability are forcing social media companies to examine user and stakeholder

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<sup>6</sup> UNESCO ‘Letting the sun shine in: Transparency and accountability in the digital age’ (2021) 1-7 <https://unesdoc.unesco.org/ark:/48223/pf0000377231> (accessed 8 November 2023).

<sup>7</sup> AJ Campbell ‘Self-regulation and the media’ (1999) 51 *Federal Communications Law Journal* 717-719.

<sup>8</sup> MA Cusumano, A Gawer & DB Yoffie ‘Social media companies should self-regulate now’ (2021) *Harvard Business Review* <https://hbr.org/2021/01/social-media-companies-should-self-regulate-now> (accessed 8 November 2023) & S Levy *Facebook: The Inside Story* (2020) 5-7.

<sup>9</sup> G Corsi ‘Evaluating Twitter’s algorithmic amplification of low-trust content: An observational study’ (2023) *arXiv* <https://arxiv.org/pdf/2305.06125.pdf> (accessed 8 November 2023); M Haroon & others ‘YouTube, the great radicalizer? Auditing and mitigating ideological biases in YouTube recommendations’ (2022) *arXiv* <https://arxiv.org/pdf/2203.10666.pdf> (accessed 8 November 2023) & J Horwitz & D Seetharaman ‘Facebook executives shut down efforts to make the site less divisive’ *Wall Street Journal* 26 May 2020 <https://www.wsj.com/articles/facebook-knows-it-encourages-division-top-executives-nixed-solutions-11590507499> (accessed 8 November 2023).

<sup>10</sup> J Habermas *The structural transformation of the public sphere* (translated by T Burger) (1989) 104.

<sup>11</sup> C Fuchs ‘The contemporary world wide web: Social medium or new space of accumulation?’ in D Winseck & DY Jin (eds) *The political economies of media: The transformation of the global media industries* (2011) 201-206.

concerns.<sup>12</sup> More so, in speaking in the capitalistic language, the threat of liability, government regulation, and advertiser and user flight provides an economic incentive for social media companies to address concerns about their platform design and operations on society, human rights, elections, and democracy.<sup>13</sup> However, there is a context bias given that tech companies pay more attention to Global North countries in enforcing compliance with their policies than to Global South.<sup>14</sup> Accordingly, a duality in public distrust towards government regulation and social media self-regulation presents with both of the actors found unsuitable to dictate the parameters of online media regulation generally and social media regulation in particular on their own.

## **2.1 On paper: An assessment of select social media policies that impact media rights and elections**

In that order, Facebook, YouTube, Twitter and TikTok are the most popular social media sites in Kenya.<sup>15</sup> The rules of engagement on these platforms are formulated by various policies proactively disclosed by these companies. Ostensibly, these rules aim to nurture safe media spaces for free expression, building social networks, and addressing illegal and harmful content online. Guided by article 20 of the International Covenant on Civil and Political Rights (ICCPR) and article 33 of the Constitution of Kenya, illegal content is expression that is prohibited by law, such as advocacy for hatred on protected grounds that incites discrimination, hostility or violence, and propaganda for war.<sup>16</sup> Harmful content, such as misinformation and disinformation, may not necessarily be illegal but is detrimental to information integrity.<sup>17</sup>

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<sup>12</sup> D Kaye 'Not just governors: Platform rules and public law' (13 June 2022) *The Four Domains of Global Platform Governance essay series* <https://www.cigionline.org/articles/not-just-governors-platform-rules-and-public-law/> (accessed 8 November 2023).

<sup>13</sup> A Hern 'Third of advertisers may boycott Facebook in hate speech revolt' *The Guardian* 30 June 2020 <https://www.theguardian.com/technology/2020/jun/30/third-of-advertisers-may-boycott-facebook-in-hate-speech-revolt> (accessed 8 November 2023).

<sup>14</sup> Z Takhshid 'Regulating social media in the Global South' 24 (1) (2022) *Vanderbilt Journal of Entertainment and Technology Law* (2022) 1- 5.

<sup>15</sup> CRSM & TIFA Research (n 5) 11.

<sup>16</sup> See secs 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR) and art 33 of the Constitution of Kenya.

<sup>17</sup> Misinformation is false or inaccurate information shared without and intention to cause harm or the realisation that it is incorrect; disinformation is false information created and shared with an intention to cause harm; and mal-information is accurate information shared with an intention to cause harm. Collectively these terms are referred to

A review of the policies of the four popular social media sites in Kenya, Facebook,<sup>18</sup> YouTube,<sup>19</sup> Twitter,<sup>20</sup> and TikTok<sup>21</sup>, reveals that all the platforms have invested in the development of policies to regulate the spread of harmful and illegal content on their platforms (see annexe 1 for a more detailed breakdown of the policies). The policies cover various categories, including hate speech, false information and deceptive practices, violence, election and civic integrity, and transparency. Facebook stands out as having relatively comprehensive policies interspersed with data on enforcement and additional information on partnerships with fact-checking organisations and digital literacy initiatives.<sup>22</sup> The establishment of the Facebook Oversight Board to review the content moderation decisions of the company also represent a positive step towards boosting perceptions of platform transparency and accountability.<sup>23</sup>

The inclusion of civic and election integrity policies by all four companies shows an enhanced appreciation of the influence of platforms on political participation, elections and democracy.<sup>24</sup> Most of these policies are largely centred around protecting electoral information

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as information disorder. For more see C Wardle & H Derakhshan ‘Information disorder: Toward an interdisciplinary framework for research and policymaking’ *Council of Europe Report* (2017) 5.

<sup>18</sup> Meta ‘Facebook community standards’ <https://transparency.fb.com/en-gb/policies/community-standards/> (accessed 8 November 2023).

<sup>19</sup> YouTube ‘Community guidelines’ <https://www.youtube.com/howyoutubeworks/policies/community-guidelines/> (accessed 8 November 2023).

<sup>20</sup> Twitter ‘Twitter rules’ <https://help.twitter.com/en/rules-and-policies/twitter-rules> (accessed 8 November 2023).

<sup>21</sup> TikTok ‘Community Guidelines’ <https://www.tiktok.com/community-guidelines/en/overview/> (accessed 8 November 2023).

<sup>22</sup> Meta ‘Inauthentic behavior’ <https://transparency.fb.com/en-gb/policies/community-standards/inauthentic-behavior/> (accessed 8 November 2023); Meta ‘Preparing for elections’ [https://about.meta.com/actions/preparing-for-elections-on-facebook/?utm\\_source=about.facebook.com&utm\\_medium=redirect](https://about.meta.com/actions/preparing-for-elections-on-facebook/?utm_source=about.facebook.com&utm_medium=redirect) (accessed 8 November 2023); Twitter ‘Civic integrity misleading information policy’ <https://help.twitter.com/en/rules-and-policies/election-integrity-policy> (accessed 8 November 2023); Twitter ‘Political content’ <https://business.twitter.com/en/help/ads-policies/ads-content-policies/political-content.html> (accessed 8 November 2023); Google ‘Elections misinformation policies’ <https://support.google.com/youtube/answer/10835034?hl=en#zippy=%2Celection-integrity%2Cvoter-suppression> (accessed 8 November 2023); Google ‘Our commitments’ <https://www.youtube.com/howyoutubeworks/our-commitments/supporting-political-integrity/#election-news-and-information> (accessed 8 November 2023); TikTok ‘Community Guidelines’ <https://www.tiktok.com/community-guidelines#38> (accessed 8 November 2023); TikTok ‘Election integrity’ <https://www.tiktok.com/safety/en/election-integrity/> (accessed 8 November 2023) & TikTok ‘Government, politician, and political party affiliated accounts’ <https://support.tiktok.com/en/using-tiktok/growing-your-audience/government-politician-and-political-party-accounts> (accessed 8 November 2023).

<sup>23</sup> Oversight Board <https://www.oversightboard.com/> (accessed 8 November 2023).

<sup>24</sup> Meta ‘Misinformation’ <https://transparency.fb.com/en-gb/policies/community-standards/misinformation/> (accessed 8 November 2023); Meta ‘Preparing for elections’ [https://about.meta.com/actions/preparing-for-elections-on-facebook/?utm\\_source=about.facebook.com&utm\\_medium=redirect](https://about.meta.com/actions/preparing-for-elections-on-facebook/?utm_source=about.facebook.com&utm_medium=redirect) (accessed 8 November 2023); Twitter ‘Civic integrity misleading information policy’ <https://help.twitter.com/en/rules-and-policies/election-integrity-policy> (accessed 8 November 2023); Google ‘Elections misinformation policies’ <https://support.google.com/youtube/answer/10835034?hl=en#zippy=%2Celection-integrity%2Cvoter-suppression> (accessed 8 November 2023); TikTok ‘Election integrity’ <https://www.tiktok.com/safety/en/election-integrity/>

integrity by tackling electoral misinformation that may interfere with political participation.<sup>25</sup> Twitter and TikTok have gone further and banned political advertising on their platform, although Twitter has made a conditioned exemption for the US.<sup>26</sup> Political advertising has long been a source of mis/disinformation during elections, and Facebook's political advertisement policy has received much criticism for capitalising on electoral misinformation through its advertisements.<sup>27</sup>

On paper, social media companies have proactively disclosed information on their policies and an interested user can find the information online. However, it is more likely that a user would know whether they are in compliance or violation of a policy through the enforcement action of the platform, either to censure a violating user or address a complaint from an offended user. Violation of platform policies is said to attract varied enforcement actions or penalties including labelling or warning messages, educational links to more information, reduced visibility of the post, content deletion, and limited functionality for retweets, likes or replies on sites like Twitter.<sup>28</sup> For severe or repeat offenders their accounts may be temporarily or permanently suspended. Facebook and Twitter offer more diverse enforcement actions than the other assessed platforms. YouTube largely leans towards removing flagged content, while TikTok may remove or restrict an account from sending direct messages or outrightly ban the account. The bone of contention lies in how these policies translate into practice and how they impact the exercise of human rights on these platforms.

## **2.2 In practice: Assessment of social media enforcement of their policies**

The three limbs that shore up self-regulation of the media are the development, monitoring and enforcement of rules and regulations. Social media companies have performed poorly on the last two limbs, attracting widespread criticism from various sectors, such as governments and civil

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(accessed 27 March 2023) & TikTok 'Government, politician, and political party affiliated accounts' <https://support.tiktok.com/en/using-tiktok/growing-your-audience/government-politician-and-political-party-accounts> (accessed 8 November 2023).

<sup>25</sup> See annex 1.

<sup>26</sup> Twitter 'Political content' <https://business.twitter.com/en/help/ads-policies/ads-content-policies/political-content.html> (accessed 8 November 2023).

<sup>27</sup> M Isaac 'Why everyone is angry at Facebook over its political ads policy' *New York Times* 22 November 2019 <https://www.nytimes.com/2019/11/22/technology/campaigns-pressure-facebook-political-ads.html> (accessed 8 November 2023).

<sup>28</sup> See annex 1.

society.<sup>29</sup> In particular, social media companies have poor content moderation practices to address harmful and illegal content that violates their own policies, validating calls for co-regulation and multi-stakeholder interventions to enhance accountability and transparency.<sup>30</sup>

Content moderation is defined as ‘the organized practice of screening user-generated content (UGC) posted to Internet sites, social media, and other online outlets, in order to determine the appropriateness of the content for a given site, locality, or jurisdiction’.<sup>31</sup> The implications on freedom of expression and the risk of censorship, particularly during critical periods such as elections, require that content moderation practices are transparent. Social media platforms employ a hybrid content moderation model through Artificial Intelligence (AI) and human reviewers to enforce their policies.<sup>32</sup>

### 2.2.1 The machine effect in content moderation

The bulk of content moderation disproportionately rests on algorithms, given the incredible volumes of information posted online and the massive cost and time implications of retaining human reviewers.<sup>33</sup> More to that point, algorithms influence the availability, accessibility and prominence of information online since they rank, upgrade, reduce or remove content. Ndlela compares algorithms to media institutions in their ability to influence the (in)visibility of information.<sup>34</sup> Juxtaposed against mainstream traditional media where media owners, editors, governments, influential politicians, advertisers and other powerful actors gatekeep information and determine what is and what is not published, he argues that designers of algorithms and

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<sup>29</sup> UNESCO (n 6) 1-7.

<sup>30</sup> Global Witness ‘Facebook unable to detect hate speech weeks away from tight Kenyan election’ 28 July 2022 <https://www.globalwitness.org/en/campaigns/digital-threats/hate-speech-kenyan-election/> (accessed 8 November 2023); Kaye (n 12) & O Madung ‘Opaque and overstretched, Part II: How platforms failed to curb misinformation during the Kenyan 2022 election’ <https://foundation.mozilla.org/en/campaigns/opaque-and-overstretched-part-ii/#case-study-labeling-failures> (accessed 8 November 2023).

<sup>31</sup> ST Roberts ‘Content moderation’ *Encyclopedia of Big Data* (2017) 1-2.

<sup>32</sup> As above.

<sup>33</sup> Facebook ‘How does Facebook use artificial intelligence to moderate content?’ <https://www.facebook.com/help/1584908458516247> (accessed 8 November 2023); Response to questions for the record by Mark Zuckerberg, Facebook disinformation nation: Social media’s role in promoting extremism and misinformation, 117th Congress (2021) 17. Also see J McGregor ‘In tech, repeat rounds of job cuts make ‘rolling layoffs’ a new reality’ *Forbes* 24 March 2023 <https://www.forbes.com/sites/jenamcgregor/2023/03/24/in-tech-repeat-rounds-of-job-cuts-make-rolling-layoffs-a-new-reality/?sh=f6864ca71b02> (accessed 8 November 2023).

<sup>34</sup> MN Ndlela ‘Social media algorithms, bots and elections in Africa’ in MN Ndlela & W Mano (eds) *Social media and elections in Africa* (2020) 15.

those who can effectively employ these tools to market, persuade and manipulate political discourses are emerging as the new gatekeepers of information.<sup>35</sup> The political economy of social media manifests in these dynamics.

The opacity of the operation of algorithms has drawn international stakeholder interest and advocacy due to implications on users' human rights, including media rights and meaningful political participation.<sup>36</sup> Algorithms influence the visibility and prominence of information online. This curated, personalised experience in determining and prioritising what information a user sees is largely based on their online behaviour, including their likes and dislikes, personal relationships, and level and quality of engagement with certain content online.<sup>37</sup> While social media companies have resisted full disclosure of the workings of their algorithms based on the protection of their intellectual property, stakeholder advocacy pressured these companies into revealing the basic mechanisms behind their algorithms. There have been varied levels of disclosure on algorithmic recommender systems by Facebook,<sup>38</sup> Twitter,<sup>39</sup> TikTok,<sup>40</sup> and YouTube.<sup>41</sup> Uniquely, Twitter gives users the option of viewing tweets based on popularity or chronologically, though these aspects are still determined by an algorithm.<sup>42</sup> Despite this disclosure, how to enhance platform accountability for targeted and algorithmically amplified illegal and harmful content, such as false and misleading information, hate speech and violent content, without threatening civil rights, such as media rights, continues to baffle governments and the international community. The quasi-autonomous nature of algorithms, given the human hand behind their development and manipulation, means that social media companies are not

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<sup>35</sup> Ndlela (n 34) 15-16.

<sup>36</sup> Ndlela (n 34) 16.

<sup>37</sup> F Pasquale *The black box society. The secret algorithms that control money and information* (2015) 4.

<sup>38</sup> Meta 'Our approach to ranking' <https://transparency.fb.com/en-gb/features/ranking-and-content/> (accessed 8 November 2023).

<sup>39</sup> Twitter 'About your For You timeline on Twitter' <https://help.twitter.com/en/using-twitter/twitter-timeline#:~:text=Home%20serves%20Tweets%20from%20accounts,you%20manage%20your%20Home%20timeline.&text=Your%20Home%20timeline%20displays%20a,by%20a%20variety%20of%20signals>. (accessed 8 November 2023); Twitter 'Twitter trends FAQ' <https://help.twitter.com/en/using-twitter/twitter-trending-faqs#:~:text=How%20are%20Trends%20determined%3F,your%20interests%2C%20and%20your%20location> (accessed 8 November 2023) & Twitter 'Topics on Twitter' <https://help.twitter.com/en/using-twitter/follow-and-unfollow-topics> (accessed 8 November 2023).

<sup>40</sup> TikTok 'How TikTok recommends videos #ForYou' <https://newsroom.tiktok.com/en-us/how-tiktok-recommends-videos-for-you> (accessed 8 November 2023).

<sup>41</sup> The YouTube algorithm explained in a video by a product manager on YouTube's recommender system. YouTube 'Behind the algorithms - how search and discovery works on YouTube' [https://www.youtube.com/watch?v=9Fn79qJa2Fc&ab\\_channel=CreatorInsider](https://www.youtube.com/watch?v=9Fn79qJa2Fc&ab_channel=CreatorInsider) (accessed 8 November 2023).

<sup>42</sup> Hootsuite 'How the Twitter algorithm works [2023 guide]' <https://blog.hootsuite.com/twitter-algorithm/> (accessed 8 November 2023)

passive actors in the online media space and should be held accountable for the consequences of the algorithms that interpret, filter, prioritise and disseminate content.

Research and revelations by whistle-blowers, such as Frances Haugen (Facebook whistle-blower) and Christopher Wylie (Cambridge Analytica whistle-blower), disclosed that platforms are not incentivised to concertedly address algorithmic bias for amplifying harmful and illegal content on their platforms, given the likely inverse effect on user engagement and profits.<sup>43</sup> Meta (Facebook's parent company), in particular, cannot feign ignorance, given its own internal studies revealed the company's knowledge of the correlation between models of increased user engagement and heightened polarisation.<sup>44</sup> This informed decisions to discard countermeasures that filtered harmful and illegal content, leading to reduced user engagement. Although machine learning is evolving, Meta's own engineers have cast doubt on the effectiveness of AI technology in moderating content in the English language, let alone the cornucopia of languages that form the global online lexicon.<sup>45</sup> Frances Haugen's testimony before the US Congress revealing that nearly 90% of Facebook's moderation efforts are focused on English content, despite most users being non-English speakers who may post in languages other than English, was telling of the invisibility of linguistically diverse regions.<sup>46</sup> Meta's employees also estimated that only 2-5% of hateful content and about 0.6% of violent content is identified and removed by AI. They approximated that this can be scaled up to about 10-20% but not more without a paradigm-shifting change in strategy.<sup>47</sup> The numbers sharply differ from Meta's own reports that

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<sup>43</sup> D Milmo 'Frances Haugen takes on Facebook: The making of a modern US hero' *The Guardian* 10 October 2021 <https://www.theguardian.com/technology/2021/oct/10/frances-haugen-takes-on-facebook-the-making-of-a-modern-us-hero> (accessed 8 November 2023) & K Hao 'The race to understand the exhilarating, dangerous world of language AI' <https://www.technologyreview.com/2021/05/20/1025135/ai-large-language-models-bigscience-project/> (accessed 8 November 2023). Also see Y Eisenstat 'Opinion: I worked on political ads at Facebook. They profit by manipulating us' *The Washington Post* 4 November 2019 <https://www.washingtonpost.com/outlook/2019/11/04/i-worked-political-ads-facebook-they-profit-by-manipulating-us/> (accessed 8 November 2023).

<sup>44</sup> K Hao 'How Facebook got addicted to spreading misinformation' <https://www.technologyreview.com/2021/03/11/1020600/facebook-responsible-ai-misinformation/> (accessed 8 November 2023).

<sup>45</sup> D Seetharaman, J Horwitz & J Scheck 'Facebook says AI will clean up the platform. Its own engineers have doubts' *The Wall Street Journal* 17 October 2021 <https://www.wsj.com/articles/facebook-ai-enforce-rules-engineers-doubtful-artificial-intelligence-11634338184> (accessed 8 November 2023). For the dismal performance in moderating content in some African countries also see B Taye 'Until the machine learns your language, you stay put' (13 June 2022) *The Four Domains of Global Platform Governance Essay Series* <https://www.cigionline.org/articles/until-the-machine-learns-your-language-you-stay-put/> (accessed 8 November 2023).

<sup>46</sup> Milmo (n 43).

<sup>47</sup> As above.

place the AI effectiveness at 97%,<sup>48</sup> which, if the employees are to be believed, is gross inflation that badly reflects on the already dubious transparency and accountability perceptions of the social media giant.<sup>49</sup>

Algorithmic models that prioritise and amplify divisive information usually increase user engagement.<sup>50</sup> The emerging algorithmic bias for false and divisive content emanates from the nature of machine learning. When illegal and harmful content such as mis-disinformation, hate speech, and violence are not flagged, reduced or removed by platforms, the algorithm continues to use these variables to determine the information accessible to the public.<sup>51</sup> Therefore, despite developing policies on content moderation that seek to address illegal and harmful content on platforms, content ranking and content recommendation practices that focus on growth are diametrically opposed to content moderation to promote the meaningful exercise of human rights.<sup>52</sup>

### **2.2.2 Humans supplementing AI in content moderation**

Investment in human reviewers helps counterbalance some of the inadequacies of AI, particularly language and local context ignorance that has led to the continued presence of harmful and illegal content on social media platforms. However, retaining human reviewers requires massive resources that many companies are unwilling and/or unable to shoulder. What has, in fact, been witnessed is a reduced reliance on human content reviewers as tech companies implement rolling layoffs.<sup>53</sup> Towards the end of 2022, Twitter, a popular platform for political information and debate in many countries, including Kenya, announced it was adopting increased use of AI to moderate content despite a surge in hate speech on the platform in the

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<sup>48</sup> Meta ‘Update on our progress on AI and hate speech detection’ <https://about.fb.com/news/2021/02/update-on-our-progress-on-ai-and-hate-speech-detection/> (accessed 8 November 2023).

<sup>49</sup> Ranking Digital Rights ‘2020 ranking digital rights corporate accountability index’ <https://rankingdigitalrights.org/index2020/executive-summary> (accessed 8 November 2023).

<sup>50</sup> Milmo (n 43).

<sup>51</sup> Hao (n 43).

<sup>52</sup> Hao (n 44).

<sup>53</sup> H Field & J Vanian ‘Tech layoffs ravage the teams that fight online misinformation and hate speech’ *CNBC* 26 May 2023 <https://www.cnbc.com/2023/05/26/tech-companies-are-laying-off-their-ethics-and-safety-teams-.html> (accessed 8 November 2023) & McGregor (n 33).



wake of Elon Musk’s attempts to reinvent the platform.<sup>54</sup> Inherent language bias in AI systems that learn largely on English-language content means that content moderation for information falling outside the English language spectrum suffers. The situation is exacerbated in continents like Africa with significant linguistic diversity, though this language variance is reduced in the African digital space. For example, Kenyan netizens often converse in English, Kiswahili, the Sheng patois and sometimes local languages. Research has already found AI moderation unsuitable to effectively moderate such content in a manner that is reflective of the local context, which impacts the quality of discourse and safety of users on the platform.<sup>55</sup> While content moderation policies for companies such as Facebook are available in Kiswahili, albeit not as up-to-date as those in English, such accessibility measures are watered-down by poor implementation of the policies.<sup>56</sup>

The physical presence of social media platforms is represented by Meta’s offices in South Africa and Nigeria, a content moderation office in Kenya, and Google’s (YouTube’s parent company) office in South Africa. Twitter closed its inaugural African office in Ghana in 2022, a little over a year since its opening.<sup>57</sup> Meta’s African office for moderating content was established in Kenya in 2019, its management was outsourced to a company called Sama. However, the company is the subject of a lawsuit with allegations of poor pay, unfavourable working conditions that are detrimental to the employees' mental health, and suppression of attempts to unionise.<sup>58</sup> The effectiveness of human reviewers in correctly identifying and removing harmful content is also jeopardised by the prioritisation of speed and efficiency over quality, contributing to the continued presence of harmful content on the platform even after the review process. The requirement for moderators to decide whether to take down or keep content within 50 seconds of viewing, regardless of the length of the video, is an untenable measure for

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<sup>54</sup> V Sankaran ‘Twitter to rely more on AI than staff to detect hate speech amid rising reports of racism on platform’ *Independent* 5 December 2022 <https://www.independent.co.uk/tech/twitter-ai-hate-speech-racism-b2238805.html> (accessed 8 November 2023).

<sup>55</sup> Global Witness (n 30) & Taye (n 45).

<sup>56</sup> Meta ‘Transparency center’ <https://transparency.fb.com/sw-ke/policies/community-standards/> (accessed 8 November 2023).

<sup>57</sup> N Ogbonna ‘Twitter lays off staff at its only Africa office in Ghana’ *BBC* 9 November 2022 <https://www.bbc.com/news/world-africa-63569525> (accessed 8 November 2023).

<sup>58</sup> B Perrigo ‘Inside Facebook’s African sweatshop’ *TIME* 17 February 2022 <https://time.com/6147458/facebook-africa-content-moderation-employee-treatment/> (accessed 8 November 2023) & Reuters ‘Ex-Facebook moderator in Kenya sues over working conditions’ *The Guardian* 10 May 2022 <https://www.theguardian.com/technology/2022/may/10/ex-facebook-moderator-in-kenya-sues-over-working-conditions> (accessed 8 November 2023).

effective content moderation.<sup>59</sup> Other guidelines for moderators required them to watch for as little as the first 15 seconds of a video before making a take-down or retain decision in the event that ‘the title, transcript, top comments and thumbnail of the video appear to be innocent, and no users nor Facebook’s AI systems have flagged specific points in the video’.<sup>60</sup>

### 2.3 The overall enforcement scorecard

The picture that emerges is of both proactive (policy development)<sup>61</sup> and reactive (content moderation) approaches by social media companies to address illegal and harmful content on their platforms. Although reactive, moderating illegal and harmful content in a rights-respecting manner that does not unlawfully and unreasonably compromise free expression is crucial to promoting online electoral information integrity. Moderating content has censorship implications, and it is essential that it does not curtail legitimate expression. A blend of reactive and proactive approaches incorporating multistakeholder input to address harmful and illegal expressions detrimental to the electoral information ecosystem is necessary, as the disparate approaches have their advantages and weaknesses. Take labelling (used by Facebook, Twitter and TikTok) specific posts as false as an example. Some studies have found that labelling posts as false or misleading may reduce the dissemination of falsehoods,<sup>62</sup> including in some cases where the news aligns with a reader’s political ideologies and may require a conscious examination of internal biases.<sup>63</sup> Perceived accuracy is diminished more so when specific posts are labelled as false instead of disputed.<sup>64</sup> On the other hand, unlabelled headlines may inadvertently be incorrectly perceived as true,<sup>65</sup> underscoring the importance of similarly

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<sup>59</sup> As above.

<sup>60</sup> Perrigo (n 58).

<sup>61</sup> Other proactive approaches include digital literacy programs by social media companies as discussed further below.

<sup>62</sup> P Mena ‘Cleaning up social media: The effect of warning labels on likelihood of sharing false news on Facebook’ (2020) 12 *Policy & Internet* 165.

<sup>63</sup> G Pennycook & others ‘The implied truth effect: Attaching warnings to a subset of fake news headlines increases perceived accuracy of headlines without warnings’ (2020) 66 (11) *Management Science* 4955. The studies that drew the discussed conclusions were western based but parallels can be drawn to the African context generally and Kenya specifically in managing the spread of harmful content such as falsehoods on social media platforms during elections.

<sup>64</sup> K Clayton & others ‘Real solutions for fake news? Measuring the effectiveness of general warnings and fact-check tags in reducing belief in false stories on social media’ (2019) 42 *Political Behavior* 1 (accessed 8 November 2023)

<sup>65</sup> Pennycook & others (n 63) 4955-4956.

flagging credible news sources.<sup>66</sup> Facebook, Twitter and TikTok all claimed to promote authoritative sources during the 2022 elections in Kenya.<sup>67</sup>

In reality, it is a tall order to expect fact-checking to keep up with the voluminous content production online. In the time it takes for a social media platform to review, fact-check and attach a label to false information, the content may have already gained virality. Repetition, regurgitation, and reposting of information increase the likelihood of its believability.<sup>68</sup> Informational validity is even more reinforced when the information aligns with one's political and ideological views.<sup>69</sup> Already, the intervention suffers an inherent disadvantage, given that debunked news never gains as much traction as the original news.<sup>70</sup> At best, fact-checking and labelling reduce but not eliminate the validity of the information in what has been termed as the continued influence effect.<sup>71</sup> Ideologues have also been known to reinforce existing beliefs even after being confronted with a correction.<sup>72</sup>

Initial warnings about falsity and swift reactive measures such as immediate retraction, repetition, and informational retractions that fill information gaps can increase the effectiveness of the retraction and corrections in combating false news.<sup>73</sup> However, while well-intended, measures that direct users to more credible third-party sources are stymied when confronted with

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<sup>66</sup> Also see I Lapowsky 'Here's what happens when news comes with a nutrition label' *Wired* 9 January 2019 <https://www.wired.com/story/gallup-poll-fake-news-ratings/> (accessed 8 November 2023)

<sup>67</sup> Madung (n 30).

<sup>68</sup> IM Begg, A Anas & S Farinacci 'Dissociation of processes in belief: Source recollection, statement familiarity, and the illusion of truth' (1992) 121(4) *Journal of Experimental Psychology: General* 446–458.

<sup>69</sup> D Krech, EL Ballachey & RS Crutchfield *Individual in society: A textbook of social psychology* (1962).

<sup>70</sup> AL Miller, KT Wissman & DJ Peterson 'The continued influence effect: Examining how age, retraction, and delay impact inferential reasoning' 36 (2022) *Applied Cognitive Psychology* 708–723 & UKH Ecker & LM Antonio 'Can you believe it? An investigation into the impact of retraction source credibility on the continued influence effect' (2021) 49(4) *Memory Cognition* 631–644 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7810102/> (accessed 8 November 2023).

<sup>71</sup> UKH Ecker, S Lewandowsky & DTW Tang 'Explicit warnings reduce but do not eliminate the continued influence of misinformation' (2010) 38(8) *Memory Cognition* 1087–1100 [https://www.classes.cs.uchicago.edu/archive/2020/spring/33231-1/readings/Ecker2010\\_Article\\_ExplicitWarningsReduceButDoNot.pdf](https://www.classes.cs.uchicago.edu/archive/2020/spring/33231-1/readings/Ecker2010_Article_ExplicitWarningsReduceButDoNot.pdf) (accessed 8 November 2023); UKH Ecker & others 'Correcting false information in memory: Manipulating the strength of misinformation encoding and its retraction' (2011) 18 *Psychonomic Bulletin & Review* 570–578; HM Johnson & CM Seifert 'Sources of the continued influence effect: When misinformation in memory affects later inferences' (1994) 20 *Journal of Experimental Psychology: Learning, Memory, and Cognition* 1420–1436.

<sup>72</sup> B Nyhan & J Reifler 'When corrections fail' (2007) Unpublished manuscript, Dartmouth College, Hanover, NH 21 <http://www.uky.edu/AS/Polisci/Peffley/pdf/nyhan-reifler%202007%20When%20Predictions%20Fail.pdf> (accessed 8 November 2023).

<sup>73</sup> S Lewandowsky, UKH Ecker & J Cook 'Misinformation and its correction: Continued influence and successful debiasing' (2012) 13(3) *Psychological Science in the Public Interest* 106–131 <https://journals.sagepub.com/doi/full/10.1177/1529100612451018> (accessed 8 November 2023).

contextual challenges such as data costs. While there are zero-rated services that facilitate online access,<sup>74</sup> such as Facebook's Free Basics,<sup>75</sup> which offers limited access to content in text format without audio, picture and video with additional data charges applying to links to further information, they come with their own challenges. Users of such zero-rated services may be vulnerable to misinformation spread through sensationalistic headlines and clickbait that may advance false narratives if they do not have access to the full content.<sup>76</sup>

To further support using varied measures to counter the spread of harmful and illegal content is the placement of various speed bumps. For example, Twitter was praised for creating more hurdles, albeit for a short period and for some tweets, to address false information disseminated by President Trump during the 2020 USA Election Day.<sup>77</sup> The company applied labelling, like Facebook, and hid like counts and retweets to counter the crowd-effect pull and required a user to add additional context before they shared a disputed tweet.

In practice, social media companies have much room for improvement. Poor enforcement of the miscellany of their content policies has amplified the spread of harmful and illegal content during critical periods such as elections. Though self-regulation in media is ideal, the poor indictment on self-policing by social media companies has invigorated calls for co-regulatory approaches and multistakeholder interventions for increased platform transparency and accountability. While the discussion on regulating social media is polarised, with little consensus on who and how to regulate, a desirable outcome is the enhanced protection of civic and political rights on these platforms. Context-specific interventions are also necessary for effective content moderation. The next section examines how social media companies performed during Kenya's elections.

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<sup>74</sup> A4AI 'The impacts of emerging mobile data services in developing countries' (2016) 8 [http://a4ai.org/wp-content/uploads/2016/05/MeasuringImpactsofMobileDataServices\\_ResearchBrief2.pdf](http://a4ai.org/wp-content/uploads/2016/05/MeasuringImpactsofMobileDataServices_ResearchBrief2.pdf) (accessed 8 November 2023).

<sup>75</sup> NW Wanjohi 'Free Basics in Kenya' (2017) <https://advox.globalvoices.org/wp-content/uploads/2017/07/KENYA.pdf> (accessed 8 November 2023).

<sup>76</sup> M Shearlaw 'Facebook lures Africa with free internet - but what is the hidden cost?' *The Guardian* 1 August 2016 <https://www.theguardian.com/world/2016/aug/01/facebook-free-basics-internet-africa-mark-zuckerberg> (accessed 8 November 2023)

<sup>77</sup> IA Hamilton 'Twitter did a better job than Facebook at reining in Trump's false election posts – experts' *Business Insider US* 5 November 2020 <https://www.businessinsider.co.za/twitter-facebook-trump-election-posts-misinformation-experts-votes-presidential-election-2020-11?r=US&IR=T> (accessed 8 November 2023)

## 2.4 In practice: Policy enforcement during Kenya's elections

The Kenyan context shares a similarity with other African countries in relation to the disproportionate enforcement of social media policies. Revenue generation may account for the dissimilar attention given to Africa by social media companies. For example, Facebook, the largest social networking site, accrues the highest Average Revenue Per User (ARPU) from the USA and Canada, Europe, and then Asia Pacific.<sup>78</sup> That being said, the more than 350 million African users contribute to the platforms' revenue and are owed a duty of care.<sup>79</sup> Concerted advocacy to promote human rights-based policy action in Africa to protect media freedom and meaningful participation through these sites is necessary.

Some social media companies have implemented a measure of country-specific interventions to address information integrity issues on their platforms, particularly during elections. Prior to the 2022 elections in Kenya, Meta, Twitter and TikTok committed to implementing a raft of interventions, including fact-checking partnerships, digital literacy programs, content moderation, local stakeholder engagements, and amplification of credible sources.<sup>80</sup> The platforms had also indicated that they were using both AI and human reviewers to 'reduce the spread of misinformation, detect and remove hate speech, improve digital literacy and help make political advertising more transparent' ahead of the 2022 elections in Kenya.<sup>81</sup> Twitter laudably had a Moment's section<sup>82</sup> with information to counter false and misleading information. It extended its interventions beyond election day to include the developments during the Supreme Court determination of the presidential election petition that drew intense public debate.<sup>83</sup>

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<sup>78</sup> Statista 'Facebook average revenue per user (ARPU) as of 4th quarter 2022, by region' <https://www.statista.com/statistics/251328/facebooks-average-revenue-per-user-by-region/> (accessed 8 November 2023).

<sup>79</sup> Statista 'Number of social network users worldwide in 2022, by region' <https://www.statista.com/statistics/454772/number-social-media-user-worldwide-region/> (accessed 8 November 2023).

<sup>80</sup> Madung (n 30).

<sup>81</sup> Meta 'How Meta is preparing for Kenya's 2022 general election' 20 July 2022 <https://about.fb.com/news/2022/07/how-metas-preparing-for-kenyas-2022-general-election/> (accessed 8 November 2023).

<sup>82</sup> Twitter 'The 2022 Kenyan general election is happening on Twitter' [https://blog.twitter.com/en\\_us/topics/company/2022/the-2022-kenyan-general-election-is-happening-on-twitter](https://blog.twitter.com/en_us/topics/company/2022/the-2022-kenyan-general-election-is-happening-on-twitter) (accessed 8 November 2023).

<sup>83</sup> Twitter 'Kenya 2022: All the latest about the presidential election petitions at the Supreme Court' <https://twitter.com/i/events/1564578494138368000> (accessed 8 November 2023).

For all their election commitments and informative policies, the scorecard with regard to implementation in the 2022 elections in Kenya was poor.<sup>84</sup> The online electoral information ecosystem was awash with mis/disinformation and hate speech that risked casting doubt on the integrity of the electoral process and fomenting violence in a context with a history of electoral violence.<sup>85</sup> Poor enforcement of the civic and election integrity, misinformation, hate speech, and violence policies was evidenced by weak moderation of such illegal and harmful content on the platforms.<sup>86</sup>

Research has revealed that harmful and illegal content in Kenya is most prevalent on Facebook and the eponymous WhatsApp, and, to a lesser degree, Twitter.<sup>87</sup> The resource investment in moderating content and taking the necessary action by social media companies to ensure compliance with their own community standards is incomparable to that of the Western world.<sup>88</sup> A study by Global Witness found that Meta was woefully unprepared and inefficient in moderating hate speech content in both English and Kiswahili ahead of Kenya's 2022 elections.<sup>89</sup> This failure was replicated in implementing its ad service, which Meta touted as adopting even stricter advertising standards in assessing compliance with its community standards.<sup>90</sup> The approval of hate speech ads intentionally submitted by the research team in both English and Kiswahili and in clear violation of Meta's policies laid bare the lopsided enforcement actions. Even after informing Meta of their experiment and the company claiming to intensify their content moderation before the election, no reinforcing action was taken, given that resubmitted hate speech ads were still accepted on the platform.<sup>91</sup> Further, the presence of

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<sup>84</sup> Madung (n 30).

<sup>85</sup> KICTANet & CIPESA 'Disinformation in Kenya's political sphere' (June 2022) & V Owino 'Kenya election: Deep fakes, propaganda, libel inundate social media' *The East African* 6 August 2022 <https://www.theeastafrican.co.ke/tea/news/east-africa/kenya-election-deep-fakes-propaganda-inundate-social-media-3904934> (accessed 8 November 2023).

<sup>86</sup> O Madung (n 30).

<sup>87</sup> AL Dahir 'WhatsApp and Facebook are driving Kenya's fake news cycle' *Quartz* 24 July 2017 <https://qz.com/africa/1033181/whatsapp-and-facebook-are-driving-kenyas-fake-news-cycle-ahead-of-august-elections> (accessed 8 November 2023).

<sup>88</sup> O Madung 'Kenya's already fragile elections now face a dangerous new enemy: Big tech platforms' *The Guardian* 7 April 2022 <https://www.theguardian.com/commentisfree/2022/apr/07/kenya-elections-2022-big-tech-platforms> (accessed 8 November 2023).

<sup>89</sup> Global Witness (n 30).

<sup>90</sup> Meta 'Our advertising principles' <https://www.facebook.com/business/about/ad-principles> (accessed 8 November 2023).

<sup>91</sup> Global Witness (n 30).

political ads with misinformation and ads displayed during campaign silence periods pointed to the disregard for proper enforcement of ad policies and compliance with national laws.<sup>92</sup>

Another study by the Institute for Strategic Dialogue (ISD) found that extremist groups such as Al-Shabaab exploited the inadequacy of moderating content in languages other than English to push extremist content, particularly on Facebook.<sup>93</sup> Media outlets associated with terror groups openly shared terrorist content and propaganda in Kiswahili, Arabic and Somali languages, unmoderated. Content that called for violence, including electoral violence, and the delegitimization of the Kenyan government, and calls for boycotting the election and for the excommunication of Muslim voters who participated in the exercise remained on the site.<sup>94</sup>

Worryingly, the National Cohesion and Integration Commission (NCIC)<sup>95</sup> threatened to recommend blocking Facebook if it failed to address online harms on its platforms during the 2022 Kenyan elections following the release of the findings by Global Witness.<sup>96</sup> While platform accountability is crucial, this indicates the poor understanding of human rights-centred approaches to addressing online harms by key implementing partners. Blocking social media platforms is a disproportionate response that has been implemented by countries such as Uganda blocking Facebook during the 2021 elections and Nigeria blocking Twitter in 2021.<sup>97</sup> In Nigeria's case, the seven-month ban was challenged before the Economic Community of West African States (ECOWAS) Court of Justice, which declared the ban unlawful and an infringement of freedom of expression, access to information and media freedom under the ICCPR and African Charter on Human and Peoples' Rights (African Charter).<sup>98</sup> Blocking

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<sup>92</sup> Madung (n 30).

<sup>93</sup> M Ayad, A Harrasy & M Abdullah 'Under-moderated, unhinged and ubiquitous: Al-Shabaab and the Islamic State networks on Facebook why Al-Shabaab and Islamic State pages and profiles in East African languages continue to plague Facebook' (2022) 4-5 <https://www.isdglobal.org/wp-content/uploads/2022/06/Undermoderated-Unhinged-and-Ubiquitous-al-shabaab-and-islamic-state-networks-on-facebook.pdf> (accessed 8 November 2023).

<sup>94</sup> M Ayad, A Harrasy & M Abdullah (n 93) 5-6.

<sup>95</sup> A statutory body tasked with among other duties promotion of national identity and values, and national reconciliation and healing. See NCIC <https://cohesion.or.ke/> (accessed 8 November 2023).

<sup>96</sup> D Miriri 'Kenya orders Meta's Facebook to tackle hate speech or face suspension' *Reuters* 29 July 2022 <https://www.reuters.com/world/africa/kenya-cohesion-watchdog-gives-meta-7-days-comply-with-regulations-2022-07-29/> (accessed 8 November 2023).

<sup>97</sup> Access Now 'No matter what they do, the world is watching' <https://www.accessnow.org/the-world-is-watching-uganda-elections/> (accessed 8 November 2023).

<sup>98</sup> *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) (Suing for & on behalf of concerned Nigerians) & The Federal Republic of Nigeria*, EWCS/CCJ/APP/23/21, defendants statement of facts, 28 September 2021 <https://gazettengr.com/wp-content/uploads/Twitter-Ban-Lawsuit-Ecowas-Court.pdf> (accessed 8 November 2023) & EFF 'Nigerian Twitter ban declared unlawful by court'

Facebook, the most popular social media app in Kenya,<sup>99</sup> would infringe freedom of expression for approximately 10 million users and impair online media freedom.<sup>100</sup> Research has shown that about half of online users are confident in their ability to identify false news through fact-checking and crowd-correcting efforts seen in user comments.<sup>101</sup> A proactive measure is for government, civil society, and social media companies to reinforce this appetite for accurate information by promoting media and digital literacy skills and ensuring proactive disclosure of public interest information.

On its part, Meta alleged to have taken action against more than 37 000 and 42 000 pieces of content for violating its hate speech and violence and incitement policies, respectively, on Facebook and Instagram in Kenya in the six months leading up to 30 April 2022.<sup>102</sup> This may likely represent a small fraction of harmful and illegal content removed from the platforms, which is symptomatic of the stark AI limitations in moderating violating content in Kenya. Mis/disinformation and hate speech purveyors leveraged the algorithmic ignorance of local languages, patios, and local context to side-step algorithmic content moderation penalties and sustain their messaging on these platforms.<sup>103</sup> The laxity of social media companies in applying focused measures similar to the Western context, such as the US, also played to their favour. Since companies increasingly rely on AI for content moderation, they must ensure these machines learn on local content, benefit from user input, and are effectively supplemented by human reviewers.<sup>104</sup>

Coordinated inauthentic behaviour manifested by humans and bots managing fake accounts, pushing falsehoods and propaganda, artificially enhancing engagement, and generally violating community standards similarly risks online political and electoral discourse in Kenya

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<https://www.eff.org/deeplinks/2022/07/nigerian-twitter-ban-declared-unlawful-court-victory-eff-and-partners> (accessed 8 November 2023).

<sup>99</sup> CRSM & TIFA Research (n 5) 11-12.

<sup>100</sup> Data Reportal 'Digital 2023: Kenya' <https://datareportal.com/reports/digital-2023-kenya> (accessed 8 November 2023).

<sup>101</sup> As above.

<sup>102</sup> Meta 'Preparing for elections' [https://about.meta.com/actions/preparing-for-elections-on-facebook/?utm\\_source=about.facebook.com&utm\\_medium=redirect](https://about.meta.com/actions/preparing-for-elections-on-facebook/?utm_source=about.facebook.com&utm_medium=redirect) (accessed 8 November 2023).

<sup>103</sup> ADDO 'How hate speech trolls targeted Kenya's 2022 elections' <https://disinfo.africa/early-detection-and-countering-hate-speech-during-the-2022-kenyan-elections-e0f183b7bdd1> (accessed 8 November 2023).

<sup>104</sup> MD Molina & SS Sundar 'When AI moderates online content: effects of human collaboration and interactive transparency on user trust' (2022) 27(4) *Journal of Computer-Mediated Communication* <https://academic.oup.com/jcmc/article/27/4/zmac010/6648459> (accessed 8 November 2023).



and many African countries.<sup>105</sup> Reports of government-sponsored disinformation through coordinated inauthentic behaviour during the Kenyan 2017 and 2022 elections bring to the fore the importance of effectively enforcing platform policies as a countermeasure.<sup>106</sup> The gravity of the coordinated inauthentic behaviour is further elaborated in the findings of a 2018 study that found that bot activity surges during election periods and influences online agenda-setting in a nefarious manner, usually by pushing negative and divisive content.<sup>107</sup> In Kenya, about a quarter of the top influencer accounts steering discourse on Twitter during the 2017 elections were machine-driven. Bots were also responsible for the dissemination of false news and divisive content. However, journalists and media houses accounted for a third of the influencers on Twitter and served as reliable sources of information to counter online mis/disinformation by humans and bots.<sup>108</sup> This evidence of the continued strong influence of professional journalists and media news sites as sources of information and agenda-setting offline and online in Kenya reinforces advocacy for protecting offline and online freedom of expression, including media freedom.

Recommendations of subjecting high-reach, hyper-partisan, and super spreader accounts with the potential to violate election integrity policies and sensitive voter information to pre-clearance before publication are worth considering cautiously.<sup>109</sup> Pre-clearance is more proactive and can pre-empt mis/disinformation, hate speech and other dangerous speech. While undoubtedly a resource-intensive endeavour, stakeholders can pay attention to Election Day or during the hearing or judgement delivery of any subsequent significant court cases.<sup>110</sup> However, pre-clearance requires establishing swift, effective and rights-based pre-clearance measures to avoid prior censorship. There should also be transparent reporting of pre-clearance decisions.

Given the inadequacies of AI moderation, social media companies and other stakeholders should prioritise local partnerships well-versed with the context, digital literacy initiatives, and amplification of educational and informational resources. While elevating authoritative

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<sup>105</sup> Meta 'Inauthentic behaviour' <https://transparency.fb.com/en-gb/policies/community-standards/inauthentic-behavior/> (accessed 8 November 2023).

<sup>106</sup> KICTANet & CIPESA (n 85).

<sup>107</sup> Portland Communications 'How Africa tweets' (2018) 4 [How-Africa-Tweets-2018.pdf](https://portlandcommunications.com/How-Africa-Tweets-2018.pdf) ([portlandcommunications.com](https://portlandcommunications.com)) (accessed 8 November 2023).

<sup>108</sup> As above.

<sup>109</sup> +Accountable tech 'Election integrity roadmap for social media platforms' 7 <https://accountabletech.org/wp-content/uploads/2020/09/Election-Integrity-Roadmap-for-Social-Media-Platforms.pdf> (accessed 8 November 2023).

<sup>110</sup> As above.

information is laudable, there should be a balance to avoid elevating the offline and online dominant voices. The uniqueness of the online space in breaking the gatekeeping barriers of legacy media and powerful actors, enhancing media plurality, and providing ordinary citizens with more control in shaping news narratives and driving discourse in the public sphere should not be impaired.

Evidently, social media companies have developed policies that govern the use of their platforms that include approaches to ensure compliance and enforcement. This discussion on implementing these policies generally and in the Kenyan context illustrates the inadequacy of self-regulation of social media in light of the implications on civic and political liberties. The next section examines emerging co-regulatory and multistakeholder approaches to enhance social media accountability.

### **3 Co-regulation: Emerging approaches to enhancing social media accountability**

Fear of government overregulation of the internet and social media that may give the government unprecedented control over information and communication and stifle innovation, expression, and meaningful participation long motivated the distrust of statutory measures.<sup>111</sup> The global state of human rights is discouraging, given global freedom<sup>112</sup> and freedom of the net<sup>113</sup> have been in perpetual decline for 16 and 12 years, respectively. Nevertheless, the global community is rethinking the predominant model of self-regulation of social media. Social media companies' accountability and transparency deficits have bolstered calls for co-regulatory interventions as social media is a vital institution that significantly influences the public sphere. It has to be held accountable and inspire public trust. This chapter envisions an approach beyond co-regulation that primarily focuses on the regulatory actors but rather advocates for a human rights-based approach to social media regulation and, generally, the evolving media ecosystem of the digital age. Importantly, this multistakeholder approach that benefits from in-depth stakeholder input at

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<sup>111</sup> *Zeran v America Online, Incorporated* 129 F.3d 327, 334 (4th Cir. 1997) paras 330 <https://www.eff.org/files/zeran-v-aol.pdf> (accessed 8 November 2023).

<sup>112</sup> Freedom House 'Freedom in the world 2022: The global expansion of authoritarian rule'(2022) [https://freedomhouse.org/sites/default/files/2022-02/FIW\\_2022\\_PDF\\_Booklet\\_Digital\\_Final\\_Web.pdf](https://freedomhouse.org/sites/default/files/2022-02/FIW_2022_PDF_Booklet_Digital_Final_Web.pdf) (accessed 8 November 2023).

<sup>113</sup> Freedom House 'Freedom in the net: Countering an authoritarian overhaul of the internet' (2022) <https://freedomhouse.org/sites/default/files/2022-10/FOTN2022Digital.pdf> (accessed 8 November 2023).

the national and international levels is a crucial building block to a human rights-based approach as long as the respect, protection and fulfilment of human rights is at the centre of the agreed regulatory measure.

Notably, some headway has been made in the Global North, with countries such as the United Kingdom, Australia, and Germany developing laws on platform accountability.<sup>114</sup> In late 2022, the EU passed the Digital Services Act (DSA), which will come into force in 2024.<sup>115</sup> In the US, the discourse has been protracted with little consensus.<sup>116</sup> The few African countries that have explored platform governance in their regulatory frameworks include Kenya, South Africa, Uganda, Ethiopia, and Zimbabwe, with legislation, and Nigeria, which has a draft law.<sup>117</sup> While social media accountability can be enhanced through regulatory interventions on aspects such as anti-trust and competition, as well as privacy and consumer protection, the following section of the assessment focuses on the intermediary liability of social media companies. The analysis below briefly looks at the two approaches adopted by the United States and the European Union and the provisions in select African countries.

### **3.1 United States of America: Section 230**

The USA's internet and social media regulatory position is important to this discourse, given that the internet companies that dominate the online zeitgeist, Meta, Twitter and Google, are American companies. The calibre of freeness or constraint adopted by the US regulatory framework will likely have global reverberations. America has historically adopted a zealously liberal approach to regulating media rights. The First Amendment constrains Congress from making any law that abridges freedom of speech or of the press.<sup>118</sup> Section 230 of the Communications and Decency Act (DCA) swooped in to shore up this protection with regard to the role played by providers of interactive computer services in facilitating freedom of

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<sup>114</sup> Reality Check Team 'Social media: How do other governments regulate it?' *BBC* 12 February 2020 <https://www.bbc.com/news/technology-47135058> (accessed 8 November 2023).

<sup>115</sup> The European Commission 'The Digital Services Act: Ensuring a safe and accountable online environment' [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en) (accessed 8 November 2023).

<sup>116</sup> VC Brannon & EN Holmes 'Section 230: An overview' (2021) *CRS Reports* 30 <https://crsreports.congress.gov/product/pdf/R/R46751> (accessed 8 November 2023).

<sup>117</sup> See the discussion on the next section on the laws.

<sup>118</sup> First Amendment, Constitution of the United States <https://constitution.congress.gov/constitution/amendment-1/> (accessed 8 November 2023).

expression and media freedom.<sup>119</sup> Section 230 epitomises the largely laissez-faire approach to internet regulation in America.

The underlying motivations for section 230 are laudable and arguably effective in as much as it sought to promote the development of the internet and tech innovation unhindered by government regulation and the threat of legal liability.<sup>120</sup> The section promotes industry self-regulation with the onus of determining internet content ostensibly placed in the hands of internet service providers and users instead of the government. Platforms have long coasted on the protections of section 230 that established the safe harbour principle that limits intermediary liability for content posted by third parties on their platforms. Section 230(1)(c) reads: ‘No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.’ Further, section 230(2) limits their liability for ‘any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected...’. However, section 230 immunity does not extend to Federal law crimes, intellectual property considerations, state laws consistent with section 230, communications privacy law, and sex trafficking law.<sup>121</sup>

Courts have broadly interpreted the provisions of section 230 to grant broad immunity to providers of interactive computer services for both content that they host or choose to take down.<sup>122</sup> This immunity persists as long as the service provider is not the author of the material and just the publisher.<sup>123</sup> *Scienter* is not considered by the courts.<sup>124</sup> Whether the provider is aware that the content is unlawful is also inconsequential. Attempts to hold providers accountable for targeted content distribution based on algorithmic determinations and recommender systems have also backfired. Courts have analogised algorithmic recommendations

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<sup>119</sup> Communications Decency Act 47 USC §230 <https://www.law.cornell.edu/uscode/text/47/230> (accessed 8 November 2023).

<sup>120</sup> *Zeran v America Online, Incorporated* (n 111).

<sup>121</sup> Section 230 (e) CDA.

<sup>122</sup> Brannon & Holmes (n 116) 46.

<sup>123</sup> *Zeran v America Online, Incorporated* (n 111) paras 330 – 334.

<sup>124</sup> As above. Also see *Barrett v Rosenthal* 146 P.3d 510, 520 (Cal. 2006) <https://www.eff.org/files/barrett-v-rosenthal.pdf> (accessed 8 November 2023).

with editorial decisions, given the content is not altered, which is protected under section 230.<sup>125</sup> As of November 2023, the Supreme Court is set to determine whether section 230(c)(1) immunises interactive computer services for targeted content recommendations.<sup>126</sup>

Section 230 has drawn polarised debate on whether and how it should be repealed or amended.<sup>127</sup> Calls for the amendment of the section have drawn bipartisan support from Democrats and Republicans, albeit for different reasons, and have inspired numerous proposals, largely unsuccessful.<sup>128</sup> However, defenders of section 230 have rightfully cautioned against the impact of reduced protections on internet censorship in and outside America.<sup>129</sup> The repeal or adulteration of section 230, altering the liability immunity on providers of interactive computer services, may trigger a domino effect that forces providers to overcorrect in moderating content to avoid liability—a consequence that section 230 sought to avoid.<sup>130</sup> While service providers have occasionally acquiesced to information requests, take-down orders, or content restriction demands from countries to enable their continued operation in the said national context, section 230 provided them greater legroom in their decision-making. A watered-down section 230 may be particularly dire for contexts grappling with authoritarian or hybrid regimes seeking to curtail media rights offline and online.

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<sup>125</sup> *Force v Facebook Inc* 934 F.3d 53, 57 (2d Cir. 2019) paras 65-70 (majority decision) <https://cases.justia.com/federal/appellate-courts/ca2/18-397/18-397-2019-07-31.pdf?ts=1564581604> (accessed 8 November 2023).

<sup>126</sup> *Gonzalez v Google LLC* 2 F.4th 871, Case No 18-16700 <https://www.supremecourt.gov/docket/docketfiles/html/public/21-1333.html> (accessed 8 November 2023).

<sup>127</sup> Brannon & Holmes (n 116) 30. Also see CW Crews ‘The case against social media content regulation’ CEI <https://cei.org/studies/the-case-against-social-media-content-regulation/> (accessed 8 November 2023); E Goldman ‘Want to learn more about section 230? A guide to my work’ [Want to Learn More About Section 230? A Guide to My Work \(UPDATED\) - Technology & Marketing Law Blog \(ericgoldman.org\)](https://ericgoldman.org/want-to-learn-more-about-section-230-a-guide-to-my-work-updated-technology-marketing-law-blog) (accessed 8 November 2023); E Goldman ‘Liability for User-Generated Content online: Principles for lawmakers’ (2019) <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2992&context=historical> (accessed 8 November 2023).

<sup>128</sup> Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (“FOSTA”) introduced exceptions to section 230 but its effectiveness is debatable. Also see Brannon & Holmes (n 116) 30.

<sup>129</sup> E Hellerstein ‘How changing a 26-word US internet law could impact online expression everywhere’ <https://www.codastory.com/authoritarian-tech/global-consequences-section-230/> (accessed 8 November 2023) & Goldman (n 127). Also see E Goldman ‘Internet immunity and the freedom to code’ (2019) 62 *Communications of the ACM* 22-24.

<sup>130</sup> W Duffield ‘Another Section 230 reform bill: Dangerous Algorithms Bill threatens speech’ <https://www.techdirt.com/2020/10/28/another-section-230-reform-bill-dangerous-algorithms-bill-threatens-speech/> (accessed 8 November 2023); FT Wu ‘Collateral censorship and the limits of intermediary immunity’ (2011) 87(1) *Notre Dame Law Review* 317–18 & *Zeran v America Online, Incorporated* (n 111) paras 333.

### 3.2 EU: The Digital Services Act

The EU's Digital Services Act (DSA)<sup>131</sup> has heralded the development of regional frameworks to enhance online safety, transparency and accountability of online intermediaries and platforms.<sup>132</sup> It is conceivable that the EU law will influence that of other regions, intergovernmental bodies, and countries, given what is commonly referred to as the 'Brussels effect'.<sup>133</sup> Case in point, the EU's 2018 General Data Protection Regulation (GDPR) not only elevated the regional block as the tech watchdog but also has an extraterritorial effect in shaping national legislative frameworks on data protection, including in several African countries such as Kenya.<sup>134</sup> Though still untested, having been passed on 16 November 2022, and with most of its provisions coming into effect in 2024, the thrust of the DSA is to promote a 'safe, predictable and trusted online environment' where fundamental human rights enshrined in the EU Charter are protected.

The DSA outlines a number of provisions to enhance the accountability of online platforms, particularly Very Large Online Platforms (VLOPs),<sup>135</sup> including the removal of illegal content as well as transparency and reporting obligations. The accrual of liability for harmful or illegal content on online platforms is outlined in safe harbour principles that conditionally limit or prevent liability. For example, where an intermediary service provider, such as an online platform, is a mere conduit of information, the service provider is protected from assuming responsibility for the content unless they initiate the transmission; select the recipients; and

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<sup>131</sup> DSA <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0825&from=en> (accessed 8 November 2023).

<sup>132</sup> Art 3(i) defines online platform as a hosting service that, at the request of a recipient of the service, stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation;

<sup>133</sup> The term Brussels effect was coined by Anu Bradford who characterised it as EU's 'strong and growing ability to promulgate regulations that become entrenched in the legal frameworks of developed and developing markets alike, leading to a notable "Europeanization" of many important aspects of global commerce.' See A Bradford 'The Brussels effect' (2012) 107 (1) *Northwestern University Law Review* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2770634](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770634) (accessed 8 November 2023).

<sup>134</sup> M Luisi 'GDPR as a global standard? Brussels' instrument of policy diffusion' <https://www.e-ir.info/2022/04/09/gdpr-as-a-global-standards-brussels-instrument-of-policy-diffusion/> (accessed 8 November 2023). Also see A Satariano 'G.D.P.R., a new privacy law, makes Europe world's leading tech watchdog' *The New York Times* 24 May 2018 <https://www.nytimes.com/2018/05/24/technology/europe-gdpr-privacy.html> (accessed 8 November 2023) & A Satariano 'E.U. takes aim at big tech's power with landmark Digital Act' *The New York Times* 24 March 2022 <https://www.nytimes.com/2022/03/24/technology/eu-regulation-apple-meta-google.html> (accessed 8 November 2023).

<sup>135</sup> Platforms and search engines with 'a number of average monthly active recipients of the service in the Union equal to or higher than 45 million, and which are designated as very large online platforms or very large online search engines pursuant to paragraph 4. See Art 33 DSA.

choose or modify the information.<sup>136</sup> This provision may address calls by proponents rallying for platform accountability for microtargeted messages and amplification of selected content, particularly that which has a negative effect on political choices and democratic processes such as elections.

Transparency obligations require clear, easily understandable and accessible terms and conditions, policies and procedures for using intermediary services, including content moderation and internal complaint handling system, remedies, and redress.<sup>137</sup> Policy enforcement measures should duly consider fundamental human rights, such as the freedom of expression and pluralism of the media.<sup>138</sup> In what would require a significant shift from the opaque operations of online platforms, the DSA imposes transparency reporting obligations on internet intermediaries, at least once a year, on content moderation.<sup>139</sup> Platforms like TikTok,<sup>140</sup> Facebook,<sup>141</sup> and Google<sup>142</sup> are already complying with this provision.

Some provisions are in line with already existing measures undertaken by platforms. For example, there is a requirement to temporarily suspend, for a reasonable time, the accounts of persistent posters of illegal content after issuing them with a prior warning.<sup>143</sup> Notorious users who often submit manifestly unfounded complaints may also have their accounts suspended.<sup>144</sup>

On online advertising, online platforms are required to ensure that a user can easily and clearly identify an advertisement, both the advertiser and the funder, and the parameters determining why the user sees the ad and how to change the parameters.<sup>145</sup> The law prohibits targeted advertising based on special categories of personal data. Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely

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<sup>136</sup> Art 4(1) DSA.

<sup>137</sup> Article 14(5) DSA

<sup>138</sup> Art 14(4) DSA.

<sup>139</sup> Art 15 DSA.

<sup>140</sup> TikTok ‘European Union (EU) – monthly active recipients report’ <https://www.tiktok.com/transparency/en/eu-mau/> (accessed 8 November 2023).

<sup>141</sup> Meta ‘Regulatory and other transparency reports’ <https://transparency.fb.com/data/regulatory-transparency-reports/> (accessed 8 November 2023).

<sup>142</sup> Google ‘Transparency report’ <https://transparencyreport.google.com/report-downloads?lu=report-24&hl=en> (accessed 8 November 2023).

<sup>143</sup> Art 23(1) DSA.

<sup>144</sup> Art 23 (2) DSA.

<sup>145</sup> Art 26 DSA.

identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited.<sup>146</sup> The subversive aspect of targeted advertising emerges from the curated amplification of harmful and illegal content that is socially divisive and detrimental to political decision-making and processes. It also enables echo chambers and filter bubbles that limit the vibrant exchange of ideas needed in a public sphere.

Transparency requirements also extend to the parameters of recommender systems of online platforms and seek to give users more control in influencing those variables.<sup>147</sup> The EU has also injected a size-based distinction in its regulatory approach, an aspect that the US is toying with in some of the proposed amendments to section 230 of DCA.<sup>148</sup> The thrust behind size-based distinctions to internet regulation recognises the variance in platforms that are purveyors of social harm and aims to confront the most pervasive. It also seeks to prevent stifling of innovation and market expansion that would likely impact smaller and new players, an undergirding principle of section 230 of the US DCA. Established and larger entities would shoulder compliance costs better than smaller, new entities.<sup>149</sup> Providers of very large online platforms and of very large online search engines are further required to assess systemic risks emerging from aspects such as the design, functioning or use of their systems and services and implementation of their policies, including fundamental human rights, civic discourse and elections.<sup>150</sup>

While pundits have raised concerns on enforcement, impact on fundamental rights such as free expression, and stifling of innovation, whether these long-held fears associated with

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<sup>146</sup> Art 26 (3) DSA. Article 4, (4), of Regulation (EU) 2016/679 defines profiling as ‘any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements;’

<sup>147</sup> Art 27 DSA.

<sup>148</sup> Protecting Americans from Dangerous Algorithms Act, H.R. 2154 (117th Cong. 2021), §2(C) and Limiting Section 230 Immunity to Good Samaritans Act, H.R. 277 (117th Cong. 2021).

<sup>149</sup> CS Bradford ‘Does Size Matter? An economic analysis of small business exemptions from regulation’ (2004) 8(1) *Journal of Small & Emerging Business Law* <https://www.sec.gov/info/smallbus/acsec/bradford-doessizematter.pdf> (accessed 8 November 2023) & E Goldman & J Miers ‘Regulating internet services by size’ (2021) *CPI Antitrust Chronicle* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3863015](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3863015) (accessed 8 November 2023).

<sup>150</sup> Art 26 DSA.



regulation of digital services, including social media companies manifest will become clearer with the implementation of the Act.<sup>151</sup>

### 3.3 Regulation on the African continent

Africa lacks a comprehensive continental guiding framework to enhance the accountability of social media companies as developed by the EU. Nevertheless, it should be reiterated that non-state actors, including social media companies, should adhere to the existing normative framework for human rights and respect human rights as articulated under the United Nations Guiding Principles on Business and Human Rights (UNGPs).<sup>152</sup> The general principles of the UNGPs are after all founded on the state's duty to respect, protect and fulfil human rights and fundamental freedoms, and the obligation of businesses to comply with applicable laws and respect human rights. That being said, a regional framework on social media accountability would have advantages given the disproportionate enforcement of social media policies in Global South regions, such as Africa, compared to Global North.<sup>153</sup> The collective force of the African context is necessary to enhance accountability that considers the unique context and diversity of the African continent. Importantly, this thesis calls for collective effort in Africa instead of fragmented national frameworks. The fragmentation of frameworks on platform governance may lead to uneven implementation of social media policies and varied actions to comply with domestic laws. Rather than adopting disparate frameworks on platform governance, it would be prudent for the African human rights system, in particular the African Commission on Human and Peoples' Rights (African Commission), to coordinate a multistakeholder process for the development of platform governance guidelines that are founded on international human rights law and are reflective of the African context be it in the form of a binding instrument, or initially a soft law such as a Model Law, Declaration or Guidelines. Lessons can be drawn (not copied) from other contexts that have already considered

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<sup>151</sup> Amnesty International 'What the EU's Digital Services Act means for human rights and harmful Big Tech business models' <https://www.amnesty.org/en/documents/pol30/5830/2022/en/> (accessed 8 November 2023) & J Mchangama 'Thoughts for the DSA: Challenges, ideas and the way forward through international human rights law' [https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2022/04/DSA\\_Commentary.pdf](https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2022/04/DSA_Commentary.pdf) (accessed 8 November 2023).

<sup>152</sup> UN Guiding Principles on Business and Human Rights [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf) (accessed 8 November 2023).

<sup>153</sup> Global Witness (n 30); Kaye (n 12) & Madung (n 30) & Takhshid (n 14).

and tested platform governance rules to enhance transparency and accountability. Notably, the African Union Convention on Cyber Security and Personal Data Protection (Malabo Convention) sets the gears in motion through a binding treaty that regulates personal data protection and cybersecurity.<sup>154</sup> It recognises the role of non-state actors including private sector enterprises in this endeavour.

While digital rights have been regulated in various countries, research has found multiple incidences of legislation that fail to meet the rights-based test and conflict with international human rights. For example, the findings of LEXOTA, Laws on Expression Online: Tracker and analysis, a tool that assesses regulation and government action on freedom of expression generally and disinformation in particular, raised concern about the emerging regulatory trends on disinformation.<sup>155</sup> Many of the laws suffered from an originality deficit, given they were transplanted from other contexts with minor changes to adapt to the local context, such as the disinformation law in Nigeria.<sup>156</sup> Assessed against international laws and standards, many of the laws fell short with broad and vaguely phrased provisions that do not sufficiently guide conduct, violating the legality requirement of the test of limitations of rights. Worryingly, are the disproportionate sanctions for violations with exorbitant fines and imprisonment provisions as found in Kenya's Computer Misuse and Cybercrimes Act (CMCA),<sup>157</sup> Mauritius' Information and Communication Technologies Act, 2001,<sup>158</sup> and Nigeria's Cybercrimes (Prohibition, Prevention, etc) Act, 2015.<sup>159</sup> The laws have been wielded to silence critical and dissenting voices of journalists, human rights defenders, political opponents, and civil society across the

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<sup>154</sup> Malabo Convention [https://au.int/sites/default/files/treaties/29560-treaty-0048\\_-\\_african\\_union\\_convention\\_on\\_cyber\\_security\\_and\\_personal\\_data\\_protection\\_e.pdf](https://au.int/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf) (accessed 2 June 2024). The Convention was adopted in 2014 and entered into force in June 2023. Angola, Benin, Chad, Congo, Egypt, Gabon, Gambia, Guinea-Bissau, Lesotho, Mauritania, Namibia, Niger, Sao Tome and Principe, Senegal and Zambia are the 15 countries that have ratified the Convention.

<sup>155</sup> LEXOTA <https://lexota.org/> (accessed 8 November 2023).

<sup>156</sup> Sahara Reporters 'Exposed: Nigerian Senator plagiarised Internet Bill from Singapore's Parliament' 24 November 2019 <https://saharareporters.com/2019/11/24/exposed-nigerian-senator-plagiarised-internet-bill-singapore%E2%80%99s-parliament> (accessed 8 November 2023).

<sup>157</sup> Secs 22 and 23 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%205%20of%202018> (accessed 8 November 2023).

<sup>158</sup> Sec 46(g), 46(ga) & 47 [https://www.icta.mu/documents/2021/11/ict\\_act.pdf](https://www.icta.mu/documents/2021/11/ict_act.pdf) (accessed 8 November 2023).

<sup>159</sup> Sec 24 (b) Cybercrimes (Prohibition, Prevention, etc) Act, 2015 [https://ictpolicyafrica.org/fr/document/h52z5b28pjr#:~:text=CYBERCRIMES%20\(PROHIBITION%2C%20PREVENTION%2C%20ETC\)%20ACT%2C%202015Explanatory,punishment%20of%20cybercrimes%20in%20Nigeria.](https://ictpolicyafrica.org/fr/document/h52z5b28pjr#:~:text=CYBERCRIMES%20(PROHIBITION%2C%20PREVENTION%2C%20ETC)%20ACT%2C%202015Explanatory,punishment%20of%20cybercrimes%20in%20Nigeria.) (accessed 8 November 2023).

continent from Zimbabwe,<sup>160</sup> Uganda,<sup>161</sup> Tanzania,<sup>162</sup> Cameroon,<sup>163</sup> Côte d'Ivoire,<sup>164</sup> and Kenya.<sup>165</sup>

However, no country has yet implemented a specific law on the accountability of digital intermediary services, but Nigeria attempted such a feat with the Draft Code of Practice for Internet Intermediaries, 2022.<sup>166</sup> Critics have worried about the implications of the Draft Code on human rights, such as freedom of expression and privacy, as well as enforcement challenges and stifling of innovation.<sup>167</sup> The country had previously tried to address disinformation with the Protection from Internet Falsehoods and Manipulation and Other Related Matters Bill 2019,<sup>168</sup> but the Bill was met with widespread criticism due to the potentially detrimental effect on freedom of expression.<sup>169</sup>

Section 56 of Kenya's CMCA introduces conditional liability on internet intermediaries generally with a measure of safe harbour guarantees by predicating civil or criminal liability on 'actual notice, actual knowledge, or willful and malicious intent, and not merely through omission or failure to act'. Walubengo and Mutemi have rightfully criticised the vague phrasing of safe harbour guarantees given the vulnerability to wide interpretation. They propose amending

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<sup>160</sup> LEXOTA 'Zimbabwe' <https://lexota.org/country/zimbabwe/> (accessed 8 November 2023).

<sup>161</sup> LEXOTA 'Uganda' <https://lexota.org/country/uganda/> (accessed 8 November 2023).

<sup>162</sup> LEXOTA 'Tanzania' <https://lexota.org/country/tanzania/> (accessed 8 November 2023).

<sup>163</sup> LEXOTA 'Cameroon' <https://lexota.org/country/cameroon/> (accessed 8 November 2023).

<sup>164</sup> LEXOTA 'Cote d'Ivoire' <https://lexota.org/country/cote-divoire/> (accessed 8 November 2023).

<sup>165</sup> LEXOTA 'Kenya' <https://lexota.org/country/kenya/> (accessed 8 November 2023).

<sup>166</sup> Draft Code of Practice for Internet Intermediaries, 2022 <https://nitda.gov.ng/wp-content/uploads/2022/06/Code-of-Practice.pdf> ((accessed 8 November 2023).

<sup>167</sup> Amnesty International 'Nigeria: NITDA Code of Practice must comply with international human rights law' <https://www.amnesty.org/en/documents/afr44/5818/2022/en/> (accessed 8 November 2023); O Oyewole 'Lawful interception of communications under The Nigeria Communications Act and the peculiarities of the NITDA Draft Code of Practice For Interactive Computer Platform/Internet Intermediaries' <https://www.mondaq.com/nigeria/telecoms-mobile-cable-communications/1217040/lawful-interception-of-communications-under-the-nigeria-communications-act-and-the-peculiarities-of-the-nitda-draft-code-of-practice-for-interactive-computer-platforminternet-intermediaries> (accessed 8 November 2023) & Templars 'Templars legislative watch NITDA Draft Code of Practice For Interactive Computer Platform/Internet Intermediaries' <https://www.templars-law.com/app/uploads/2022/06/Templars-Legislative-Watch-NITDA-Draft-Code-of-Practice-for-Internet-Platforms-16.06.2022-Final-Infographics-OCC.pdf> (accessed 8 November 2023).

<sup>168</sup> Protection from Internet Falsehood and Manipulation Bill 2019 <https://nass.gov.ng/documents/billdownload/10965.pdf> (accessed 8 November 2023).

<sup>169</sup> V Mabika & EC Ogu 'Internet impact brief: Nigeria's Protection from Internet Falsehood and Manipulation Bill 2019' <https://www.internet-society.org/resources/2022/internet-impact-brief-nigerias-protection-from-internet-falsehood-and-manipulation-bill-2019/> (accessed 8 November 2023).

the provision to base safe harbours on function, for example, ‘conduits, caching, hosting and information location.’<sup>170</sup>

In Ethiopia, section 8 of Proclamation No. 1185/2020 Hate Speech and Disinformation Prevention and Suppression Proclamation<sup>171</sup> imposes duties on social media service providers to take measures to ‘to suppress and prevent the dissemination of disinformation and hate speech’ on their platforms. The Proclamation provides a 24-hour timeframe for service providers to implement removal or take-down requests upon receipt of notice of violating content on disinformation or hate speech. The providers are tasked with developing policies and procedures to discharge their duties. However, the section does not provide for liability upon failure of the provider to implement the request. Shortly-timed takedown notices from states or other actors outside the courts and with short timelines are a double-edged sword. While they can ensure swift removal of unlawful content, particularly where there is a high risk of immediate and irreversible harm, the timeline may be insufficient to ensure a fair, transparent and efficient process. There is also the risk that platforms would choose to remove lawful content without proper assessment to avoid court processes or fines.<sup>172</sup> The threat to media rights is heightened more so in authoritarian contexts such as Ethiopia.

Section 8 oversight lies with the Ethiopian Broadcast Authority, which is tasked with developing public reports on social media compliance and undertaking public awareness and media literacy campaigns on disinformation. The Ethiopian Human Rights Commission has similar duties to tackle hate speech. While the Proclamation empowers the Council of Ministers to issue a Regulation elaborating on the section, as of November 2023, no such Regulation has been passed.

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<sup>170</sup> J Walubengo & M Mutemi ‘Treatment of Kenya’s internet intermediaries under the Computer Misuse and Cybercrimes Act, 2018’ (2018) 21 *The African Journal of Information and Communication* 16.

<sup>171</sup> Hate Speech and Disinformation Prevention and Suppression Proclamation <https://www.accessnow.org/cms/assets/uploads/2020/05/Hate-Speech-and-Disinformation-Prevention-and-Suppression-Proclamation.pdf> (accessed 8 November 2023).

<sup>172</sup> GPD ‘A rights-respecting model of online content regulation by platforms’ (2018) 18 & 32 <https://www.gpd-digital.org/wp-content/uploads/2018/05/A-rights-respecting-model-of-online-content-regulation-by-platforms.pdf> (accessed 8 November 2023).

Chapter XI of South Africa's Electronic Communications and Transaction Act (ECT Act)<sup>173</sup> introduced conditional limitation of liability of service providers defined as 'any person providing information system services.'<sup>174</sup> The extension of liability is subject to membership in a representative body with an official code of conduct.<sup>175</sup> The Act came into effect in 2009 with the recognition of the Internet Service Providers Association (ISPA) as an industry representative body. As of November 2023, it has 228 registered members.<sup>176</sup> The law contains safe harbour principles that outline the conditions that may lead to, limit or prevent the liability of service providers, including mere conduits, caching and hosting service providers, and information location tools. Liability varies for the different providers and is linked to aspects such as authorship, recipient selection, modification of information, knowledge of rights infringing content, or failure to act on a notice or takedown request for infringing content.<sup>177</sup> Service providers are not obligated to generally monitor the data that they transmit or store or unlawful activity.<sup>178</sup> The Minister of Communications may prescribe regulations for service providers to disclose alleged illegal activities or identification of users. The ECT Act goes a step further than Kenya's CMCA in defining the conditions for safe harbour guarantees. Uganda's part v of the Electronic Transactions Act (2011)<sup>179</sup> reads similarly to South Africa's ECT Act on conditional liability for internet intermediaries. In Zimbabwe, obligations and conditional immunity of service providers for third-party content are provided under section 379 (c) of the Criminal Law (Codification and Reform) Act (as amended by the Cyber and Data Protection Act).<sup>180</sup> Criminal liability is attached under some of the provisions.

A comprehensive analysis of the provisions of the above laws and their implementation falls outside the scope of this chapter and thesis, but the above was to show that there are scattered provisions to address accountability of internet intermediary service providers such as social media companies. A conditional liability approach emerges from these provisions. Other than the

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<sup>173</sup> Electronic Communications and Transaction Act (25 of 2002) [https://www.internet.org.za/ect\\_act.html](https://www.internet.org.za/ect_act.html) (accessed 8 November 2023).

<sup>174</sup> Sec 70 ECT Act.

<sup>175</sup> Sec 72 ECT Act.

<sup>176</sup> ISPA 'List of members' <https://ispa.org.za/membership/list-of-members/> (accessed 8 November 2023).

<sup>177</sup> See secs 73 and 74 ECT Act.

<sup>178</sup> Sec 78 ECT Act.

<sup>179</sup> ECA <https://ulii.org/akn/ug/act/2011/8/eng%402011-03-18> (accessed 8 November 2023).

<sup>180</sup> Criminal Law (Codification and Reform) Act [https://www.veritaszim.net/sites/veritas\\_d/files/Cyber%20%26%20Data%20Protection%20Act%20Cap1207%20No%205%20of%202021%20gaz%202022-03-11.pdf](https://www.veritaszim.net/sites/veritas_d/files/Cyber%20%26%20Data%20Protection%20Act%20Cap1207%20No%205%20of%202021%20gaz%202022-03-11.pdf) (accessed 8 November 2023).

brief provisions in the CMCA, Kenya lacks strong legal provisions to enhance social media platform accountability despite research indicating there is a public appetite for the government to co-regulate with social media companies to enhance their accountability, but not overreach.<sup>181</sup> Previous attempts to regulate social media platforms were unsuccessful through the former Electronic Transactions Bill of 2007, which was modelled after the EU Commerce Directive but lacked adequate safe harbour safeguards.<sup>182</sup> Revisiting chapter four of this thesis, Kenya has legislation on illegal and harmful content in offline and online media, including the Constitution,<sup>183</sup> the CMCA, the NCIC Act,<sup>184</sup> and the Kenya Information and Communications Act<sup>185</sup>. However, the regulatory weakness with regard to ensuring the accountability of social media companies is concerning, with human rights implications, including media rights and meaningful political participation.

#### **4 Towards rights-based approaches to social media accountability**

The discourse around emerging regulatory approaches for social media accountability generally reveals significant distrust in empowering a singular entity to regulate social media, especially with regard to addressing the challenges emerging from harmful and illegal content online. Firstly, social media companies are not trusted to self-police. Although they have policies in place, platforms have a poor record of enforcement that worsens outside Global North countries. On the other hand, there is little trust that governments will not overstep in their regulation, which would be detrimental to fundamental freedoms such as media rights and meaningful political participation. Infringing measures such as restrictive laws and actions that violate human rights justify concerns of heavy-handed government approaches regulating the internet and social media platforms in Africa. The quandary that emerges is how to effectively hold social media companies accountable without curtailing fundamental rights and freedoms and stifling innovation. Arguably, the regulatory answer lies in basing laws and policies on

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<sup>181</sup> CRSM & TIFA Research (n 5) 23

<sup>182</sup> A Comminos 'The liability of internet intermediaries in Nigeria, Kenya, South Africa and Uganda: An uncertain terrain' (2012) [https://www.apc.org/sites/default/files/READY%20-%20Intermediary%20Liability%20in%20Africa\\_FINAL\\_0.pdf](https://www.apc.org/sites/default/files/READY%20-%20Intermediary%20Liability%20in%20Africa_FINAL_0.pdf) (accessed 8 November 2023).

<sup>183</sup> For example, articles 33 of the Constitution.

<sup>184</sup> Act No 8 of 2008 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2012%20of%202008> (accessed 8 November 2023). See sec 13 and 62.

<sup>185</sup> No. 2 of 1998 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%202%20of%201998> (accessed 8 November 2023).

advancing human rights and decentralising regulatory powers by providing a process and system that benefits from multistakeholder input and oversight by platforms, governments, the private sector, international human rights bodies, and civil society.

International human rights law (the UN and African normative framework) is the lodestar for a human rights-based approach at the international level. The UNGPs, also known as the Ruggie framework, although non-binding, articulate the responsibilities of businesses to respect human rights. Like a tripod stool, it sits on three principles: state duty to protect human rights, business responsibility to respect human rights, and access to remedy.<sup>186</sup> As a point of departure, this thesis acknowledges that the primary duty to respect, protect and fulfil human rights rests on the state and should not be offloaded on other actors. As reflected by several authors and argued in chapter three, there is a need to rethink the narrowed responsibility of businesses only to respect human rights.<sup>187</sup> The UNGPs include some obligations to protect and fulfil under the responsibility of businesses to respect human rights found under the human rights' due diligence requirements.<sup>188</sup> Therefore, arguments to extend the responsibility to protect and fulfil human rights to businesses are legitimate. Applying the binary description of negative and positive rights to explore this argument, the right to respect is a negative right that requires an actor to refrain from infringing on human rights. On the other hand, the duties to protect and fulfil are positive rights requiring an actor to take measures to prevent the violation of human rights and provide a remedy in the event of such violation.

The African Charter uniquely introduced the language of duties beyond state actors and includes individual duties to family, society, states, other legally recognised communities and the international community.<sup>189</sup> However, the phrasing still adopts the language of respect for the

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<sup>186</sup> The Ruggie framework is named after Prof John Ruggie of Harvard University who was appointed by the United Nations Secretary General at the request of the UN Human Rights Council as the Special Representative (SRSG) to investigate issues on business and human rights. His report with the proposed framework provided the direction for the UNGPs.

<sup>187</sup> D Bilchitz 'The Ruggie framework: An adequate rubric for corporate human rights obligations?' (2010) 7(12) *Sur –International Journal of Human Rights* 204 - 215; D Bilchitz *Fundamental rights and the legal obligations of business* (2021) 59-60; S Deva 'Covid-19, business and human rights: A wake-up call to revisit the "protect, respect and remedy" framework?' (2021) 23 *International Community Law Review* 433 & F Wettstein *Multinational corporations and global justice: Human rights obligations of a quasi-governmental institution* (2009) 305.

<sup>188</sup> S Deva 'Mandatory human rights due diligence laws in Europe: A mirage for rightsholders?' (2023) *Leiden Journal of International Law* 3, 6 & 25.

<sup>189</sup> Arts 27-29 African Charter on Human and Peoples' Rights <https://au.int/sites/default/files/treaties/36390-treaty-0011 - african charter on human and peoples rights e.pdf> (accessed 8 November 2023).

rights of others. The African Commission has also elaborated that the duty to respect also extends to corporations and companies, and further, these bodies should ensure their actions and operations comply with international human rights.<sup>190</sup> Arguably, the UN framework implies that the duties of non-state actors can extend beyond duty to respect in instruments such as the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (commonly referred to as the UN Declaration of Human Rights Defenders).<sup>191</sup> The instrument underscores that the primary duty rests on states. Nevertheless, this opens a window to break the mould and narrowly extend the purview of responsibilities to non-state actors such as social media companies beyond responsibility to respect. Already, with bodies such as the EU setting up legal requirements on businesses such as Big Tech and the ongoing process to develop a Business and Human Rights Treaty,<sup>192</sup> it reflects a shift from the underlying argument of the Ruggie framework that the responsibilities to businesses emanate from social as opposed to legal expectations.<sup>193</sup> There is room for further reasonable adjustments to the Ruggie framework.

Social media companies hold considerable power in influencing the realisation of media rights online. The link between the realisation of these rights and meaningful political participation has been explored in this thesis. The policies and actions of social media companies, including content moderation and political advertising, have an immeasurable influence on the quality of engagement in the public sphere and, ultimately, meaningful political participation of the electorate (presumably informed voters). Free and independent media also contribute to free and fair elections. While the policies exist, failure to effectively enforce them threatens media rights online and meaningful public and political participation. If online violent content leads to offline violence, the rights to privacy, life and personal integrity are at risk.

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<sup>190</sup> State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment paras 56-58 <https://achpr.au.int/en/node/845> (accessed 8 November 2023).

<sup>191</sup> UN Declaration of HRDs <https://www.ohchr.org/sites/default/files/Documents/Issues/Defenders/Declaration/declaration.pdf> (accessed 8 November 2023).

<sup>192</sup> OHCHR 'BHR treaty process' <https://www.ohchr.org/en/business-and-human-rights/bhr-treaty-process> (accessed 8 November 2023).

<sup>193</sup> Human Rights Council 'Protect, respect and remedy: A framework for business and human rights', A/HRC/8/5 (7 April 2008) para 54 <https://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/a-hrc-8-5.doc> (accessed 8 November 2023).



Kenya's electoral history, for example, evidences how unmoderated proliferation of hate speech online can cause, contribute or exacerbate election violence.

As of 2023, the industry is largely self-regulated, although some individual countries and the EU have established co-regulatory frameworks that largely adopt a conditional liability approach, while other countries, such as the US, offer broad immunity. Be that as it may, social media companies still have disproportionate power in developing and enforcing policies on the exercise of freedom of expression and media freedom on their platforms. An argument for reinforcing their duties beyond a responsibility to respect is shored up by the vast sphere of influence occupied by these companies.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) spearheaded a multistakeholder engagement to develop global guidelines for regulating digital platforms. The Guidelines follow suit from the UNGPs by crafting the duties as a responsibility to respect human rights but with elements of the duty to protect in the human rights' due diligence requirements. These include implementing human rights safeguards, undertaking risk assessments, and requiring access to a remedy in cases of content moderation.<sup>194</sup> Interestingly, in the 2021 report on transparency and accountability in the digital age, the proposed UNESCO approach provided that internet 'Companies should explicitly recognise they have an obligation to *protect* human rights, and particularly freedom of expression and access to information, and the privacy of their users;' (own emphasis)<sup>195</sup> Importantly, the guidelines for regulating digital platforms provide that digital platforms undertake specific measures with relation to election integrity including transparent risk assessments related to election integrity followed by mitigation measures.<sup>196</sup> There is particular emphasis on political advertising in this regard. Digital platforms should also engage with relevant stakeholders. Other non-state actors have also proposed human rights guidelines for social media platforms.<sup>197</sup>

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<sup>194</sup> UNESCO 'Guidelines for the governance of digital platforms: safeguarding freedom of expression and access to information through a multi-stakeholder approach' (2023) <https://unesdoc.unesco.org/ark:/48223/pf0000387339> (accessed 8 November 2023).

<sup>195</sup> UNESCO (n 6) 1-2.

<sup>196</sup> UNESCO (n 195) paras 85, 86, 107, 131, 132, 136 & 137.

<sup>197</sup> GNI Principles <https://globalnetworkinitiative.org/gni-principles/#:~:text=GNI%20Participants%20commit%20to%20implementing,of%20these%20human%20rights%20globally> (accessed 8 November 2023) & GPD '(n 172) 21.

Moving forward, a multipronged intervention that extends beyond the law is also advisable. There are more proactive actions for promoting the democratising potential of the online sphere by holding social media companies accountable and creating a space for rich public discourse essential to improving meaningful political participation and contributing to free and fair elections and healthy democracies. Stakeholders across different countries have developed initiatives to enhance social media accountability. In Kenya, social media companies have collaborated with factchecking organisations such as AfriCheck,<sup>198</sup> and Pesa Check<sup>199</sup> to improve context-specific content moderation and promote an accurate and effective information ecosystem. Further, the Council for Responsible Social Media in Kenya is a multistakeholder consortium that seeks to drive the discourse on addressing online harms, improving online safety, and holding social media platforms accountable while balancing fundamental rights such as freedom of expression.<sup>200</sup> There are also plans to form a local coalition on content moderation and freedom of expression spearheaded by Article 19.<sup>201</sup> Consultation with the Council for Responsible Social Media is necessary to avoid duplicity. Key in these interventions is the balance of enhancing social media accountability and rights-based measures. The full ambit of respecting, protecting, promoting and fulfilling human rights should be the guiding light of the interventions that include responsibilities to state and non-state actors in varying degrees.

There is evidence of platforms' willingness to undertake some measure of their corporate social responsibility. Further, the economic incentive emanating from revenue loss, advertiser and user flight, and liability can be leveraged. Case in point, Meta, the Facebook Oversight Board, and Google have organised and participated in various stakeholder engagements with African partners as well as forums and conferences such as the Internet Governance Forums, Forum on Internet Freedom in Africa (FIFAfrica), and the Digital Rights and Inclusion Forum (DRIF).<sup>202</sup> These are crucial opportunities for honest stakeholder feedback to inform social media policies and actions in Kenya and Africa. Other platforms like Twitter and TikTok should create and/or accept more opportunities for multistakeholder engagement in Kenya and Africa.

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<sup>198</sup> Africa Check <https://africacheck.org/who-we-are> (accessed 8 November 2023).

<sup>199</sup> Pesa Check <https://pesacheck.org/> (accessed 8 November 2023).

<sup>200</sup> Accountable Big Tech 'Home' <https://accountablebigtech.com/> (accessed 8 November 2023).

<sup>201</sup> Article 19 'Content moderation and freedom of expression: Bridging the gap between social media and local civil society' (June 2022) <https://www.article19.org/wp-content/uploads/2022/06/Summary-report-social-media-for-peace.pdf> (accessed 8 November 2023).

<sup>202</sup> The author of this thesis has participated in these engagements.

## 5 Conclusion

The preceding discussion explores self-regulation of social media platforms, and the report card is disappointing. Self-policing of social media without government intervention or overreach would have been ideal. However, poor enforcement of self-regulatory policies and the threats to free expression, meaningful political participation, free and fair elections, and democracy have backstopped calls for more multistakeholder involvement to reinforce platform transparency and accountability.<sup>203</sup> Opaque practices by online platforms, particularly the big three, Meta, Twitter, and Google, and the increasingly popular TikTok depict an architecture that requires a transparency and accountability boost by external players. When content moderation practices, targeted advertising, and algorithms manipulate voter decision-making and negatively impact elections and democracy, the arguments for co-regulatory approaches gain more traction. More so in light of evidence that profit trumps human rights considerations in the decisions of social media platforms and their uneven attention to non-Western contexts such as Kenya.

Statutory regulation solely in the preserve of national governments is similarly resisted, given scepticism of strict human rights commitments by many states.<sup>204</sup> This distrust is heightened in authoritarian contexts and weak democracies that may implement laws and policies that violate human rights. This state of affairs necessitates digital rights activists, civil society, academics and other stakeholders to sustain and ratchet up advocacy for rights-based regulation and action. While the UNGPs and developing frameworks provide for corporate responsibility to respect human rights primarily, the influence of businesses such as social media companies on the online exercise of media rights, which affects other rights such as meaningful political participation and even the right to life supports arguments for a narrow extension of the duty to protect and fulfil human rights on such businesses. This will go beyond the current limited provisions under the responsibility to respect.

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<sup>203</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/38/35, 6 April 2018 <https://www.ohchr.org/en/documents/thematic-reports/ahrc3835-report-special-rapporteur-promotion-andprotection-right-freedom> (accessed 8 November 2023); D Kaye *Speech Police: The Global Struggle to Govern the Internet* (2019) 10-12 & W Roberts 'Big tech platforms face reckoning on accountability' 8 March 2023 <https://www.ibanet.org/Big-tech-platforms-face-reckoning-on-accountability> (accessed 8 November 2023).

<sup>204</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/38/35 (n 202) & Al Jazeera English 'Should the UN regulate the internet?' [https://www.youtube.com/watch?v=d8fTgTrb3CQ&ab\\_channel=AlJazeeraEnglish](https://www.youtube.com/watch?v=d8fTgTrb3CQ&ab_channel=AlJazeeraEnglish) (accessed 8 November 2023).

Overall, approaches to the regulation of platform accountability should be multilateral and multistakeholder involving governments, mandated international human rights bodies, the private sector, the technical community, civil society and the public.<sup>205</sup> Critically, these interventions should be strongly founded on respecting, protecting, promoting, and fulfilling human rights.

However, the ongoing search for a more nuanced regulatory approach to reinforce platform accountability, protect digital rights during elections and generally enhance democracy is contributing to disparate national regulations. These provisions may be unevenly implemented by social media platforms. Further, without proper transparency and stakeholder oversight, authoritarian contexts may impose restrictive requirements on platforms to the detriment of human rights. Unlike the EU, a distinct African framework is lacking but much needed. This chapter proposes that the African Commission coordinates a multistakeholder process with governments, regulatory bodies, civil society, and users to develop a rights-based transparency and accountability framework for digital platforms reflective of the continental context and needs. Reference can be made to relevant instruments such as the EU framework and UNESCO's guidelines for digital platforms.

The vibrant media and civil society sector and politically engaged public are crucial voices for the Kenyan regional engagement. On the institutional side, the participation of the statutory regulator, the Communication Authority of Kenya, and the statutory self-regulator, the Media Council of Kenya, as well as relevant government representatives is inevitable. Collectively, stakeholders can strengthen the national and continental call for enhanced social media transparency and accountability in Africa to improve media rights, elections, and democratic culture.

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<sup>205</sup> NDI 'Influencing the internet: Democratizing the politics that shape internet governance' (2022) 16-18 [https://www.ndi.org/sites/default/files/NDI%20Norms%20White%20Paper%20May%202022\\_1.pdf](https://www.ndi.org/sites/default/files/NDI%20Norms%20White%20Paper%20May%202022_1.pdf) (accessed 8 November 2023).

## CHAPTER SIX: CONCLUSION

### 1 Introduction

In exploring a rights-based approach to media protection in the digital age for meaningful political participation of the electorate in Kenya, this thesis posed six research questions. It then proceeded to explore the research questions in five chapters canvassing a historical outlook into the evolution of media freedom in Kenya and the influence on political participation and elections, political participation and media protection under the international and national normative framework, and approaches to enhancing accountability for one of the new governors of online media freedom, social media companies, who also impact political participation and elections. The theories of the public sphere by Jürgen Habermas and the political economy of the media provided a discursive lens.<sup>1</sup> Below is a synthesis of the discussion in the five chapters and the answers to the research questions. Additionally, this concluding chapter frames the proposed contextualised human rights-based approach to media regulation in the digital age for enhanced media freedom that leverages the opportunities and confronts the challenges to media freedom in Kenya. Consequently, the media can effectively play its role in facilitating meaningful political participation and promoting free and fair elections in Kenya.

### 2 The impact of the evolution of Kenyan traditional and online media on media freedom and meaningful political participation of the electorate in Kenya

Through a historical prism, chapter two of this thesis explores how the metamorphosis of Kenyan media from pre-colonial times to the recent 2022 elections has influenced media freedom, meaningful political participation and elections in Kenya. The underlying assumption is that when media is free, independent, pluralistic and enabled to effectively play its normative functions of public educator, debate forum, watchdog, and campaign platform, it positively contributes to the meaningful political participation of a well-informed electorate and free and fair elections. A free, independent and plural media is indispensable to the chimerical but

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<sup>1</sup> J Habermas *The structural transformation of the public sphere* (translated by T Burger) (1989).

desirable Habermas public sphere that allows for a free and accessible space for rational-critical debate by the public towards reasoned decision-making in democratic processes such as elections. Pivoting from the elitist connotations of rational and critical debate, this thesis calls for meaningful public debate.

The chapter argues that although Kenyan traditional mainstream media (broadcast and print) has been described as robust, vibrant and relatively independent, it is hamstrung from effectively undertaking its institutional functions by various factors, including politics, market economy, media ownership, peace and conflict, social demands, and some restrictive media laws and practices. The chapter depicts this media evolution as an inchoate media liberalisation endeavour. Traditional Kenyan mainstream media has perpetually struggled to shed different yokes that constrained its independence and normative functionality. In pre-independence times, it was the burden of reporting for colonial over African interests. In post-independence times and the struggle for multi-democracy, it had to resist government pressures to conform to the developmental theory of the media that emphasised positive rather than accurate, objective, truthful and critical reporting. It was also faced by a political establishment hostile towards critical media that actively harassed, attacked and attempted to silence media. In the different epochs of time, media freedom was seen as diametrically opposed to political interests to the detriment of the public good and democratic development.

While political hostility has waned over the years, the level of media freedom still ebbs and flows depending on the social, political, economic and legal zeitgeist. Different regimes have exploited restrictive laws and law enforcement action to silence, harass, attack, and constrain media. Co-option of the media is a patent threat. Case in point, all previous and current presidents have an ownership stake in mainstream traditional media and, resultantly, have some level of control in agenda setting and news framing. Media owners have also been known to protect their economic interests by sometimes bowing to political over public interests to ensure their business survival. Illegal broadcasting bans after the 2007 elections and targeted signal interruption of major media houses after the 2017 elections justified on national security and public order grounds also illustrate some of the contentious government measures to control the media and information in Kenya. This chapter finds that mainstream traditional media still contends and confronts interference from political and economic fronts that chip away at its

independence, illustrating the political economy of Kenyan media and the bastardisation of the Kenyan public sphere.

This clash is most evident during critical periods such as elections when political stakes are high, and the media's role as a watchdog, educator, debate mediator and campaign platform in the public sphere is crucial. Although Kenyan traditional mainstream media has punctuated episodes of substantive agenda-setting towards building an informed electorate, promoting free and fair elections, and reporting for democracy, this has not been consistent. During the contentious 2007 elections, several reports found that the media, especially local language radio stations, were complicit in stoking the flames of Kenya's most violent post-election period through their framing approaches.<sup>2</sup> Mainstream traditional media overcompensated by adopting solution-focused peace journalism as a mitigating strategy to quell the violence and restore peace. This continued into the 2013 electoral cycle, leading to criticism that the media abdicated its normative role to deliver objective, truthful and fair reporting in the pursuit of peaceful over free and fair elections.<sup>3</sup>

Information gatekeeping by mainstream traditional media, in the face of a population eager for free and diverse avenues for expression, information and participation, provided an entry point for greater adoption of new media in the information and communication landscape and catapulted online platforms such as social media as key sources of information and debate, especially during the 2017 and 2022 elections. The contemporary media space is complex, diverse, and shared by traditional and new media. Social media represents the second most

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<sup>2</sup> BBC 'The Kenyan 2007 elections and their aftermath: The role of media and communication' (April 2008) 1 *Policy Briefing* 14-15 [http://downloads.bbc.co.uk/worldservice/trust/pdf/kenya\\_policy\\_briefing\\_08.pdf](http://downloads.bbc.co.uk/worldservice/trust/pdf/kenya_policy_briefing_08.pdf) (accessed 8 November 2023); CIPEV 'Report of the Commission of Inquiry into the Post-Election Violence (CIPEV)' (2008) 296 <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1004&context=tjrc-gov> (accessed 8 November 2023) & IREC 'Report of the Independent Review Commission on the general elections held in Kenya on 27 December 2007' (2008) 97-201 [https://aceproject.org/regions-en/countries-and-territories/KE/reports/independent-review-commission-on-the-general/at\\_download/file](https://aceproject.org/regions-en/countries-and-territories/KE/reports/independent-review-commission-on-the-general/at_download/file) (accessed 8 November 2023).

<sup>3</sup> C Odote 'The 2013 elections and the peace narrative' in N Cheeseman, K Kanyiga & G Lynch (eds) *The Oxford handbook of Kenyan politics* (2020) 99; D Galava 'From watchdogs to hostages of peace' in HM Mabweazara (ed) *Newsmaking cultures in Africa* (2018) 313-315; JD Long & others 'Kenya's 2013 elections: Choosing peace over democracy' (2013) 3 *Journal of Democracy* 143-144 & KHRC 'The democratic paradox: A report on Kenya's 2013 general elections' (2014) 21-22 <https://www.khrc.or.ke/mobile-publications/civil-political-rights/21-democratic-paradox-a-report-on-kenya-s-2013-general-election/file.html> (accessed 8 November 2023).

popular news source among Kenyans after television.<sup>4</sup> Social media companies such as Meta (Facebook's owner), Twitter (now X) and Google (YouTube's owner) are 'the internet' for many people and arguably represent mainstream online media.

Even traditional mainstream media recognises audience engagement in new media and has established a presence in online media through websites and social media accounts to tap into the online community. The news creation, selection, framing and dissemination process that fosters and steers public debate and influences state, public and voter decision-making is decentralised with contributions from professional journalists, peripheral journalists such as bloggers, social media influencers and comedians, and ordinary citizens. Admittedly, professional journalists still have an upper hand and are instrumental in shaping agendas in Kenya's traditional and new media. A relatively rich plurality of voice exists in traditional and online spaces in Kenya, and the vibrancy in debate and dispersion of watchdog functions manifests during election periods towards enhanced meaningful political participation of the electorate and electoral accountability. However, per the structural theory of vote choice, the tendency to vote based on tribal, ethnic, and regional lines as opposed to other shared ideological and policy positions outside of group interests is an Achilles' heel of voter decision-making in Kenya.

However, the complementary and alternative media opportunities enabled by online media have not birthed a utopia of information and communication bliss. The unmediated or poorly mediated nature of discourse in online media platforms and the absence of journalistic ethics have led to the proliferation of harmful and illegal content that has atrophied the democratising potential of the internet, prompting dystopian predictions. The creation of information echo chambers that engender ideological pockets that reinforce biases as opposed to a vibrant clash of ideas persists. Habermas himself cast doubt on the democratising potential of the internet in light of the potential to create fragmented publics.<sup>5</sup> Incivility in online discourse sometimes negates its potential for rich meaningful debate that should lead to reasoned decision-making. The spread of propaganda, hate speech, misinformation and disinformation by both state

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<sup>4</sup> CRSM & TIFA Research 'National 2022 report on disinformation & the role of big tech in Kenya' 11 [https://accountablebigtech.com/wp-content/uploads/2023/01/Public-Opinion-Research-on-Disinformation-Big-Tech-Harms-DISSEMINATED-REPORT\\_Final-1.pdf](https://accountablebigtech.com/wp-content/uploads/2023/01/Public-Opinion-Research-on-Disinformation-Big-Tech-Harms-DISSEMINATED-REPORT_Final-1.pdf) (accessed 8 November 2023).

<sup>5</sup> J Habermas 'Political communication in media society: Does democracy still enjoy an epistemic dimension? The impact of normative theory on empirical research.' (2006) 16(4) *Communication Theory* 423-424.



and non-state actors is more prevalent online compared to traditional media. This threatens access to credible information necessary to inform public debate and decision-making in electoral contexts. The weaponization of information to manipulate public decision-making and engineer consent materialises in both traditional and online media, gravely threatening the development of an informed electorate who can actively and meaningfully participate in the electoral process. This study finds that some restrictive laws ostensibly aimed at addressing information pollution online, such as the Computer Misuse and Cybercrimes Act (CMCA), have unjustifiably limited online media freedom in Kenya. More so when the government uses these laws as a smokescreen to control information by targeting critical voices such as journalists and human rights defenders. Further, access to the internet and high data cost hurdles obstruct some segments of the population, particularly rural and disadvantaged groups, from engaging online. Although Kenya has a relatively high mobile and internet penetration, the youth and urban populations are the main beneficiaries of online media opportunities for democracy. Inversely, they are also vulnerable to harmful and illegal content if not equipped with media and information literacy skills.

This chapter finds that different collaborating and competing forces continue to influence Kenya's blended media space of offline and online media. On one side is a vibrant, robust traditional and online media mediating between the state and a relatively politically conscious citizenry that positively influences public and political participation, reports on election and democracy news, and holds electoral stakeholders accountable. The appetite for political participation can be inferred from the above-average voter turnout in Kenyan elections— 68% in 1992,<sup>6</sup> 65.4% in 1997,<sup>7</sup> 57.2% in 2002,<sup>8</sup> 69% in 2007<sup>9</sup>, 85.9% in 2013,<sup>10</sup> 78% in 2017,<sup>11</sup> and

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<sup>6</sup> P Wanyande 'Electoral politics and election outcomes in Kenya' (2006) 31 *Africa Development* 67-68.

<sup>7</sup> IPU 'Kenya parliamentary chamber: Bunge - National Assembly' [http://archive.ipu.org/parlinee/reports/arc/2167\\_97.htm](http://archive.ipu.org/parlinee/reports/arc/2167_97.htm) (accessed 8 November 2023).

<sup>8</sup> EU EOM 'Final report Kenya general elections 27 December 2002' (2003) 31 <https://aceproject.org/ero-en/regions/africa/KE/Kenya%20-%20EU%20rep02.pdf> (accessed 8 November 2023).

<sup>9</sup> IRI 'Kenya presidential, parliamentary and local elections December 27, 2007 election observation mission final report' (2008) 7 [https://www.iri.org/wp-content/uploads/2021/12/kenyas\\_2007\\_presidential\\_parliamentary\\_and\\_local\\_elections-1.pdf](https://www.iri.org/wp-content/uploads/2021/12/kenyas_2007_presidential_parliamentary_and_local_elections-1.pdf) (accessed 8 November 2023).

<sup>10</sup> ELOG 'The historic vote: Elections 2013' 64 [https://elog.or.ke/wp-content/uploads/2022/06/THE\\_ELOG\\_REPORT\\_2013\\_final.pdf](https://elog.or.ke/wp-content/uploads/2022/06/THE_ELOG_REPORT_2013_final.pdf) (accessed 8 November 2023).

<sup>11</sup> IEBC 'Data report of 2017 elections' 3 <https://www.iebc.or.ke/uploads/resources/siEABKREDq.pdf> (accessed 8 November 2023).

64.77% in 2022<sup>12</sup>. A strong drive to respect, protect and fulfil media freedom for the benefit of meaningful political participation, free and fair elections, and overall democratic development has not manifested from the political side of Kenya through the governance continuum since independence. Therefore, it is conceivable that the conflict between political and economic interests and media freedom will persist to the detriment of meaningful political participation and the ideal public sphere. Strong resistance by different stakeholders is necessary to protect offline and online media freedom. A central thread in this thesis is the push for a human rights-based approach to regulating media freedom as a protective measure. The adoption of a contextualised human rights approach considers the history that has forged the contemporary Kenyan media, socio-political and economic dynamics, and a contentious electoral landscape.

### **3 The effectiveness of the legislative and policy approaches at the international and national levels towards protecting offline and online media freedom and political participation throughout the electoral cycle in Kenya**

The legal analysis in chapters three and four of this thesis explores the effectiveness of human rights instruments at the international level and legislation and policies in Kenya towards protecting media freedom and political participation in the digital age. The underlying argument of these two chapters is that the Constitution of Kenya and international law form the substantive legal basis of a contextualised human rights-based approach to media protection through regulation in the digital age for meaningful political participation and promoting free and fair elections.

At the international level, some instruments such as the Universal Declaration of Human Rights (Universal Declaration), the International Covenant on Civil and Political Rights (ICCPR), and the African Charter on Human and Peoples' Rights (African Charter) were enacted before the explosion of digital technologies in the information and communication environment. The assessment finds that the broad phrasing of the guarantees of freedom of expression and media freedom through 'any media' reinforces the relevance of these provisions in the information age. The doctrinal analysis emphasises the inseparability of freedom of expression

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<sup>12</sup> IEBC 'Post election evaluation report for the 9th August, 2022 general election' xvii <https://www.iebc.or.ke/uploads/resources/pabjKTV6Xa.pdf> (accessed 8 November 2023).

and media freedom, collectively called media rights. Freedom of expression encompasses media freedom, although the protection for media freedom has been further distinctly refined under international and national laws. However, the thesis underscores that the expansion of conceptualisation of media beyond professional journalism to accommodate other peripheral journalists on the one hand and the legal gaps in offering media protections to the growing crop of peripheral journalists playing public interest functions reinforces the symbiotic relationship between freedom of expression and media freedom in protecting the contemporary media landscape.

Departing from the legislative ambiguity on the extension of media freedom protections to peripheral digital journalists, chapter three finds that international law has leveraged soft law instruments to buttress the protection of media rights in the digital age through instruments such as General Comment 34 on article 19 of the ICCPR, the Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda, and the 2019 Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019 Declaration). General Comment 34 on article 19 of the ICCPR, General Comment 25 on article 25 of the ICCPR, and the Guidelines on Access to Information and Elections in Africa (the Guidelines) further explore the link between media rights, political participation and elections. These soft law instruments have offered guidance on protecting human rights in the new media age. In particular, international law underlines the impact of harmful content, such as misinformation and disinformation, and illegal content, such as advocacy for hatred on protected grounds to incite violence and discrimination. The soft laws do not exist in a vacuum. They are umbilically linked to binding treaties by reinforcing protections in treaty provisions and providing state guidance in better undertaking their duties to respect, protect and fulfil human rights. State obligations to adopt measures including legislative, judicial and administrative towards ensuring the implementation of soft laws seek to provide a more binding force to soft laws and entrench them in state practice. Further, reporting obligations on compliance with these soft laws before the UN and African human rights monitoring bodies shines a greater focus on these instruments and promotes their implementation. Soft laws can further provide the springboard for the adoption of binding norms where necessary.

Admittedly, freedom of expression and media freedom are not absolute rights. However, this study underscores that any limitations should meet the three-part test set under international law: be provided by law, serve a legitimate aim (protection of the rights and reputations of others; public order, health and morals, and national security), and be necessary and proportionate in a democratic society. Article 24 of the Kenyan Constitution provides general guidance on limitations of rights, and article 33 specifically on freedom of expression restrictions that correlate with international law.

International law instruments such as the 2019 Declaration and the Guidelines further address the growing threat of internet shutdowns as an unreasonable and unjustifiable restriction on media rights and meaningful political participation. Internet shutdowns implemented in the context of elections violate media rights, political participation, and free and fair elections. While Kenya has never implemented an internet shutdown, worrying sentiments from Kenyan state representatives on such a possibility necessitates that stakeholders are vigilant against such actions. The thesis calls on African human rights bodies to strongly oppose internet shutdowns and develop progressive jurisprudence on the same. While the Economic Community of West African States (ECOWAS) Court of Justice in the *Amnesty International Togo and 7 others v The Togolese Republic* case provides persuasive guidance on internet shutdowns,<sup>13</sup> a binding judgement by the African Court on Human and Peoples' Rights (the African Court) on the incompatibility of internet shutdowns with democracy generally and on online media rights specifically would be a strong reference point in the continent. However, access challenges to the African Court for countries that have not ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol) or made the declaration under article 34.6 of the Court Protocol to allow access by individuals and Non-governmental Organisations (NGOs) with observer status limits the opportunity of the African Court to adjudicate over such a matter. It rests on the African Commission on Human and Peoples' Rights (African Commission), African intergovernmental organisations, and individuals and NGOs that enjoy access privileges to the African Court to submit relevant cases.

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<sup>13</sup> *Amnesty International Togo v The Togolese Republic*, suit ECW/CCJ/APP/61/18, ECOWAS Court of Justice, judgement, 6 July 2020 <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2020/07/JUD-ECW-CCJ-JUD-09-20-AMNESTY-INTERNATIONAL-TOGO-7-ORS-V.-REPUBLIC-OF-TOGO-of-6-july-2020.pdf> (accessed 8 November 2023).

Chapters three and four also find a legislative gap under international and national law on accountability for internet intermediaries, such as social media companies, who dominate online governance. Soft law instruments such as the 2019 Declaration have attempted to articulate the responsibilities of internet intermediaries. There is a need for a more comprehensive enunciation of the human rights obligations of internet intermediaries, given their influence on media rights, particularly in the context of elections. The United Nations Guiding Principles on Business and Human Rights (UNGPs) are also relevant as they articulate the human rights responsibilities of businesses, including social media companies. However, chapter three argues for a narrowed expansion of the responsibilities of such powerful companies beyond the responsibility to respect human rights and to include distinct responsibilities to protect and fulfil human rights. As it stands, duties to protect and fulfil are subsumed under the responsibility to respect. In a nutshell, chapter three posits that international law, to some extent, is adaptable or adapting to the threats and opportunities of the digital age on media rights as well as the role of media in enhancing political participation and free and fair elections in the digital age.

At the national level, Kenya has a progressive Constitution in which the guarantee for freedom of expression and media freedom under articles 33 and 34 extends to digital media and other media, therefore encapsulating online media. The Constitution also strongly protects the right to political participation (article 38) and guarantees free, fair and credible elections (article 81). While the 2009 Media Policy is outdated, with a central focus on traditional media and in need of revision, the 2020 ICT Policy reflects the developments of the digital age in various sectors, including the media. It, however, needs to emphasise the adoption of rights-based legislation in alignment with the Constitution and international law to address the threat of restrictive as opposed to enabling legislation. Other policies, such as the Diaspora Policy, further recognise the role of media in facilitating public and political participation for the Kenyan diaspora community.

To some extent, definitions of journalism and media in national media laws accommodate the transforming nature of the sector in light of the porosity of its boundaries in the digital age in accommodating new actors. However, the conceptualisation of who is a journalist and enjoys attendant duties and protections of the profession is still steeped in the traditional understanding. This conventional reference to journalists may have advantages in avoiding

saddling peripheral digital journalists with the strictures of professional journalism. Chapter four argues that the protection of media freedom generally in Kenya's legislative and policy framework needs updating to reinforce protections for traditional journalists and peripheral digital journalists, both of whom operate in the digitalised media space. The enhancement of this protection needs to take a rights-based approach. This protective gap has implications for media performance of normative functions, including promoting meaningful political participation and free and fair elections. The link between freedom of expression and media freedom in protecting modern-day media is critical in light of the ambiguity. To further shore up this interdependence argument, chapters three and four recognise that there is merit to special duties and protections accruing only to professional journalists who still play a key role in mediating the public spheres guided by journalistic ethics.

The media regulatory landscape in Kenya portrays a co-regulatory framework version with statutory self-regulatory measures under the stewardship of the Media Council of Kenya (MCK) and state regulation administered by the Communications Authority of Kenya (CA) and the Kenya Film and Classification Board (KFCB). Both self and state regulators influence regulations for offline and online media. Chapter four argues that the media legislative and policy landscape in Kenya, while comprehensive, is fragmented, with the risk of overregulation of the media. Literature analysis supports the long-held perception that media regulation by the state is disproportionately targeted towards stifling media freedom.<sup>14</sup> Contentious provisions in some media laws that contradict the Constitution and international laws and standards belie the state's commitment to respecting, protecting, and fulfilling media rights as guaranteed under the Constitution. A strong culture of strategic litigation by media, civil society and human rights defenders, and a relatively independent judiciary with activist judges have defied the violation of these rights and the bastardisation of the Constitution. This is manifest in legal challenges and progressive judgements against contentious provisions in laws such as the 2013 amendments to the Media Council Act and the Kenya Information and Communications Act (KICA) that had contentious provisions that compromised the independence of regulatory bodies, as well as

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<sup>14</sup> MCK 'Media sector legislative review 2020' 27 [https://mediacouncil.or.ke/sites/default/files/downloads/MEDIA%20SECTOR%20LEGISLATIVE%20REVIEW%202021\\_1.pdf](https://mediacouncil.or.ke/sites/default/files/downloads/MEDIA%20SECTOR%20LEGISLATIVE%20REVIEW%202021_1.pdf) (accessed 8 November 2023) & LL Wanyama 'Media control in Kenya: The state of broadcasting under the new Kenya Information and Communication Act of 2013' (2015) 33 *New Media and Mass Communication* 1-7.

unjustifiable restrictions on media rights. The ongoing litigation around the Computer Misuse and Cybercrimes Act (in the Court of Appeal as of 2023) is particularly important because this law primarily aims to protect freedom of expression online, among other functions. Controversial provisions on false news under sections 22 and 23 with harsh sanctions have dire implications on media rights, as witnessed in their misuse by powerful actors for political expediency to clamp down on critical voices, including digital peripheral journalists. Further evidence of a strong culture of strategic litigation in the face of contentious elections is also seen in the successive presidential election petitions before the Supreme Court of Kenya following the 2013, 2017 and 2022 elections. In 2017, Kenya became the first African country to nullify a presidential election petition for gross illegalities and irregularities.<sup>15</sup>

The assessment in chapter four of the relationship between electoral laws and media also reveals a legislative appreciation of the role of media in enabling meaningful political participation and promoting free and fair elections. This is evident in the Elections Act, Media Council Act, and related Codes of Conduct. Encouragingly, in undertaking its standard-setting duties, the MCK appreciated the role of traditional and new media in elections, as seen in the collaborative multistakeholder development of Codes of Conduct for traditional and new media and guidelines on election coverage for traditional media.

On the part of the Independent Electoral and Boundaries Commission (IEBC), it laudably uses traditional and new media, especially its website and, more regularly, its social media handles, to facilitate access to information. However, a deeper examination of the influence of digital media technologies in election campaigns is necessary. Consequently, this study recommends that in reviewing laws on campaign financing, Parliament and the Electoral Management Body (EMB) need to factor in issues such as online political advertising on social media platforms and other online spaces, given the growing use of online media for campaigns and debate, and ensure equitable access.

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<sup>15</sup> *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR <http://kenyalaw.org/caselaw/cases/view/140716/> (accessed 8 November 2023).

#### 4 Unpacking the dissonance between international and national laws on media rights

International law and ratified treaties and conventions form part of Kenyan law as provided by articles 2(5) and 2(6) of the 2010 Constitution of Kenya. Case law has clarified that with regard to the hierarchy of laws, the Constitution is the supreme law, and international law and national legislation enjoy equal status.<sup>16</sup> Positively, the 2010 Kenyan Constitution, with its strong Bill of Rights, is a progressive instrument and largely substantively concurs with the principles of international law. However, some provisions affecting media rights in some Kenyan laws have failed to pass legal muster when challenged before courts based on contradiction with the Constitution and international laws and standards. Article 20(3) of the Constitution provides that courts shall ‘adopt the interpretation that most favours the enforcement of a right or fundamental freedom.’ This provision guides courts in a conflict between international and national law. The historical discussion under chapter two provides the starting point for assessing the tension between national and international law. Kenya’s governance continuum does not elicit evidence of a strong political commitment to protect media rights. The enactment of the 2010 Constitution resulted from a decades-long struggle anchored by non-state actors such as civil society, academia, church, trade unions, and political opposition. Political interference remains a challenge to media freedom in Kenya, raising doubt about the state’s dedication to strong human rights guarantees that enhance the checks and balances against the government. This thesis posits that the public distrust of state regulation of the media underlines the importance of dispersing human rights regulatory and oversight duties beyond the state level to international level and non-state actors as additional safeguarding measures.

The lacklustre political commitment to international guarantees of media rights is also hamstrung by international law ignorance. CSOs, media and other enthusiasts must engage more with political actors, particularly parliamentarians, on international law obligations. This should be done before and after the signing and ratification of treaties. Engagement between civil society and different parliamentarians on international law obligations, particularly in light of the developments of the digital age, has revealed a worrying ignorance of rights evolution in the digital age. The enactment of laws contradicting international law is a consequence of this unawareness.

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<sup>16</sup> *Beatrice Wanjiku & Another v Attorney General & Another* [2012] eKLR High Court Petition 190 of 2011 <http://kenyalaw.org/caselaw/cases/view/81477/> (accessed 8 November 2023).



Pivoting from the political side, chapter four also explores how the judiciary has contributed to protecting human rights, particularly after the promulgation of the 2010 Constitution. The 2010 Constitution paved the way for institutional reform, including judicial reform, facilitating increased trust in the judiciary. Further, clarity on the role of international law in Kenya has allowed for more judicial reliance on international law in assessing the legitimacy of laws and state actions compared to the judicial reluctance in previous decades. However, a criticism emerging from the chapter is that courts have been more receptive than dialogic in their interaction with international law. The application of international law in Kenya offers a judicial opportunity for contextualised elucidation on protecting media rights in the digital age and its impact on rights such as political participation to inform global conversations. For example, an opportunity presented (and may have been lost at the High Court) in the ongoing litigation of the Computer Misuse and Cybercrimes Act.<sup>17</sup> Chapter four argues that international law, in addition to the Constitution, would have been a good reference point in challenging the contentious provisions such as the criminalisation of false news and the attendant disproportionate sanctions. The chapter also criticises the High Court decision that sought to constrain online media freedom based on the threat of ease of spread of illegal and harmful content that may have implications on national security and public order, given cyclic electoral violence in Kenya. While admittedly, Kenya's electoral past has been blighted with electoral violence, and the media was complicit in exacerbating and pacifying the violence, the chapter argues that the High Court failed to balance the protection of rights with state obligations under international law. In particular, the 2019 Declaration calls on states to decriminalise false news laws under principle 22.

Another source of slight disharmony between national and international law is in the conceptualisation of media. As noted above, soft law instruments under international law elaborate on the expanded understanding of media in the computer age to include both professional journalists and peripheral journalists. While there is still ambiguity about how far media protection guarantees extend to peripheral journalists in international and national law, the conceptual articulation is a positive starting point. While Kenyan laws recognise that media and

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<sup>17</sup> *Bloggers Association of Kenya (BAKE) v Attorney General & 3 Others; Article 19 East Africa & Another (Interested Parties)* [2020] eKLR, Petition 206 of 2019 <http://kenyalaw.org/caselaw/cases/view/191276/> (accessed 8 November 2023).

journalism include internet-enabled actors and activities, the same does not apply to the definition of a journalist that only covers professional journalists as traditionally conceptualised.

## **5 Performance of social media platforms in protecting online media freedom in Kenya, especially during elections**

In studying the performance of social media in protecting online media freedom in Kenya, chapter five assesses the policies of four popular social media platforms used by Kenyans – Facebook, Twitter, YouTube and TikTok, against compliance and enforcement measures implemented by the sites. The conclusion is that the scorecard is poor. The decision to assess social media platform performance in protecting online media freedom was informed by several factors. Firstly, after television, social media is the second most popular news source for Kenyans.<sup>18</sup> Therefore, it is a key platform for public discourse, expression and information, particularly during elections. The quality of engagement and information integrity ultimately affects informed voter decision-making and meaningful political participation. Secondly, social media companies, especially the big three, Meta, Twitter and Google, represent the internet for many and are the dominant shapers of online platform governance. Their policies and practices influence online media freedom and the exercise of interrelated rights such as public and political participation.

Chapter five finds that in the largely self-regulatory dispensation of social media platform governance, the sites proactively self-police through various policies and reactively through practices such as content moderation. These policies that cover issues such as false news, illegal content, violent content, election integrity, and transparency, while ostensibly designed to protect media rights online, are poorly enforced. The enforcement scorecard worsens outside Global North in countries such as Kenya. Case in point, studies found that there was a proliferation of illegal and harmful content on social media platforms such as Facebook, Twitter and TikTok during the 2017 and 2022 elections in Kenya in violation of social media policies.<sup>19</sup> Content

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<sup>18</sup> CRSM & TIFA Research (n 4) 11.

<sup>19</sup> ADDO 'How hate speech trolls targeted Kenya's 2022 elections' <https://disinfo.africa/early-detection-and-countering-hate-speech-during-the-2022-kenyan-elections-e0f183b7bdd1> (accessed 8 November 2023); O Madung 'Opaque and overstretched, Part II: How platforms failed to curb misinformation during the Kenyan 2022 election' <https://foundation.mozilla.org/en/campaigns/opaque-and-overstretched-part-ii/#case-study-labeling-failures>

moderation on social media sites is increasingly undertaken by artificial intelligence, which is limited by language and context biases. The chapter calls on social media companies to better ensure compliance and enforcement of their policies in a rights-based manner.

Admittedly, companies such as Meta and Twitter and, to some extent, TikTok took steps to create local stakeholder partnerships to serve local populations better, collaborate with fact-checking organisations, provide digital literacy programs, undertake content moderation, and amplify credible sources during the 2022 elections in Kenya. Chapter five argues that while the popular social media companies proactively disclose their policies with varied levels of comprehensiveness and some companies engage with local stakeholders to address concerns, the soft underbelly of social media platform governance is poor compliance and enforcement measures. Consequently, the poor performance of social media companies atrophies the democratising potential of the internet, negatively affects legitimate expression, impairs meaningful public debate, and, in the context of elections, compromises the quality of electoral information integrity in a way that could affect meaningful political participation.

## **6 Enhancing social media accountability to promote online media freedom, meaningful political participation and election integrity in Kenya**

Chapter five notes that online media governance, including social media governance, has largely been self-regulatory. However, whistle-blower revelations and studies have exposed poor compliance and enforcement of the policies of social media companies.<sup>20</sup> The prioritisation of

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(accessed 8 November 2023); O Madung ‘Inside the shadowy world of disinformation for hire in Kenya’ (2021) [https://assets.mofoprod.net/network/documents/Report\\_Inside\\_the\\_shadowy\\_world\\_of\\_disinformation\\_for\\_hire\\_in\\_Kenya\\_5\\_hcc.pdf](https://assets.mofoprod.net/network/documents/Report_Inside_the_shadowy_world_of_disinformation_for_hire_in_Kenya_5_hcc.pdf) (accessed 8 November 2023) & O Madung ‘From dance app to political mercenary: How disinformation on TikTok gaslights political tensions in Kenya’ (2022) <https://foundation.mozilla.org/en/campaigns/kenya-tiktok/> (accessed 8 November 2023).

<sup>20</sup> D Milmo ‘Frances Haugen takes on Facebook: The making of a modern US hero’ *The Guardian* 10 October 2021 <https://www.theguardian.com/technology/2021/oct/10/frances-haugen-takes-on-facebook-the-making-of-a-modern-us-hero> (accessed 8 November 2023); K Hao ‘The race to understand the exhilarating, dangerous world of language AI’ <https://www.technologyreview.com/2021/05/20/1025135/ai-large-language-models-bigscience-project/> (accessed 8 November 2023); S Levy *Facebook: The Inside Story* (2020); D Seetharaman, J Horwitz & J Scheck ‘Facebook says AI will clean up the platform. Its own engineers have doubts’ *The Wall Street Journal* 17 October 2021 <https://www.wsj.com/articles/facebook-ai-enforce-rules-engineers-doubtful-artificial-intelligence-11634338184> (accessed 8 November 2023) & B Taye ‘Until the machine learns your language, you stay put’ (13 June 2022) *The Four Domains of Global Platform Governance Essay Series* <https://www.cigionline.org/articles/until-the-machine-learns-your-language-you-stay-put/> (accessed 8 November 2023).

private over public interests has emerged as a central reason behind poor social media enforcement of policies on spreading harmful and illegal content and civic and election integrity. This also portrays the economic considerations of social media that affect media freedom. The increasing reliance on artificial intelligence to moderate content also plays a role. Admittedly, the resource investment for human reviewers would be astronomical due to the volumes of information produced online. To get around this hurdle, the thesis supports calls for social media companies to adopt a contextualised artificial intelligence learning approach based on language and local content supported by human intervention.

The poor performance of social media companies has shored up calls for co-regulatory measures to enhance social media accountability. On the other hand, there has been public reluctance to empower governments to regulate the internet, given the threat of government overreach in online media regulation that may have negative implications on media rights and stifle tech innovation. The twofold distrust against self-policing by social media companies and government regulation illustrates the ensuing dilemma in addressing social media accountability through regulatory measures. However, regulation is necessary and cannot be undertaken without these two crucial actors. Therefore, chapter five postulates that the entry of other relevant stakeholders to disperse regulatory and oversight powers is crucial.

In drawing lessons from existing and ongoing efforts to address the regulatory gap in social media accountability, the chapter looks at approaches by the United States of America (USA), the European Union (EU), and selected African countries. Chapter five reviews the USA because leading social media companies are American and subject to the country's regulations. Historically, the USA has adopted a liberal approach to media rights as articulated under the Constitution's First Amendment and section 230 of the Communications and Decency Act. Social media companies consequently enjoy broad immunity. Chapter five canvasses the EU approach because of the passage of the Digital Services Act (DSA) in 2023, which represents the first regional effort to comprehensively articulate the responsibilities of internet intermediaries and promote a safe online environment. Given the 'Brussels effect' that recognises the transnational influence of EU frameworks, Kenya included, it is a reasonable assumption that the first-ever regional instrument for tech accountability will influence other frameworks. Largely, the instrument sets conditional immunity for internet intermediaries. The brief examination of

the scant provisions for internet intermediary responsibility in legislation in Kenya, Ethiopia, South Africa, Uganda, and Zimbabwe was to provide a bird's-eye view of the unfolding efforts to enhance internet intermediary responsibility in Africa.

Chapter five of this thesis cautions against the proliferation of disparate national frameworks on tech and social media accountability in Africa and calls for collective efforts led by the African human rights system, particularly the African Commission. Realistically, this is based on the ability of the African human rights bodies to undertake their normative functions effectively. The chapter proposes a collective continental force to enhance social media accountability, drawing lessons from the EU approach but contextualising it to African needs, opportunities and challenges. Already, the 2019 Declaration, a soft law instrument, briefly enunciates internet intermediary obligations concerning media rights and outlines state duties. Much more can be done, including refining internet intermediary responsibilities in the context of African elections. The call for a continental effort is also informed by the dismal performance of social media companies in ensuring compliance and enforcement of their policies and the resultant impact on democracy and elections. Further, the worrying trajectory with regard to emerging laws on digital rights that contradict international laws and standards leans more towards restrictive as opposed to enabling approaches to human rights. This proposed regional approach aims to stave off restrictive laws and embrace a human rights-based approach to social media accountability. The ultimate goal is to protect online media rights and enable the right of political participation.

The chapter also argues that although the discourse on human rights obligations for businesses such as social media companies has been articulated under the frame of respect for human rights as provided by the Ruggie framework of the UNGPs, there is a benefit to narrowly extending corporate obligations to duty to protect and fulfil human rights which requires them to take positive measures to ensure the realisation of certain human rights. The chapter proffers this argument with the caveat that the primary duty to respect, protect, and fulfil human rights rests on states. The UNGPs, to some extent, extend duties to protect and fulfil human rights under the corporate responsibility to respect human rights. Chapter five argues that companies such as social media companies have disproportionate power, influence, control and esoteric knowledge over their products and processes that have significant implications on human rights, elections

and democracy. This sphere of influence demands enhanced accountability and interrogation of how to narrowly extend the duty to protect and fulfil human rights on powerful social media companies to protect human rights, elections and democracy. Further argued in the chapter is that precedence already exists on extending duties to non-state actors beyond the responsibility to respect human rights. Other than the approach undertaken by the UNGPs, the African Charter introduced individual duties that can also be extended to corporations, and the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms implies individuals have a right and responsibility to promote and protect human rights.

Global stakeholder engagement is necessary to explore how to achieve tech accountability under such a framework and tackle the international community's predicament in striking a balance between enhancing social media accountability for protecting human rights without jeopardising human rights and stifling tech innovation. As of 2023, the United Nations Educational, Scientific and Cultural Organization (UNESCO) is undertaking a multistakeholder engagement to develop guidelines for regulating digital platforms. Notably, the language is still framed under an obligation for businesses to respect human rights, as did the UNGPs. Encouragingly, it includes the duties of internet intermediaries in the context of elections. The international community can draw lessons from existing and emerging measures to enhance tech accountability towards an effective human rights-based approach.

## **7 Framing a human rights-based approach for media freedom towards enhanced meaningful political participation in Kenya**

Media regulation as a protective measure for media freedom is an inescapable subject in related scholarly discussion. Conventionally, states and the media sector have adopted a trinary approach of self-regulation, state regulation, or co-regulation. A common thread in these traditional approaches is the focus on the regulatory actors involved instead of the approach's substantive character. Building upon growing proposals for human rights-based approaches to regulation, this thesis proposes a contextualised human rights-based approach to media regulation in Kenya, linking it with enhancing meaningful political participation and promoting free and fair elections that are crucial building blocks to democracy. This study proposes a

contextualised human-based approach to temper the political economy shortcomings of the media in Kenya that hinder its role in nurturing a vibrant public sphere where citizens can meaningfully participate in democratic processes such as elections. In unpacking this approach, the below synthesises the context considerations, actors, and norms as the bellwether.

## **7.1 Context considerations**

Media regulation in Kenya cannot be divorced from the historical and contemporary context that moulded the prevailing Kenyan public sphere. The state has occupied a disproportionately powerful position with regard to media regulation in Kenya. This study finds state regulation to be more restrictive and controlling than enabling. A lawfare of sorts forged in Kenya's history from the post-colonial era to the modern day with the legitimisation of media control and clampdown on critical and independent media. Protection of economic interests by media owners in navigating the political minefield led to compromises on free, independent and professional media. The political economy of the media that compromised its independence dates back to pre-colonial times. Despite the punctuated media liberation of the 1990s and the more nuanced period of media liberalisation of the 2000s with the end of the 24-year Moi regime and the introduction of the 2010 Constitution, concerns over restrictive media provisions, overregulation of media, fragmented media laws, duplication of media regulatory functions, and political and economic interference persist. There is an indelible political footprint in the ownership structure of mainstream traditional media in the past and contemporary media space that cannot be ignored in the discussion of media freedom. The contemporary media regulatory approach in Kenya is a version of co-regulation with a statutory self-regulator (Media Council of Kenya) and statutory state regulators (Communications Authority of Kenya and the Kenya Films Classification Board). Emerging laws on online media similarly contain restrictive and contentious provisions with harsh sanctions in violation of media rights. Non-regulatory attempts by the government to control online media freedom are seen in state-sponsored propaganda, misinformation and disinformation, particularly during elections. Consequently, the thesis argues that disproportionately empowering the state to regulate traditional and online media in Kenya may likely lead to further constriction of media rights to the detriment of meaningful public and political participation in the public sphere.

Encouragingly, Kenya has a progressive Constitution with a strong Bill of Rights and several oversight mechanisms. A valiant culture of strategic litigation against controversial unconstitutional laws that violate international laws and standards exists. The stewardship of the Constitution rests with a relatively independent and activist judiciary that elicits mixed reactions in its ability to rise to the challenge. The offline and online media sector is vibrant and robust. Traditional media is relatively independent, with private media attracting significantly more audience share than the state broadcaster. The blended offline and online media space mediates between the state and a politically conscious populace with an appetite for news in the Kenyan public sphere. Television, social media and radio are the most popular sources of news. Audience engagement multiplies during election periods in both offline and online media. Relatively high mobile and internet penetration allows for online public participation, albeit tempered by challenges of high data costs, poor infrastructure and access to electricity, particularly in rural communities and lower income brackets.<sup>21</sup> Electoral stakeholders, including the IEBC, utilise various digital technologies to disseminate information, engage with the electorate and the public, and safeguard the electoral process. Election processes such as voter registration, identification and results transmission heavily rely on technology. As of 2023, the state has never implemented an internet shutdown. However, media bans and signal interruptions have occurred after the 2007 and 2017 elections.

A chequered history of cyclic electoral violence in previous elections in Kenya (notably 1992, 1997, 2007 and 2017) after flawed election processes illustrates a vulnerability to electoral violence tied to the nature of public discourse offline and online. Offline and online protest is a popular form of dissent in the face of contentious elections. The spread of harmful and illegal content online has exacerbated tensions during elections. While mainstream traditional media, to some extent, exercises professionalism and social responsibility in facilitating access to ensure accurate and fair reporting, the same is not present in online media, particularly social media. Political and economic interests, peace and conflict considerations, and inhibitive media laws mitigate traditional media's ability to perform its normative functions. On the other hand, poor enforcement of policies on harmful and illegal content, civic and election integrity and transparency by major social media platforms such as Facebook, Twitter, YouTube and TikTok

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<sup>21</sup> Datareportal 'Digital 2023: Kenya' <https://datareportal.com/reports/digital-2023-kenya> (accessed 8 November 2023).



contribute to a compromised digital public sphere unsuitable for meaningful public discourse to nurture an informed electorate. A regulatory gap exists with regard to strong accountability measures for internet intermediaries such as social media companies at international and national levels. A complex depiction of Kenya's networked contemporary public sphere emerges with a battered yet robust media meditating over state and society to promote various human rights and values such as meaningful political participation, and safeguard elections.

## **7.2 Actors**

The proposed human rights-based approach envisions a multistakeholder and multi-layered stakeholder structure that disperses norm development, regulation and oversight functions between relevant state and non-state actors. This is aimed at tempering the powers of the different regulators and reinforcing checks and balances. This process is tiered, happening at the international and state levels, which informs the type of actors involved at the different levels. At the international level, the main gap in reinforcing media protection in the digital age is accountability for internet intermediaries such as social media companies. The proposed model seeks to include new players in the regulatory discussion, especially in the online space, further decentralise the regulatory powers from the state, and add layers of oversight and accountability to rein in the state's penchant for media interference and control.

At the continental level, the study proposes the African Commission, especially the Office of the Special Rapporteur on Freedom of Expression and Access to Information, to shepherd a multistakeholder process of norm development under its promotional mandate to address normative gaps with regard to online media regulation and social media accountability. Key stakeholders in this process include state actors such as parliamentarians and relevant policymakers, for example, relevant members of the executive arm of government and electoral management bodies. Other critical non-state actors include representatives from media regulatory bodies, the private sector, the tech community, internet intermediaries such as social media platforms and search engines, experts in the international community, media, civil society, academia, and other public members.

The rights-based approach at the international level must also be distilled to the national level by developing a rights-based legal and policy media framework with wide stakeholder

representation. Strong oversight and accountability measures are necessary through independent media bodies and the judiciary. The media, civil society and the general public also play less formalised oversight roles.

### **7.3 Substantive norms**

The bellwether for norm development for the realisation of media rights in Kenya to further enhance political participation and free and fair elections are the Constitution of Kenya and international laws and standards. Compliance with the Constitution and international laws and standards should guide the enactment, nullification, amendment, and review of laws at the state level. The international community (United Nations and African system) need to address the regulatory gap for internet intermediaries, including social media accountability. Importantly, the media laws should include reporting obligations to monitor compliance by the different stakeholders at the national, continental (for example, shadow reporting before the African Commission) and global (for example, reporting under the Universal Periodic Review of the UN) level. Additionally, there should be initial and continuous training of the relevant stakeholders to ensure that enforcement action is informed by constitutionally and internationally compliant human rights-based norms. Relevant stakeholders, including the EMB and civil society, should ensure rights education is inculcated in regularly updated civic and voter education manuals to nurture an informed public and electorate who can further safeguard constitutional rights such as media rights and (meaningful) political participation.

## **8 Conclusion**

The backdrop of Kenya's historical and modern-day social, economic, political and legal context underscores the proposed framework for a human rights-based approach to protecting media rights. Central to the discussion is enabling media regulation that allows traditional and online media to undertake their normative functions to promote meaningful political participation and free and fair elections in Kenya. As opposed to examining media regulation through the prism of regulatory actors, the proposed human rights-based approach envisions a multistakeholder, multi-layered and multilateral architecture, grounded on the Constitution of Kenya and

international laws and standards, adapted and adapting to the continuum of the digital age. A complex web indeed but necessary. Media is a pivotal player in the networked public sphere, which links online and offline spaces, and the extent of its freedom is intricately linked to the realisation of the full gamut of human rights, including media rights and meaningful political participation, as well as free and fair elections in Kenya. The robust traditional and online media space, politically conscious and active citizenry, vibrant civil society, progressive Constitution, international law obligations, relatively independent judiciary, beleaguered but relatively effective EMB in matters related to access to information, and relatively good internet penetration arguably provide the springboard for the realisation of the proposed human rights-based approach with the right stakeholder support in Kenya.

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## **1.8 International normative instruments**

### **Africa**

#### *Charters, conventions and treaties*

African Charter on Democracy, Elections and Governance.



African Charter on Human and Peoples' Rights.

Agreement Establishing the African Continental Free Trade Area.

African Union Convention on Cyber Security and Personal Data Protection

Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area.

***Declarations, guidelines and resolutions***

Declaration of Principles on Freedom of Expression and Access to Information in Africa.

Guidelines on Access to Information and Elections in Africa.

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## 1. Annex one: Policies of social media companies

### *Facebook*

<b>Type of policy</b>	<b>Availability</b>	<b>Brief description</b>
Hate speech	Proactively disclosed. <sup>1</sup>  Categorised as objectionable content.	Includes policy rationale and definition.  Chronology of the evolution of the hate speech policy.  Detailed explanation on what content violates the policy.  Guidelines on reporting a violation and process of enforcement of policies upon reporting a violation.  Internal data on prevalence of hate speech on the platform and actions taken to address violation of the policy.
False information and deceptive practices	Proactively disclosed through various related policies categorised as integrity and authenticity policies including:	Includes policy rationale and definitions.  Chronology of the evolution of the policy (apart from misinformation policy).

<sup>1</sup> Meta 'Hate speech' <https://transparency.fb.com/en-gb/policies/community-standards/hate-speech/> (accessed 8 November 2023).

	<p>account integrity and authentic identity,<sup>2</sup> spam<sup>3</sup>, cybersecurity<sup>4</sup>, inauthentic behaviour<sup>5</sup>, and misinformation.<sup>6</sup></p>	<p>Detailed explanation on what content violates the policy.</p> <p>Guidelines on reporting a violation and process of enforcement of policies upon reporting a violation.</p> <p>Internal data on enforcement actions on spam and fake accounts to address violation of the policy.</p>
Violence	<p>Proactively disclosed through various related policies including: violence and incitement,<sup>7</sup> dangerous individuals and organisations,<sup>8</sup> coordinating harm and promoting crime,<sup>9</sup></p>	<p>Includes policy rationale and definitions.</p> <p>Chronology of the evolution of the policy.</p> <p>Detailed explanation on what content violates the policy.</p>

<sup>2</sup> Meta ‘Account integrity and authentic identity’ <https://transparency.fb.com/en-gb/policies/community-standards/account-integrity-and-authentic-identity> (accessed 8 November 2023).

<sup>3</sup> Meta ‘Spam’ <https://transparency.fb.com/en-gb/policies/community-standards/spam/> (accessed 8 November 2023).

<sup>4</sup> Meta ‘Cybersecurity’ <https://transparency.fb.com/en-gb/policies/community-standards/cybersecurity/> (accessed 8 November 2023).

<sup>5</sup> Meta ‘Inauthentic behavior’ <https://transparency.fb.com/en-gb/policies/community-standards/inauthentic-behavior/> (accessed 8 November 2023).

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<sup>8</sup> Meta ‘Dangerous individuals and organisations’ <https://transparency.fb.com/en-gb/policies/community-standards/dangerous-individuals-organizations/> (accessed 8 November 2023).

<sup>9</sup> Meta ‘Coordinating harm and promoting crime’ <https://transparency.fb.com/en-gb/policies/community-standards/coordinating-harm-publicizing-crime/> (accessed 8 November 2023).

	and violent and graphic content. <sup>10</sup>	<p>Guidelines on reporting a violation and process of enforcement of policies upon reporting a violation.</p> <p>Internal data on prevalence and enforcement actions on dangerous organisations, and violent and graphic content violations of the policy.</p>
Election integrity	<p>Misinformation policy includes electoral misinformation that may interfere with political participation.<sup>11</sup></p> <p>Detailed election centre section.<sup>12</sup></p>	<p>Details on addressing election misinformation, and voter interference.</p> <p>Information on empowering voters, preventing interference with political participation, fighting misinformation, and increasing transparency including on political advertising.</p>
Transparency	Proactively disclosed under	Includes policies,

<sup>10</sup> Meta ‘Violent and graphic content’ <https://transparency.fb.com/en-gb/policies/community-standards/violent-graphic-content/> (accessed 8 November 2023).

<sup>11</sup> Meta ‘Misinformation’ <https://transparency.fb.com/en-gb/policies/community-standards/misinformation/> (accessed 8 November 2023).

<sup>12</sup> Meta ‘Preparing for elections’ [https://about.meta.com/actions/preparing-for-elections-on-facebook/?utm\\_source=about.facebook.com&utm\\_medium=redirect](https://about.meta.com/actions/preparing-for-elections-on-facebook/?utm_source=about.facebook.com&utm_medium=redirect) (accessed 8 November 2023).

	transparency centre. <sup>13</sup>	enforcement, and transparency reports. Transparency reports include community standards enforcement, content restrictions, government requests for user data, and internet disruptions.
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*Twitter*

Type of policy	Availability	Brief description
Hate speech	Policy on hateful conduct proactively disclosed. <sup>14</sup>	Detailed explanation on what content violates the policy.  Reporting guidelines.  Enforcement options for violation of the policy.
False information and deceptive practices	Proactively disclosed through various related policies on authenticity including:  platform manipulation and spam, <sup>15</sup> misleading and	Detailed explanation on what content violates the policy.  Reporting guidelines.  Enforcement options for

<sup>13</sup> Meta ‘Transparency’ <https://transparency.fb.com/data/> (accessed 8 November 2023).

<sup>14</sup> Twitter ‘Hateful conduct’ <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> (accessed 8 November 2023).



	deceptive identities, <sup>16</sup> and synthetic and manipulated media. <sup>17</sup>	violation of the policy.
Violence	Proactively disclosed through various related policies including violent speech policy, <sup>18</sup> violent and hateful entities policy, <sup>19</sup> and perpetrators of violent attacks. <sup>20</sup>	Detailed explanation on what content violates the policy.  Reporting guidelines.  Enforcement options for violation of the policy.
Civic integrity	Proactively disclosed through civic integrity misleading information policy, <sup>21</sup> and ad policy on political content. <sup>22</sup>	Detailed explanation on what content violates the policy.  Reporting guidelines.  Enforcement options for violation of the policy.
Transparency	Proactively disclosed under transparency centre. <sup>23</sup>	Includes rules' enforcement, information requests,

<sup>15</sup> Twitter 'Platform manipulation and spam policy' <https://help.twitter.com/en/rules-and-policies/platform-manipulation> (accessed 8 November 2023).

<sup>16</sup> Twitter 'Misleading and deceptive identities policy' <https://help.twitter.com/en/rules-and-policies/twitter-impersonation-and-deceptive-identities-policy> (accessed 8 November 2023).

<sup>17</sup> Twitter 'Synthetic and manipulated media policy' <https://help.twitter.com/en/rules-and-policies/manipulated-media> (accessed 8 November 2023).

<sup>18</sup> Twitter 'Violent speech policy' <https://help.twitter.com/en/rules-and-policies/violent-speech> (accessed 8 November 2023).

<sup>19</sup> Twitter 'Violent and hateful entities policy' <https://help.twitter.com/en/rules-and-policies/violent-entities> (accessed 8 November 2023).

<sup>20</sup> Twitter 'Perpetrators of violent attacks' <https://help.twitter.com/en/rules-and-policies/perpetrators-of-violent-attacks> (accessed 8 November 2023).

<sup>21</sup> Twitter 'Civic integrity misleading information policy' <https://help.twitter.com/en/rules-and-policies/election-integrity-policy> (accessed 8 November 2023).

<sup>22</sup> Twitter 'Political content' <https://business.twitter.com/en/help/ads-policies/ads-content-policies/political-content.html> (accessed 8 November 2023).

<sup>23</sup> Twitter 'Transparency' <https://transparency.twitter.com/> (accessed 8 November 2023).

		removal requests, and platform manipulation.
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### *YouTube*

<b>Type of policy</b>	<b>Availability</b>	<b>Brief description</b>
Hate speech	Proactively disclosed. <sup>24</sup>	<p>Link to article on the evolution of the hate speech policy.</p> <p>Detailed explanation on what content violates the policy.</p> <p>Details on enforcement actions upon violation of the policy.</p> <p>Link to reporting guidelines.</p>

<sup>24</sup>Google 'Hate speech policy' [https://support.google.com/youtube/answer/2801939?hl=en&ref\\_topic=9282436](https://support.google.com/youtube/answer/2801939?hl=en&ref_topic=9282436) (accessed 8 November 2023).

False information and deceptive practices	Proactively disclosed through various related policies on misinformation, <sup>25</sup> fake engagement, <sup>26</sup> impersonation, <sup>27</sup> and spam, deceptive practices, and scams policies. <sup>28</sup>	Detailed explanation on what content violates the policy.  Details on enforcement actions upon violation of the policy.  Link to reporting guidelines.
Violence	Policies on violent or dangerous content are proactively disclosed and include violent extremist or criminal organisations policy, <sup>29</sup> harmful or dangerous content policies, <sup>30</sup> and violent or graphic content policies. <sup>31</sup>	Detailed explanation on what content violates the policy.  Details on enforcement actions upon violation of the policy.  Link to reporting guidelines.

<sup>25</sup> Google ‘Misinformation policies’ <https://support.google.com/youtube/answer/10834785?hl=en> (accessed 8 November 2023).

<sup>26</sup> Google ‘Fake engagement policy’ [https://support.google.com/youtube/answer/3399767?hl=en&ref\\_topic=9282365](https://support.google.com/youtube/answer/3399767?hl=en&ref_topic=9282365) (accessed 8 November 2023).

<sup>27</sup> Google ‘Impersonation policy’ [https://support.google.com/youtube/answer/2801947?hl=en&ref\\_topic=9282365](https://support.google.com/youtube/answer/2801947?hl=en&ref_topic=9282365) (accessed 8 November 2023).

<sup>28</sup> Google ‘Spam, deceptive practices, & scams policies’ [https://support.google.com/youtube/answer/2801973?hl=en&ref\\_topic=9282365](https://support.google.com/youtube/answer/2801973?hl=en&ref_topic=9282365) (accessed 8 November 2023).

<sup>29</sup> Google ‘Violent extremist or criminal organizations policy’ [https://support.google.com/youtube/answer/9229472?hl=en&ref\\_topic=9282436](https://support.google.com/youtube/answer/9229472?hl=en&ref_topic=9282436) (accessed 8 November 2023).

<sup>30</sup> Google ‘Harmful or dangerous content policies’ [https://support.google.com/youtube/answer/2801964?hl=en&ref\\_topic=9282436](https://support.google.com/youtube/answer/2801964?hl=en&ref_topic=9282436) (accessed 8 November 2023).

<sup>31</sup> Google ‘Violent or graphic content policies’ [https://support.google.com/youtube/answer/2802008?hl=en&ref\\_topic=9282436](https://support.google.com/youtube/answer/2802008?hl=en&ref_topic=9282436) (accessed 8 November 2023).

Election integrity	Election misinformation policies are proactively disclosed. <sup>32</sup>  Commitments on election news and information, and political advertising. <sup>33</sup>	Detailed explanation on prohibited content with examples.  Details on enforcement actions upon violation of the policy.
Transparency	No discernible exclusive section on transparency measures.  Google proactively discloses transparency reports. <sup>34</sup>	Google's transparency reports cover security and privacy, content removal, and others such as political advertising, network disruptions, and EU monthly active users.

### *TikTok*

Type of policy	Availability	Brief description
Hate speech	Hate speech and hateful behaviours guidelines are proactively disclosed as part	Includes definition.  Concise explanation on what

<sup>32</sup>Google 'Elections misinformation policies' <https://support.google.com/youtube/answer/10835034?hl=en#zippy=%2Celection-integrity%2Cvoter-suppression> (accessed 8 November 2023).

<sup>33</sup> Google 'Our commitments' <https://www.youtube.com/howyoutubeworks/our-commitments/supporting-political-integrity/#election-news-and-information> (accessed 8 November 2023).

& Google 'Our commitments' <https://www.youtube.com/howyoutubeworks/our-commitments/supporting-political-integrity/#political-advertising> (accessed 8 November 2023).

<sup>34</sup> Google 'Google Transparency Report' <https://transparencyreport.google.com/?hl=en> (accessed 8 November 2023).

	<p>of the community guidelines under the safety and civility category.<sup>35</sup></p> <p>Also elaborated under its topics section.<sup>36</sup></p>	<p>content violates the policy.</p> <p>Information on recourse for victims of hate speech on topics section of the platform.<sup>37</sup></p>
False information and deceptive practices	<p>Proactively disclosed as part of the community guidelines under the integrity and authenticity category. Include misinformation, fake engagement, synthetic and manipulated media, and spam and deceptive account behaviours.<sup>38</sup></p>	<p>Concise explanation on what content violates the policy.</p> <p>Concise details on the enforcement actions for violation.</p>
Violence	<p>Information on violent content is proactively disclosed as part of the community guidelines under the safety and civility category. Include violent behaviours and criminal activities, and violent and</p>	<p>Concise explanation on what content violates the policy.</p> <p>Concise details on enforcement actions for violation.</p>

<sup>35</sup> TikTok ‘Community Guidelines’ <https://www.tiktok.com/community-guidelines#38> (accessed 8 November 2023).

<sup>36</sup> TikTok ‘Countering hate on TikTok’ <https://www.tiktok.com/safety/en/countering-hate/> (accessed 8 November 2023).

<sup>37</sup> As above.

<sup>38</sup> TikTok ‘Community Guidelines’ <https://www.tiktok.com/community-guidelines#38> (accessed 8 November 2023).

	hateful organizations and individuals. <sup>39</sup>	
Election integrity	Information on civic and election integrity is proactively disclosed as part of the community guidelines. <sup>40</sup>  Topics section also elaborates on the platform’s approach to election integrity, <sup>41</sup> and another link on government, politician, and political party affiliated accounts. <sup>42</sup>	Concise details on approach to civic and information integrity including tackling misinformation, and political advertising policy.  Prohibits paid political advertising and fundraising.
Transparency	Information proactively disclosed. <sup>43</sup>	Reports include community guidelines enforcement, government removal requests, collapse information requests, code of practice on disinformation, Digital Services Act reports, and terrorist content online

<sup>39</sup> TikTok ‘Community Guidelines’ <https://www.tiktok.com/community-guidelines#38> (accessed 8 November 2023).

<sup>40</sup> TikTok ‘Community Guidelines’ <https://www.tiktok.com/community-guidelines#38> (accessed 8 November 2023).

<sup>41</sup> TikTok ‘Election integrity’ <https://www.tiktok.com/safety/en/election-integrity/> (accessed 8 November 2023).

<sup>42</sup> TikTok ‘Government, politician, and political party affiliated accounts’ <https://support.tiktok.com/en/using-tiktok/growing-your-audience/government-politician-and-political-party-accounts> (accessed 8 November 2023).

<sup>43</sup> TikTok ‘TikTok transparency centre’ <https://www.tiktok.com/transparency/en/> (accessed 8 November 2023).

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