

**WEBINAR ORGANISED BY THE INSTITUTE FOR DEMOCRATIC
GOVERNANCE**

**THEME: THE BALANCE BETWEEN FREEDOM AND REGULATION
IN THE VIRTUAL SPACE: WHAT DO WE DO?**

PRESENTATION BY:

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TOPIC:

**‘WHAT RECOURSE IS AVAILABLE FOR POLITICAL ACTIVISTS
AND CITIZENS WHEN THEIR RIGHTS ARE ABUSED IN THE
VIRTUAL PUBLIC SPACE?’**

IDEG CONFERENCE ROOM, ACCRA, 29TH JULY, 2020

1. Introduction & background

The impact of the internet on public and private life worldwide cannot be understated.

Arguably there is exponential growth in internet infrastructure globally which offers exceptional opportunities for freedom of expression and media freedom generally facilitating political, social and economic discourse, particularly in the midst of the challenges posed by COVID-19 globally.

John Perry Barlow characterises the freedom regarding internet usage as *“a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear or being coerced into silence or conformity”* (**Declaration of Independence on Cyberspace, 8 February 1996**)

The virtual public space (VPS) is driven by internet is premised on the *‘right to hold opinions without interference, and the right to freedom of expression, which 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 19(1) (2) of ICCPR, UDHR as replicated in other international, regional and national/domestic human rights instruments; article 21 of 1992 Constitution**)

Essentially, VPS/internet facilitates the right to information and enhances democratic governance.

The rights guaranteed under Article 1, 2 of the ICCPR shall be exercised cognisant of the respect of the rights or reputations of others, protection of national security or of public order, public health or morals. **(Article 19 (3) (a) (b) of the ICCPR)**

Legitimate grounds for limitation of right to freedom of expression

The right to freedom of expression is sacrosanct to the extent that international human rights standards require that this right States can only limit or derogate from this right under strict conditions namely:

- (1) **Legality** – precise, clear laws that avoid unbound/unbridled discretion;
- (2) **Legitimacy** – respect for the rights or reputations of others or to protect national security, public order, health and morals; and
- (3) **Necessity and proportionality.**

2. Challenges/issues

Despite its advantages, the VPS/internet is fraught with challenges which lead to human rights violations/abuses (e.g. violation of privacy and reputation, etc). These include:

blasphemy; extremism; defamation; ‘false/fake news’; hate speech (speech that incites violence or discrimination and damage reputation/dignity), propaganda often used as pretexts to demand accountability and to suppress legitimate discourse. **(Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, April 2018)**

These challenges **(eloquently captured in the IDEG concept paper relative to the Ghanaian context – e.g. MFWA media monitoring project)** calls for a governance regime in terms of regulatory intervention to balance the rights of internet users and those whose rights are abused through PVS/internet:

- (i) democratic society’s values to allow open debate and individual autonomy, vis-à-vis
- (ii) obligation to prevent attacks on vulnerable communities/groups and persons to ensure free, equal and non-discriminatory participation of everyone in public life.

(a) Protection of intermediaries

The noted challenges have been compounded by protection of intermediaries (internet access providers/companies, e.g. Google, Twitter, Facebook, VKontakte (Russian), Tencet (China), etc.) based on baseline global safeguards and best practices (**Manila Principles on Intermediary Liability, Global Civil Society Initiative, March 2015**):

Intermediaries should be shielded from liability for third party content

Content must not be restricted without an order by a judicial authority
Request for restrictions of content must be clear and follow due process

Laws and content restriction orders and practices must comply with the tests of necessity and proportionality

Responsibilities of intermediaries

Adherence to industry self-regulating ‘community standards’ or global standards largely shaped by the **UN Guiding Principles on Business and Human Rights** (‘soft law’) that regulate conduct of business affairs.

Need to for intermediaries to avoid causing or contributing to adverse human rights impacts or strive to mitigate such impacts inherent in their operations taking into account internally recognised human rights standards.

Conduct due diligence that identifies, addresses and accounts for actual and potential human rights impacts of their activities

3. Recourse mechanism - Role of CHRAJ

The right to an effective remedy is a human right and necessarily implies a recourse mechanism in respect of human rights abuses/violations.

CHRAJ has the constitutional mandate to promote and protect/enforce human rights and prove remedy through investigations of human rights violations perpetrated by duty bearers (state actors) and private enterprises (telcos, in this context)

As an investigative body, CHRAJ is empowered to receive all complaints that tend to violate rights in the context of international human rights law and the relevant provisions of the 1992 Constitution (i.e. articles 12 & 17 (right to non-discrimination); 15 (respect for human dignity); 19 (right to fair trial/hearing; as well as article 33(5) of the Constitution relating to abuse perpetrated by internet access providers, particularly their local collaborators/agents,

No known case filed with CHRAJ on violations on the internet.

Above situation due to lack of or inadequate awareness of CHRAJ as a remediation mechanism for all rights violations.

4. Conclusions - Examples of content moderation

(a) Companies/intermediaries

Companies are obligated to comply with domestic law (consistent with the principles of legality, legitimacy and necessity and proportionality) where they operate

Collaboration with regulatory bodies – i.e. Press Councils/Commissions (NMC, NCA) to remove harmful content)

Recourse to automated flagging, removal and pre-publication filtering to remove ‘undesirable’ content.

Commitment to standards of due diligence, transparency and accountability (‘community standards’)

(b) Government

States often resort to domestic legislation to restrict/limit ‘illegal’ of abusive content – e.g. child sexual abuse, threats of harm, incitements, etc.).

In extreme cases they governments/states resort to censorship and criminalisation to regulate content

Imposition of company obligations – e.g. Guidelines adopted during the elections in Kenya, 2017 (these require platforms to ‘pull down’ used in disseminating undesirable political contents)

(c) Global removals

States demanding extra-territorial removal of links, websites, etc. of contents that violate local/national laws – see Supreme Court of Canada in the case of *Google Inc. v Equustek Solutions Inc*, 28 June 201 – this approach raises concerns about right to freedom of expression.

5. Way forward

Need for e sustained engagement/collaboration with key stakeholders through education on the dangers posed by unrestrained, indecent language by political activists

CHRAJ and NCCE should intensify public education aimed at sensitising the public on reporting/lodging complaints on human rights violations and abuse of executive/administrative power by duty bearers.

NMC should be in a position to ‘sanitise’ content and if necessary impose sanctions

Regulatory bodies should discharge their duties devoid of arbitrariness or mindful of unfettered discretion as per article 23 and 296 of the Constitution