The Emerging role of African Sub-Regional Courts in Protecting Human Rights on the Internet

By:

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Introduction

Human rights protection in Africa has traditionally consisted of two layers: the regional human rights system hinged on the African Charter and national human rights mechanisms of individual African states. A third layer has emerged at the sub-regional level through the repurposing of some sub-regional economic community regimes (mainly courts or tribunals) to determine claims of human rights violations (Viljoen 1999; Ebobrah 2009; Gathii, 2020).

An important area in which these sub-regional human rights systems are making inroads is the protection of human rights on the Internet. Following the lead of the UN Human Rights Council, the African Commission adopted its Resolution on Freedom of Information and Expression on the Internet 2016. The

Resolution mandates African States to respect and protect freedom of expression on the Internet including by adopting legislative measures. Most recently, the African Commission adopted a 'normative equivalency' approach where the same rights people have offline must be protected online in its landmark Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019. Despite this, digital authoritarianism through Internet shutdowns, restriction of access to social media during elections, and arbitrary electronic surveillance of journalists, opposition politicians or other persons considered threats to ruling governments are rife (Morozov 2012; Mare 2020). Sub-regional courts are rising to the challenge by pushing back on these threats to human rights on the Internet in Africa.

In this contribution, we seek to demystify the emerging but underappreciated roles of African sub-regional courts, mainly the ECOWAS Court of Justice and the East African Court of Justice, in fostering human rights on the Internet through their jurisprudence.

Sub-regional courts' human rights jurisdiction: inherent or repurposed?

Africa is one of three regions of the world with a regional human rights system. The African Charter on Human and Peoples' Rights, the constitutive instrument of the African human rights system, provides for a catalogue of human and peoples' rights as well as duties of the individual. The Charter also creates the African Commission as the primary body for the promotion and protection of human rights on the continent, although the protective mandate is now shared with the African Court. Nevertheless, because an international human rights mechanism is subsidiary and complementary to national jurisdiction, African states still retain the primary mandate to protect human rights. (See Heyns et al 2005; Shelton & Carozza 2013) This is evident in their obligation to take all measures (whether legislative, judicial or administrative) to implement the rights in the African Charter; and the requirement for individuals to exhaust local remedies before seizing the Commission or the Court. (Murray 2019 at 17).

A third layer of human rights protection has since emerged at the sub-regional level. Subregional groupings of African states are typically for economic

integration purposes. Indeed, under the roadmap for the creation of the African Economic Community (AEC) in the Abuja Treaty 1991, the AEC is to be established in six stages using Regional Economic Communities (RECs) as the building blocks. For this purpose, the African Union has officially recognised eight RECs, namely, the Economic Community of West African States (ECOWAS), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of Central African States (ECCAS), the Southern African Development Community (SADC), the Intergovernmental Authority on Development (IGAD), the Arab Maghreb Union/Union du Maghreb Arabe (UMA), the Community of Sahel-Saharan States (CEN-SAD), and the East African Community (EAC).

Given their economic outlook, the human rights dimensions of RECs are not always appreciated. Yet, the ultimate objective of any integration project is to improve the socioeconomic wellbeing of the peoples of the integrating states. Thus, at the very least an integration project has an implied objective to promote socioeconomic rights like the rights to health, education, work, and an adequate standard of living. Similarly, gross, widespread or systematic violation of human rights in one or more of the integrating states can cause political instability that will destabilise the whole region and by extension the integration agenda. Given this connection between economic integration and human rights protection and their mutually reinforcing roles, RECs typically indicate the recognition, promotion and protection of human rights among their core objectives or principles. Some go a step further to establish mechanisms for the protection of human rights. Currently, ECOWAS and EAC are the best examples of the latter. However, since these RECs were not originally nor primarily established for human rights protection, they have had to take on that mandate along the way. They have done this by repurposing existing Community institutions (in this case, their Community courts or tribunals) to adjudicate claims of human rights violations. (Okafor & Effoduh 2020 at 113; Akinkugbe 2020 at 158).

Thus, for the ECOWAS Court, for instance, its human rights mandate is additional to its core functions as the Community Court of Justice, the Community Administrative Court and the Community Arbitration Tribunal all of which serve ECOWAS' primary purpose as an economic integration organisation. But the re-purposing of the ECOWAS Court for human rights

protection differs from how the EACJ attained its human rights protection mandate. (Gathii and Mbori 2020 p. 302) While the ECOWAS Court is specifically granted the jurisdiction for human rights cases (and via the 2005 Supplementary Protocol), the EACJ took on that role through an expansive interpretation of its jurisdiction.

ECOWAS Court and the Protection of Human Rights in the Digital Environment

As noted above, economic integration and human rights protection are interconnected and mutually reinforcing. Accordingly, protecting human rights is not only a moral or political issue, but also an essential factor in economic development. For instance, the freedom of movement including the right of persons to leave and return to their countries freely is essential for economic integration. Cross-border trade and business will be severely affected without the guarantee and protection of such a right. But in our current globalised world that is so interconnected by information communication technologies, many of the things people needed to physically meet to do can now be done virtually. Teaching and learning, trade in goods and services, social interactions, business meetings, and even political meetings or gatherings are now done online without the need for people to travel to, or meet in, a physical location. It is in this broader conception of the indispensability of the Internet to our social, political and economic lives that attempts to frame access to the internet as human right must be viewed. (see UN Special Rapporteur on Freedom of Expression, Frank La Rue report A/66/290 2011; Land 2013; Joyce 2015, and African Commission Special Rapporteur on Freedom of Expression and Access to Information, Lawrence Mute report 2019 paras 34-36).

The Ecowas Court has been at the forefront of framing access to the internet and services provided over the internet as human rights issues to ensure stronger normative protections for them. In *Amnesty International et al v. Togo*, the ECOWAS Court held that the Togolese government violated freedom of expression when it shut down the Internet in Togo in 2017. The Court noted that in and of itself, access to the internet cannot strictly speaking be considered as a fundamental right. (ibid, para 38; Cerf 2012) However, since the Internet is a medium that facilitates or complements the enjoyment of other rights such as freedom of expression, which was in issue, it should be deemed

as ‘an integral part of [the] human right that requires protection by law’.

In *Incorporated Trustees of Laws and Rights Awareness Initiatives v. Nigeria*, the Court held the criminal sanctions imposed by section 24 of Nigeria’s Cybersecurity Act 2015 to prevent speech that, among others, was ‘grossly offensive’, ‘indecent’, ‘insulting’ or ‘annoying’ were not necessary or proportionate restrictions of freedom of expression on the Internet. Similarly, in *Festus Ogwuche v. Nigeria*, the Court agreed with applicants that the government’s directive which required prior vetting of political programs before they are broadcast on traditional media or streamed online (in order to prevent divisive, inciteful or hateful speech) violated freedom of expression.

Finally, in the recent case of *SERAP and Others v Nigeria (the Twitter Ban Case)* , the Court held, relying on Amnesty International v Togo, that because access to the internet facilitates freedom of expression, ‘denial of access to the internet or services provided via the internet… operates as denial of the right to freedom of expression and to receive information’. It therefore overruled Nigeria’s objection to its jurisdiction. On the merits, it reasoned that access to social media like Twitter is essential for exercising freedom of expression; therefore, access to social media including Twitter should be regarded as a component of freedom of expression and protected from unlawful, arbitrary, or disproportionate restrictions. It therefore concluded that Nigeria’s ban of Twitter without the backing a law or court order violated freedom of expression under the African Charter and the ICCPR.

It is significant that the ECOWAS Court has recognised access to the Internet as a human rights issue that has implications for the enjoyment of rights such as freedom of expression. While access to the internet in the above cases were litigated and determined within the context of freedom of expression, they are important precedents that may be applied by analogy in future cases to other human rights enjoyed or exercised on the Internet. But on a more conceptual level, one could view the Court’s pushback against restrictions of access to the Internet as exemplifying the mutually reinforcing roles of human rights protection and economic integration. Given the crucial importance of Internet access for trade in goods, provision of services, running of businesses and other economic purposes, protecting access to the Internet as a human right will have a multiplier effect that contributes to the economic integration agenda of

ECOWAS. Therefore, the Court's role in human rights protection generally, and in the protection of access to the Internet in particular, is not a deviation from ECOWAS' core objective of economic integration. It is an integral part of it.

East African Court of Justice – a custodian of Internet freedom in the Great Lakes Region?

Given their different focus, the constitutive treaties of most RECs lack express or extensive provisions on human rights, both in general and in terms of specific rights. The Treaty for the Establishment of the East African Economic Community (EAC) toes a similar line. It only refers to 'human rights' in general terms a few times under its 'good governance clauses' (Articles 6(d)) and 7(2)) and other provisions such as Articles 3(3)(b), 27(2) and 123(3)(c). Specifically, Article 6(d) of EAC Treaty (the good governance clause) provides:

- The fundamental principles that shall govern the achievement of the objectives of the Community by the partner states shall include: … (d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

Similarly, Article 7(2) of the EAC Treaty requires Member States to abide by the principles of rule of law, democracy, social justice and the maintenance of universally accepted standards of human rights. Based on these provisions, cases involving claims of human rights violations, have often been referred to the East African Court of Justice (EACJ) which has creatively interpreted those good governance clauses of the EAC Treaty to claim a limited human rights mandate. For example, in *Burundi Journalists' Union v. The Attorney General of the Republic of Burundi*, the EACJ, citing these provisions, held that the government of Burundi's Press Law No. 1/11, mandating an arbitrary accreditation scheme that compels journalists to obtain a press card before exercising their profession, violated freedom of expression (para 123). The EACJ reasoned that 'there is no doubt that freedom of the press and freedom of expression are essential components of democracy' (Ibid, para 80). The Court further noted that 'under Articles 6(d) and 7(2), democracy must of necessity

include adherence to press freedom' and a 'free press goes hand in hand with the principles of accountability and transparency which are also entrenched in articles 6(d) and 7(2)' (Ibid, para 83).

The EACJ took a similar position in the case of *Media Council of Tanzania v. Attorney General*. In that case, it held that numerous provisions of Tanzania's Media Services Act violated the EAC Treaty as they infringed the right to freedom of expression. The Court found that the Tanzanian government had failed to demonstrate that the limitations to the right in the law were legitimate, and therefore held that the impugned provisions violated the Treaty by infringing freedom of expression protected by the African Charter (para, 118).

While these cases of the EACJ protecting media freedoms were decided within traditional media contexts, they nonetheless provide standards that are applicable to enjoyment of media rights on the Internet. In any event, because journalism is now practised mainly through digital or online mediums, there is a strong basis to extend the Court's jurisprudence to the digital environment using the 'normative equivalency approach'. Accordingly, although the EACJ has yet to specifically address the issue of Internet access and its implications for enjoyment of human rights, one can predict based on its prevailing jurisprudence that it will not hesitate to protect Internet access and human rights within the digital ecosystem.

Conclusion

Sub-regional courts such as the ECOWAS Court and East Africa Court of Justice are assuming crucial roles in protecting human rights on the Internet. Their contributions can be seen in generally expanding the institutional protection of human rights, flagging online human rights violations, fostering digital rights norms and setting the boundaries of acceptable behaviour for states on access to the Internet. While their normative and institutional capability to foster human rights on the Internet cannot be doubted, compliance and enforcement of judgments continues to be the Achilles heel of sub-regional courts in Africa (Ebobrah & Lando at 192). Within Ecowas for instance, most member states have failed to domesticate the Court's Protocol or its relevant provisions on execution of judgments to enable their domestic courts enforce decisions of the

Ecowas Court. Also, out of the 15 members, only six have complied with their duty to appoint or designate a competent national authority to process judgments of the Court. Many of the states 'do not all-too-often respect the decisions of their own domestic courts' and seem to approach the Ecowas Court with the same attitude (Okafor and Effoduh at 109).

Given that the rate of compliance with a court's decisions is an important way of measuring its effectiveness, low compliance is always concerning. However, effectiveness may also be assessed by focusing less on quantitative indicators (i.e., rate of compliance), and rather looking to whether overall, the decisions of a court are effective in setting standards, influencing a change in the behaviour of states and generally aiding in normative development (Gathii, 2020; Posner & Yoo 2005). Going by this alternative approach, we argue that despite low compliance rates with their judgments, sub-regional courts like the ECOWAS Court and the EACJ are making effective normative contributions to curbing the authoritarian behaviour of African states within the digital environment.

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