

The right to freedom of speech law constitutional administrative essay

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Introduction and problem statement

The history of Africa has been dominated by gross human right violations.

[1]The African Charter on Human and Peoples' Rights (hereinafter the ACHPR) is the first regional instrument committed to the protection of human rights in Africa.[2]The right to freedom of speech is one of the fundamental rights protected under article 9 of the ACHPR.[3]The right to freedom of speech is very important in that it helps to exercise other fundamental rights of individuals such as the right of access to information, right to hold opinions, freedom of assembly, freedom of association and the right to participate in politics.[4]The African Commission on Human and Peoples' Rights (hereinafter the African Commission) was established by the OAU to promote and protect the human rights contained under the ACHPR.

[5]Through the years, the Commission has entertained many cases of violations of the right to freedom of speech and the right to freedom of expression by state parties.[6]The Commission has given meaning to the right to freedom of expression contained under article 9 of the ACHPR. It also explained how the ' claw back clause' attached to the right is to be interpreted.[7]The Commission has made various efforts to ensure the protection of the right to freedom of speech as part of the right to freedom of expression. One of such measures includes the appointment of a Special Rapporteur on Freedom of Expression and Access to Information. The Special Rapporteur is in charge of investigating violations of the right to freedom of expression by state parties and making public interventions when the right is violated. She also submits reports to the African Commission on the status of the right to freedom of expression in Africa.[8]The Commission also made

the Declaration of Principles on Freedom of Expression in Africa to reinforce the protection of the right under the ACHPR.[9]Despite the various efforts of the Commission to improve the protection of the right to freedom of speech and other forms of expression in Africa, African governments have continued to severely violate the right through the use of domestic legislations.[10]The failure of the Commission to curb the violation of human rights including the right to freedom of speech is attributable to the lack of adequate resources, the non-binding nature of the findings of the Commission and absence of a strong machinery to enforce the decisions of the Commission.[11]To strengthen the protective mandate of the African Commission, the African Court on Human and Peoples' Rights (hereinafter the African Court) was established. The Court has very broad powers which involve the interpretation and application of the ACHPR, the Protocol establishing the Court and other human rights instruments to which the states concerned are parties.[12]The Court has a compulsory jurisdiction to receive cases of human right violations from state parties, the Commission and African Inter-governmental Organizations.[13]It has also an optional jurisdiction to receive complaints from individuals and Non-Governmental Organizations (hereinafter NGOs), with observer status before the Commission alleging violations of the ACHPR by state parties. The Court can however entertain such individual communications if the state parties against whom complaint is lodged have made a declaration recognizing the competence of the Court as provided under article 34(6) of the Protocol.[14]Since it began its function recently, the Court has dismissed most of the individual communications brought before it for want of jurisdiction.[15]Although the Court hasn't so far

entertained many cases of violations of the right to freedom of speech it is expected to play important roles in the protection of the right for various reasons. The final and binding nature of the Court's judgment contributes to the better protection of the right.[16]The Court can also order appropriate remedies such as repatriation and fair compensation against state parties found to have violated human rights.[17]Unlike that of the Commission, the Court has strong enforcement machinery in place to monitor the implementation of its judgment. The AU Executive Council which is in charge of monitoring the Court's decisions can recommend sanctions on state parties that have failed to comply with the judgment of the Court.[18]Hence, compared to the African Commission, the Court has stronger powers to protect human rights including the right to freedom of speech.

Problem Statement

Matters of human right violations have been the major concern in Africa for the past few years.[19]Different fundamental rights of people are being violated and the human right to freedom of speech is one of the fundamental human rights of persons which have been violated.[20]The right to freedom of speech upholds the right of all to express their views and opinions freely. It is essential in enabling democracies to work, which demands public participation in decision making of any country. Citizens cannot exercise their right to vote effectively or take part in public decision making if they are unable to exercise their right to freedom of speech. The right to freedom of speech is linked directly to the right to have free access to information and ideas.[21]Thus freedom of speech is not only important for individual dignity but also to participation, accountability, and democracy. Violations of

freedom of speech go hand in hand with other violations, in particular with the right of association and assembly.[22] Various international and regional documents and mechanisms are in place to guarantee the right to freedom of speech. In relation to the main mechanisms that are in place in Africa to guarantee freedom of speech, the ACHPR is considered as the corner stone of the African human right system.[23] Under Article 9(2) of the ACHPR it is stated that " Every individual shall have the right to express and disseminate his opinions within the law." [24] Although this right is considered as a corner stone of development, its protection has been severely watered down by the ' claw back clause' inserted within the same article.[25] The ACHPR like other existing regional human rights instruments provides for the establishment of an African Human Right Commission.[26] The African commission performs different tasks in order to fulfill its mandates in relation to promoting freedom of speech. In October 2002, the African Commission made a declaration on the principle of freedom of expression in Africa.[27] The declaration sets out important bench marks and elaborated on the precise meaning and scope of the guarantees of freedom of expression laid down under Article 9 of the ACHPR.[28] The Commission in view of the situation of the right to freedom of expression in Africa appointed a Special Rapporteur on Freedom of Expression and Access to Information in Africa.[29] However, unlike its regional counter parts, the ACHPR does not provide for a court of appropriate jurisdiction designed to offer judicial settlements in situations insoluble by mutual agreement. Although the African commission indeed serves as useful purpose, the African human right machinery remains inadequate and ineffective in the absence of a centralized court.[30] This led

to the adoption of the protocol to the establishment of the African Court in 1998 in order to remedy the lack of judicial power. Guaranteeing freedom of speech in Africa has many challenges. The challenges differ from country to country. In some countries there could be lack of understanding about the principles that should be used to balance the right to freedom of expression of individuals and the need to protect the rights of other individuals.[31]The main issue that this paper is going to analyze is the role that the African Court plays in the protection of freedom human right in general and freedom of speech in particular by overcoming such challenges. The paper answers whether or not the African Court may serve as an effective mechanism in the protection of the right to freedom of speech. In answering this question, the present situation of the right to freedom of speech will be examined.

CHAPTER TWO

2. What does the right to freedom of speech mean?

2. 1 Definition of the right to freedom of speech

The Right to freedom of speech is one of the means of expressing one's views and disseminating ones opinions. It is a crucial fundamental human right which involves communicating one's ideas and views to others through oral means. Hence, it protects the rights of both the speaker and the listener. [32]The right to freedom of speech refers to " the freedom to communicate ideas without government suppression or interference or punitive action. It protects the individual's ability to think and to express his thoughts in material form, whether spoken, written, filmed, staged, or otherwise depicted visually." [33]Some authors defined the right to freedom of speech as " our most fundamental—and our most contested—right." [34]They argue <https://assignbuster.com/the-right-to-freedom-of-speech-law-constitutional-administrative-essay/>

that it is an essential freedom since the protection of the right to freedom of speech enables individuals to exercise their other fundamental rights.

[35]The scope of the protection of the right to freedom of speech is broad in that it protects not only speech in the public interest but also speech which is unpleasant and distasteful.[36]Although freedom of expression is used synonymously with the right to freedom of speech, it is wider than freedom of speech since it involves other rights such as seeking, receiving and transferring information through other means.[37]Free expression includes not only spoken words but also paintings, photographs, performances, writings, and publications.[38]Thus freedom of expression is broader than the right to freedom of speech. In fact, the right to freedom of speech is only one component of freedom of expression. The right to freedom of expression including the right to freedom of speech is a negative right which requires government not to interfere in the exercise of the right.[39]The right has however a positive aspect that demands states to take positive measures to ensure the protection of the right from interference by individuals.[40]The positive obligation related to the right to freedom of expression also requires states to create a legal system that gives access to information held by public bodies.[41]The protection of the right to freedom of speech echoes the principle that government should not stifle the free flow of information and ideas.[42]

2. 2 Why protect the right to freedom of speech?

The right to freedom of speech is given recognition and protection as a vital fundamental right under international human rights instruments. There have been different arguments justifying the protection of the right to freedom of

speech. One of such arguments relates to the importance of the right to freedom of speech to exercise the rights of individuals to self fulfillment and development.[43]This theory reflects that restriction on the right to freedom of expression restrains the growth of our personality.[44]Another important argument for the protection of the right to freedom of speech has to do with the relevance of open discussion to discover the truth.[45]According to this theory if the right to freedom of speech is limited, the society withholds its honest opinions and thoughts.[46]Such restriction gets in the way of knowing the truth and making well informed decisions.[47]Some scholars argued that the rights of all members of society including minority groups to engage in political debate and participate in government related affairs necessitates the protection of the right to freedom of speech.[48]In describing the importance of the protection of the right to freedom of speech Cooray stated that: The freedom of speech is the single most important political right of citizens, although private property is required for its operation. Without free speech, no political action is possible and no resistance to injustice or oppression is possible. Without free speech elections would have no meaning at all. Policies of contestants become known to the public and become responsive to public opinion only by virtue of free speech. Between elections the freely expressed opinions of citizens help to restrain oppressive rule. Without this freedom it is futile to expect political freedom or, consequently, economic freedom. Thus freedom of speech is the sine qua non of a democratic society.[49]The right to freedom of speech is also useful to government since it enables it to reply to unfair criticisms from the public about its functions.[50]The free flow of information and the right to freedom

of expression enables individuals to actively engage in government related affairs. It also advances good governance, accountability and transparency.

[51]It is very important in liberal and democratic societies.[52]The right to freedom of speech is an enabling right in that it helps to create awareness among the society about other human rights and how they are exercised.

[53]This is confirmed by the statement of the United Nations General Assembly which described the freedom to receive and impart information as the " touchstone" of all the rights to which the United Nations is committed.

[54]The Inter-American Court of Human Rights affirmed this view by stating that freedom of expression is the main foundation of a democratic society.

[55]In Media Rights Agenda and Others v. Nigeria the African Commission on Human and Peoples' Rights also asserted the importance of freedom of expression. The Commission held that freedom of expression is important to the advancement of an individual's personality and his participation in the political aspects of his/her country.[56]

2. 3 The scope of the right to freedom of speech

The right to freedom of speech is not an absolute right. In fact unlimited exercise of the right to freedom of speech can result in the violations of the rights of others.[57]It can be limited to protect the right to privacy and reputation of others.[58]Article 9 of the ACHPR protects the right of every one to express his or her ideas and opinions " within the law"[59]From the reading of this provision of the ACHPR, it is possible to understand that the right to express and disseminate one's opinions has a ' clawback clause.'[60]Many African states have laws that limit the rights to freedom of speech.[61]The African Commission has asserted that the ' clawback

clauses" contained in the ACHPR should be interpreted inline with the obligations of states under international human right instruments. The Commission further held that states can only put reasonable restrictions on rights protected by international human right instruments and they can't abandon the rights all together.[62]The African Commission held that article 9(2) of the ACHPR provides for the limitation of the right to freedom of expression by law. However this does not mean that states can dismiss the right to freedom of expression protected by international law through domestic legislations. Domestic laws should not be given priority over international law.[63]There is a general limitation clause under article 27(2) of the ACHPR which states that the rights in the Charter are to be exercised inline with the rights of others, common interest and security.[64]According to the African Commission, freedom of expression as contained under article 9 of the ACHPR, does not allow derogation regardless of the political situation of states.[65]Similarly, the Special Rapporteur on Freedom of Expression and Access to Information in Africa asserted that the ACHPR does not have a derogation clause. She stated that state parties are under obligation to ensure the protection of the right to freedom of expression provided under article 9 of the ACHPR and the Declaration of Principles of Freedom of Expression in Africa despite difficult situations such as armed conflict, civil unrest or any form of state emergency.[66]She further held that Freedom of expression can be limited by national security grounds only if a risk of serious danger to a legitimate interest exists and there is a close connection between such risk and the expression in question.[67]She further stated that " No one should be found liable for true statements, opinions, or

statements regarding public figures which it is reasonable to make in the circumstances." [68] According to article 19(3) of the ICCPR, the right to freedom of expression can be limited under strict conditions. The ICCPR provides that all limitations on the right to freedom of expression should pass the following three tests. [69] First the limitation should be inline with the law. Second, the limitation should serve a legitimate purpose acceptable by international law. Finally, the limitation of the right must be necessary for the legitimate purpose. Hence, all limitations on the right to freedom of expression should pass the above mentioned tests. [70] Article 20(2) of the ICCPR prohibits 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.' [71]

2. 4 The relationship of the right to freedom of speech with other human rights

The right to freedom of speech is inter-related with the following fundamental rights.

2. 4. 1 The right to information

The right to "impart information and ideas" is a very clear constituent part of the right to freedom of expression. It involves transferring what an individual thinks and knows to others either privately or through public means.

[72] Freedom of expression involves the right to receive information and the right to impart information. The protection of the right to impart information involves the protection of the right to freedom of speech. It should however be noted that the right to freedom of speech which is one means of imparting information is inseparable from the right to receive information.

When the speaker exercises his right to freedom of speech, the listener

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exercises his right to receive information. It has been argued that the two rights are the " sides of the same coin".[73]According to the Inter-American Court of Human Rights, the unlawful limitation of the right to freedom of expression violates not only the right to impart information of an individual but also the right to get access to information of others. The rights of citizens to get access to the ideas and opinions of others, is as important as the right to express ones views.[74]Similarly in Sir Dawda K. Jawara v. The Gambia, the African Commission held that harassing and detaining journalists because of the articles they published and the questions they raised amounts to violation of not only their rights to freedom of expression but also the right of the public to receive information.[75]

2. 4. 2 Freedom of assembly and association

The right to freedom of assembly is highly related to the right to freedom of speech in that in order to fully exercise their rights to assemble, individuals should be able to speak freely and disseminate information to each other. The very purpose of the assembly of people is to exchange information and discuss on different issues. In order to do so they should be able to exercise their rights to freedom of speech without fear. Thus, the two rights are highly inter-related. The right to free association also depends on the right to freedom of speech since members of an association should be able to express their opinions on different matters freely.

2. 4. 3. The Right to hold opinion

The right to freedom of speech is also highly associated with the right to hold an opinion.[76]The right to hold opinion is a precondition for the right to

freedom of speech.[77]When one exercises the right to freedom of speech he or she is expressing ones opinions and ideas. The opinions and views of individuals can not be expressed if it is not exercised through rights such as freedom of expression and the right to freedom of speech. The Universal Declaration of Human Rights (UDHR) recognizes the right to freedom of expression and the right to hold an opinion as a single right.[78]

2. 4. 4 The right to participation-Accountability and democracy

According to the African Commission the protection of freedom of expression and access to information helps to achieve good governance, accountability, transparency and democracy.[79]The state should protect and guarantee the right to freedom of expression to prove its commitment to democracy and good governance.[80]

CHAPTER THREE

3. International human right instruments: How the right to freedom of speech has been protected

The right to freedom of speech is protected by numerous regional and international human right instruments which will be discussed below.

3. 1 International human right instruments

3. 1. 1 The right to freedom of speech under the UDHR

Article 19 of the UDHR reads " 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 medium and regardless of frontiers."[81]The right to impart information

via any medium includes communicating information by oral means which in turn refers to the right to freedom of speech. Like other rights under the UDHR, the right to freedom of speech can be limited in accordance with article 29(2) of the same which states that the rights and freedoms of individuals can only be limited by law for the purpose of protecting the rights of others and for the sake of morality, security and public order. It should be noted that although the UDHR does not have a binding force, it created some obligations towards UN member states.[82]The United Nations Commission for Human Rights, the primary body in charge of handling cases of human right violations, launched the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression.[83]The function of the Special Rapporteur includes collecting information on violations of the right to freedom of expression and the right to freedom of opinion. It receives communications alleging violations of the right to freedom of expression and the right to freedom of opinion.[84]It makes fact finding country visits and gives recommendations on ways of better promotion and protection of the right to freedom of opinion and the right to freedom of expression.[85]

3. 1. 2 The Right to freedom of speech under the ICCPR

The International Covenant on Civil and Political Rights (hereinafter the ICCPR) also recognizes the right to freedom of expression as a fundamental human right that ought to be protected from undue interference and violations.[86]Unlike that of the UDHR, the ICCPR is binding.[87]The ICCPR also provides for restriction of the right to freedom of expression. It states that the right can only be limited when it is provided by law and when it is

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necessary for the protection of the rights of others, national security or public order.[88] Thus, the ICCPR indicates that limitations on the right to freedom of speech should not be arbitrarily imposed by government and should be constricted narrowly.[89] The Optional Protocol to the ICCPR recognized individual communications to the UN Human Rights Committee (hereinafter the HRC), the monitoring body of the ICCPR, alleging the violations of human rights under the ICCPR.[90] After considering such communications the Committee makes recommendations such as the amendment and repeal of laws violating human rights.[91] Regarding the right to freedom of expression the UN HRC held that the right must be interpreted as consisting of all forms of ideas and opinions that can be communicated to others.[92]

3. 2 Regional human right instruments

3. 2. 1 Europe

3. 2. 1. 1 European Convention on Human Rights

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the European Convention) is among the first regional human rights instruments that protect freedom of expression.

[93] Like that of the ICCPR, the European Convention also specifies the conditions that justify the limitation of the right to freedom of expression.

[94] States and individuals can bring complaints alleging violations of the rights to freedom of speech and expression to the European Court of Human Rights (hereinafter the European Court) which is an enforcement body of the Convention.[95] The judgment of the Court is binding on member states.

[96] In *Handyside v. the United Kingdom*, the European Court held that the <https://assignbuster.com/the-right-to-freedom-of-speech-law-constitutional-administrative-essay/>

right to freedom of expression is an important cornerstone of democracy. It gives protection to not only favorable ideas and opinions but also ideas that are deemed to be offensive and shocking.[97]

3. 2. 2 America

3. 2. 2. 1 Inter-American Convention

Article 13(1) of the American Convention on Human Rights (hereinafter the American Convention) also provides for the right to freedom of thought and expression of all sorts of ideas through any media.[98]The American

Convention specifically refers to the communication of information through oral means which reflects the importance to the right to freedom of speech.

The Convention has also a limitation clause that specifies under what circumstances the right to freedom of expression may validly be limited.

[99]The Convention does not however give protection to speech connected to propaganda for war and advocacy of violence, provocation of genocide and child pornography.[100]The American Human Rights System has also a Special Rapporteur for Freedom of Expression created to raise awareness on the relevance of the right to freedom of expression and information to the advancement of democracy.[101]The American Convention is enforced by the Inter-American Commission on Human Rights and Inter-American Court on Human Rights. The Inter-American Commission has the power to receive individual complaints regarding violations of human rights under the Convention. The Commission can make investigations regarding the alleged violations and gives recommendations to the state concerned after considering the case. If state parties fail to comply with its

recommendations, it transfers the case to the Inter-American Court.[102]The <https://assignbuster.com/the-right-to-freedom-of-speech-law-constitutional-administrative-essay/>

Court can only receive petitions of violations of the Convention from state parties and the Inter-American Commission.[103]With regard to the right to freedom of expression, the Inter-American Court held that " Freedom of expression is a cornerstone upon which the very existence of a democratic society rests."[104]

3. 2. 3 Africa

3. 2. 3. 1 The ACHPR

Article 9(2) of the ACHPR also provides for the right of everyone to impart his opinion " within the law".[105]From the reading of the above provision, it is possible to infer that the right to freedom of expression has a " clawback clause". According to Gittleman, although the right to freedom of expression and opinion is put in simple terms under article 9 of the ACHPR, the application of the provision is somewhat complicated.[106]The ACHPR has also a general limitation cause under article 27 which requires individuals to exercise their rights inline with the rights of others, morality, common security and mutual interest.[107]The enforcing bodies of the ACHPR include the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights. The role of the two bodies in the protection of the right to freedom of expression is discussed in detail under chapter five of this paper.