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AN OVERVIEW OF ONLINE EXPRESSION AS A DIGITAL RIGHT

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ABOUT US

DRLI is a not-for-profit organization (Non Governmental Organization) registered under Part C of the Companies and Allied Matters Act (Laws of the Federation of Nigeria) to, among other objectives, facilitate the defence and promotion of digital rights and sundry matters by providing pro bono legal services to victims of digital rights violations.

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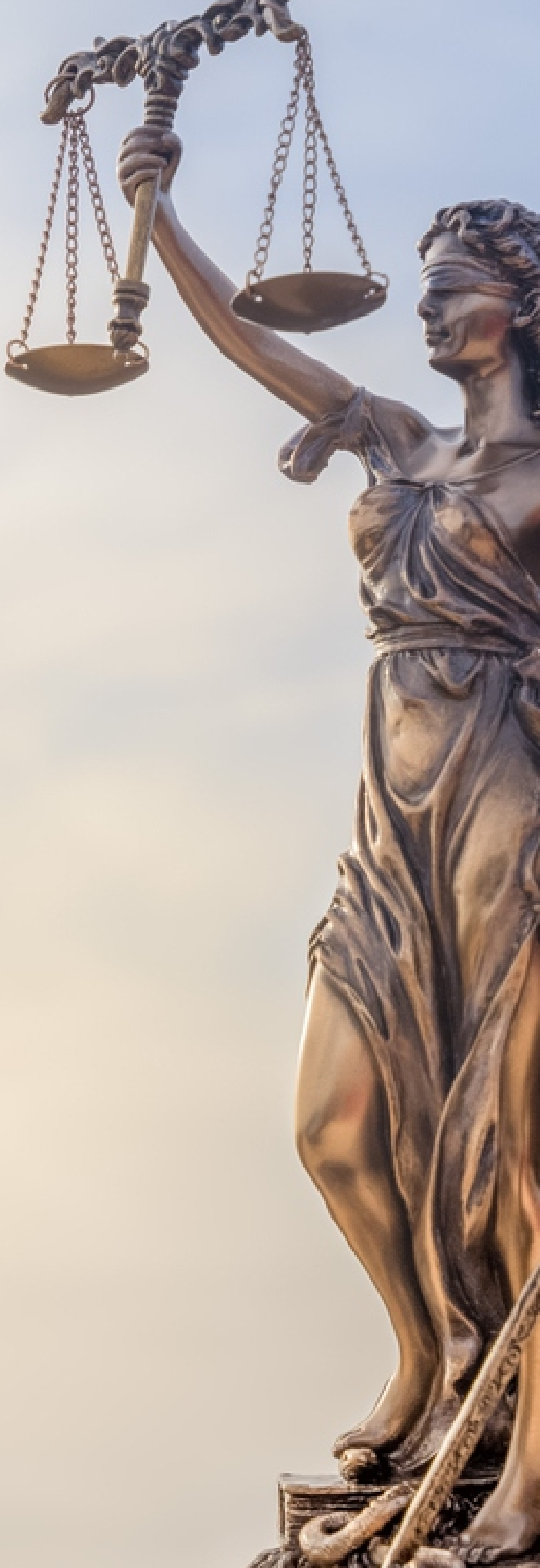
INTRODUCTION



INTRODUCTION

We no longer live in an offline society. We are living more in an online world connecting with people from different countries and sharing our thoughts and experiences, protesting online, and seeking the same rights that we seek in our daily lives. One of such rights is the freedom of expression. Freedom of expression is one of the basic fundamental human rights, enshrined in several international human treaties. These rights apply both online and offline. The internet, with the opportunities it offers people to express themselves, is an enabler for the exercise of this right.

The Internet has of course changed the way we communicate, work, and play. It has affected the way we live learn, socialize, and protest, etc. Freedom of expression on the Internet is key to understanding the potential of information and communication technologies for increasing the level of human rights protection around the globe. The right to online expression exist just as the right to freedom of expression offline. The right to freedom of expression is an umbrella term that houses the right to expression both offline and online. The internet is very ubiquitous, and so the avenue to express oneself has grown exponentially, hence, there is a need to legally protect this right.

The importance of the right to freedom of expression is well-established under domestic and international law. It is recognized as a fundamental right in itself, as well as the key to facilitating an array of other fundamental rights.

Most importantly, with the freedom to receive and impart information and ideas, the right to freedom of expression can play a crucial role in achieving openness, transparency, and accountability. It further enables individuals to meaningfully participate in decision-making and political affairs. The internet is one of the most powerful tools in facilitating the receiving and imparting of information and ideas. It allows for the speedy sharing of information across borders and to wide audiences. It enables individuals to engage with diverse views and perspectives, to access an array of resources to assist them to formulate their views.[1]

However, it should be noted that the right to freedom of expression just like other fundamental rights is not without exceptions. What this means is that the right to freedom of expression is not absolute. It has some limitations that expressly contained in any statute that guarantees this right. These limitations are established to guide the affairs of the citizens and the government to the respect that humans tend to abuse any privilege or right which they enjoy. It should be noted that if such freedom is not guided, it might lead to the breakdown of law and order as false information can be used to stir civil unrest, propagate lies about individuals. The main aim of this work is to examine the definitions, statutory enactments, judicial authorities, and limitations that surround the concept of online expression as a digital right.

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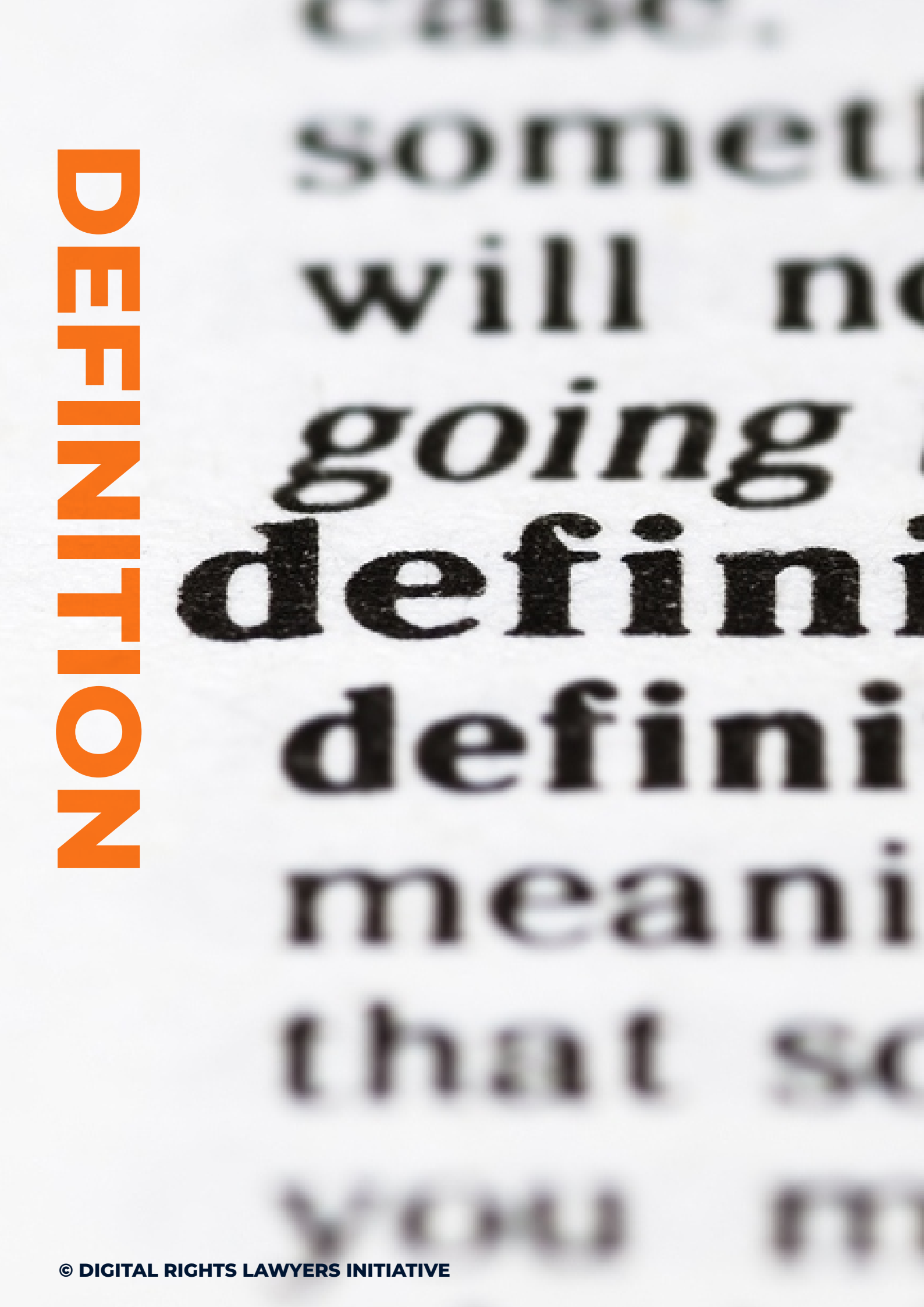
DEFINITION



DEFINITION

Online expression is one of the rights every internet user enjoys online. To lay a better understanding we would consider the two terms "Online" and "Expression".

The Black's Law Dictionary (2nd Edition)[2] defined Online as

- "A device that is connected to the Internet or other network.
- Documents, files, or web pages that are accessible for reading and downloading by users of a particular network (usually the Internet).
- Services, such as ticket reservations or technical support, directly accessible to other users of that network (usually the Internet)."

According to the Oxford Dictionary;[3]
The expression can be defined as *"The action of making known one's thoughts or feelings."*

The expression[4] can also mean "The action of expressing thoughts, ideas, feelings, etc. It could also mean a particular way of phrasing an idea."

Therefore, combining these definitions, the concept of **online expression** can be defined as expressing your thoughts, feelings, ideas, and so on, on an online platform

THE RISE OF DIGITAL RIGHTS THROUGH ONLINE EXPRESSION

Before we can talk about online expression as a digital right, especially as it applies to the Nigerian situation, we must first consider the history of online expression.

Freedom of expression began with religious toleration.[5] Before that, many important philosophers believed that censorship and control of information were an essential part of a society and statecraft (Machiavelli for example). Many priests and theologians routinely burnt the writings of their opponents and punished them for heresy.[6]

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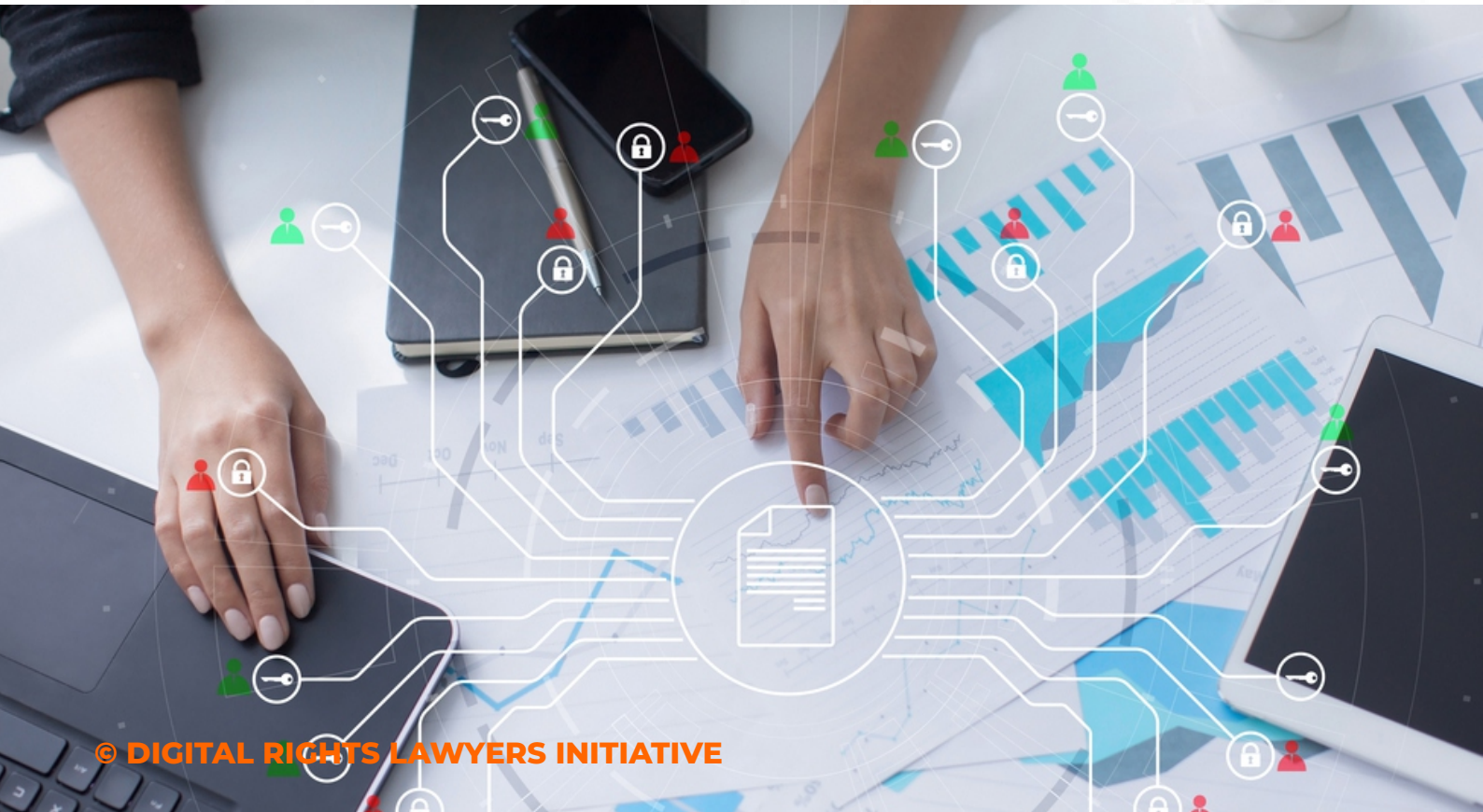
However, in 1598 places like France and England, the kings began to allow a limited form of religious toleration to relieve their kingdoms of religious strife. The American Constitution in 1791, however, was one of the first codified laws to enshrine this right. This idea spread because of smaller religious groups that felt they might be threatened by larger ones. For example, Baptists supported it because of the threat of persecution by Catholics and Protestants.[7]

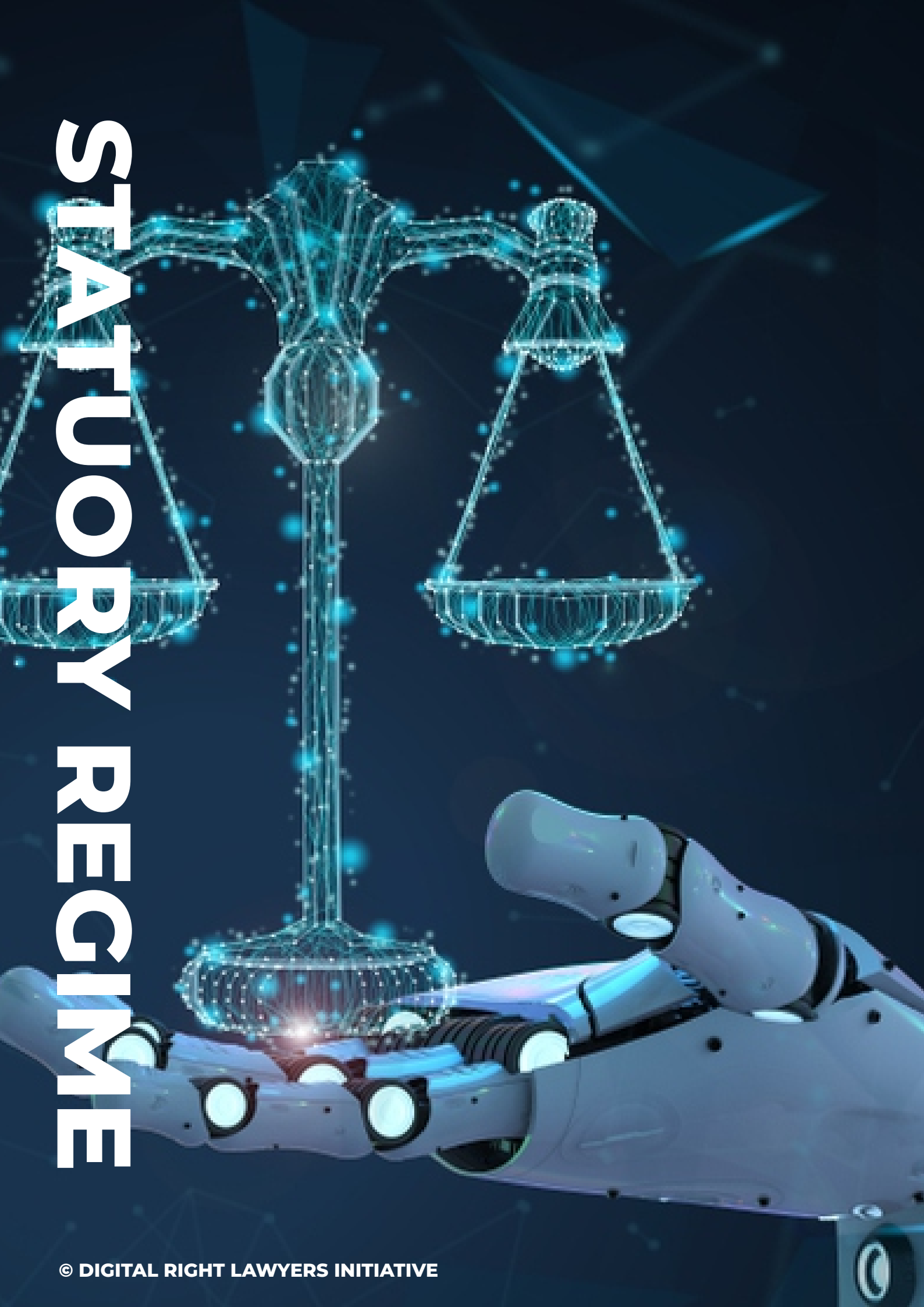
By the time of colonialism, it was already considered a basic right and it was enshrined in the Universal Declaration of Human Rights (UDHR) in 1945.[8]

In Nigeria from 1859 to 1960, the press in Nigerian was privately owned, but in 1961, the government seized the Morning Post's headquarters to control it, and then slowly expanded its influence over the press.[9] Over the years, the military has censored the press multiple times, and have cracked down on opposing views expressed in newspapers and so on.[10]

In 1979, freedom of expression was enshrined in the Nigerian constitution[11], more so, freedom of expression was enshrined in section 39 of the constitution of the Federal Republic of Nigerian 1999 (as amended) but there have not been a lot of regulations dealing with the online aspect of this freedom except mainly the Cyber Crime Act of 2015 which will be discussed subsequently.



STATUORY REGIME



STATUTORY REGIME

INTERNATIONAL ENACTMENTS

Human rights under international law are generally considered to be rooted in the Universal Declaration of Human Rights (UDHR), which was adopted by the United Nations General Assembly on 10th December 1948, following the end of World War II. The UDHR is not a binding treaty in itself, but countries can be bound by those UDHR principles that have acquired the status of customary international law. The UDHR has further been the catalyst to creating other binding legal instruments, most notably the ICCPR[12] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[13]

- The ICCPR enshrines civil and political rights, sometimes referred to as first-generation rights, and includes the rights to life, liberty, freedom of expression, access to information, privacy, and assembly.[14]

- The ICESCR enshrines economic, social, and cultural rights, sometimes referred to as second-generation rights, and includes the rights to health, education, work, and participation in cultural life. In recognition of the limited resources of many states, it is generally accepted that these rights are to be progressively realized over time.[15] The International law of freedom of expression is contained under Article 19 of the ICCPR[16] which comprises three core tenets:

- The right to hold opinions without interference (freedom of opinion);

- The Right to seek and receive information (access to information);

- The right to impart information (freedom of expression).

The right is contained in several legal instruments that have been developed by the United Nations and by regional human rights mechanisms, such as the ACHPR. Certain instruments provide a holistic guarantee of the right, whilst others focus on particular aspects thereof.[17] The right to freedom of expression is not absolute and may be limited by prescribed conditions.

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- The ICCPR is not the only treaty within the United Nations framework to address the right to freedom of expression. For instance:

I. **Article 15(3) of the ICESCR**[18] specifically refers to the freedom required for scientific research and creative activity, providing that:

> *"The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity."*

ii. **Articles 12 and 13 of the UN Convention on the Rights of the Child (CRC)**[19] contain extensive protections relating to the right to freedom of expression enjoyed by children, providing that:

> *"Article 12 (1) States Parties shall assure to the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, the views of the child being given due weight by the age and maturity of the child. (2) For this purpose, the child shall, in particular, be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."*

> *"Article 13 (1) The child 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 print, in the form of art, or through any other media of the child's choice. (2) The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> *a. For respect of the rights or reputations of others; or*
>
> *b. For the protection of national security or public order (order public), or public health or morals."*

iii. **Article 21 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD)**[20] contains extensive protections relating to freedom of expression and access to information of persons with disabilities, providing as follows:

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> *"States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:*
>
> *(a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities promptly and without additional cost;*
>
> *(b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes, and formats of communication of their choice by persons with disabilities in official interactions;*
>
> *(c) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;*
>
> *(d) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;*
>
> *(e) Recognizing and promoting the use of sign languages."*

It is therefore clear that the right to freedom of expression is firmly entrenched in the International human rights system, as an important right on its own, as well as a crucial enabling right.

In Africa, the right to freedom of expression is also well entrenched in the African regional system and contained in several regional treaties and soft law instruments. As a starting point, **Article 9** of the **African Charter**[21] is key in this regard and provides for the right to freedom of expression as follows:

> *"(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."*

The reference to *"within the law"* should not be seen as permitting states to enact laws that violate the right to freedom of expression but to ensure observance of due process in lawfully restricting freedom of expression.

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The guarantee of the right to freedom of expression is underscored in the Declaration of Principles on Freedom of Expression in Africa, adopted by the resolution of the ACHPR in October 2002. In its preamble, it notes:

> *"the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms" and "the important contribution that can be made to the realization of the right to freedom of expression by new information and communication technologies".*

Principle I (2) reaffirms that:

> *"Everyone shall have an equal opportunity to exercise the right to freedom of expression and access to information without discrimination".*

Moreover, Principle XVI calls on state parties to the African Charter to make every effort to give practical effect to the principles contained in the Declaration of Principles on Freedom of Expression in Africa. It is thus apparent that the right to freedom of expression is an indispensable part of the regional and international human rights framework.

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THE FREEDOM OF EXPRESSION ONLINE

Article 19(2) of the ICCPR was drafted in a technologically-neutral manner. In other words, through its statement that the right to freedom of expression applies "regardless of frontiers." It perfectly makes it clear that, the medium through which the speech is communicated does not affect the ambit of the protection that the right conveys. General Comment No 34 further explains that Article 19(2) includes internet-based modes of communication.[22] It goes further to call on states to take all necessary steps to foster the independence of new forms of media that have arisen through information and communication technologies (ICTs)[23], and to take into account both the differences and points of convergence in print and broadcast media on the one hand, and the internet on the other.[24] In a 2016 resolution, the UNHRC affirmed that:

> *"the same General* Comment No. 34 at Para 39.
> *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, by articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights".*[25]

The UNHRC further recognized the global and open nature of the internet as a driving force in accelerating progress in various forms, including in achieving the Sustainable Development Goals (SDGs).[26] This has similarly been recognized by the ACHPR.[27] In a 2016 resolution, the ACHPR recalled that the UNHRC's affirmation that the same rights that people have offline must also be protected online, and called on states to promote and facilitate access to the internet and international cooperation aimed at the development of media and information and communications facilities in all countries.[28]

The ACPHR further called on states to respect and to take legislative and other measures to guarantee, respect, and protect citizens' rights to freedom of information and expression through access to internet services.[29] The ACHPR also called on African citizens to exercise their right to freedom of expression on the internet responsibly. Historically, different forms of media were regulated differently. For instance, print media was typically self-regulated, whilst broadcast media often had more involvement from the state. The significance of this distinction, however, has diminished considerably over time.[30]

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There is ever-increasing convergence between the traditional and digital media sectors, including in respect of infrastructure that is increasingly becoming interdependent. The recognition by the UNHRC and by the ACHPR that the right to freedom of expression must be equally protected both offline and online is therefore appropriate and pays due regard to the convergence of different mediums and platforms through which the right to freedom of expression is exercised.[31]

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NIGERIAN ENACTMENTS

Online Expression does not have a large coverage by statutes in Nigeria, but some statutes deal with expression generally, and some of their provisions cover a small part of how it works online.

- The Constitution

The Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended) provides for the fundamental right of freedom of expression. Section 39(1) provides that:

> *"Every person shall be entitled to freedom of expression, including the freedom to hold opinions and to receive and impart ideas and information without interference."*

Subsection 2 expresses how *every person shall be entitled to own, establish, and operate any medium for the dissemination of information, ideas, and opinions.* The two subsections read together can apply to online mediums.

It is interesting to note that *"medium"* as used in the subsection was held by the court to apply to digital platforms as far back as 1982 in the case of **Anthony Olubunmi V. Lagos State Government**[32] where the court held that *"medium"* as used in provision of section 36 of CFRN 1979 (in pari materia with section 39 of the CFRN 1999 (as amended) covers schools as long as school is used as a platform to disseminate ideas and information.

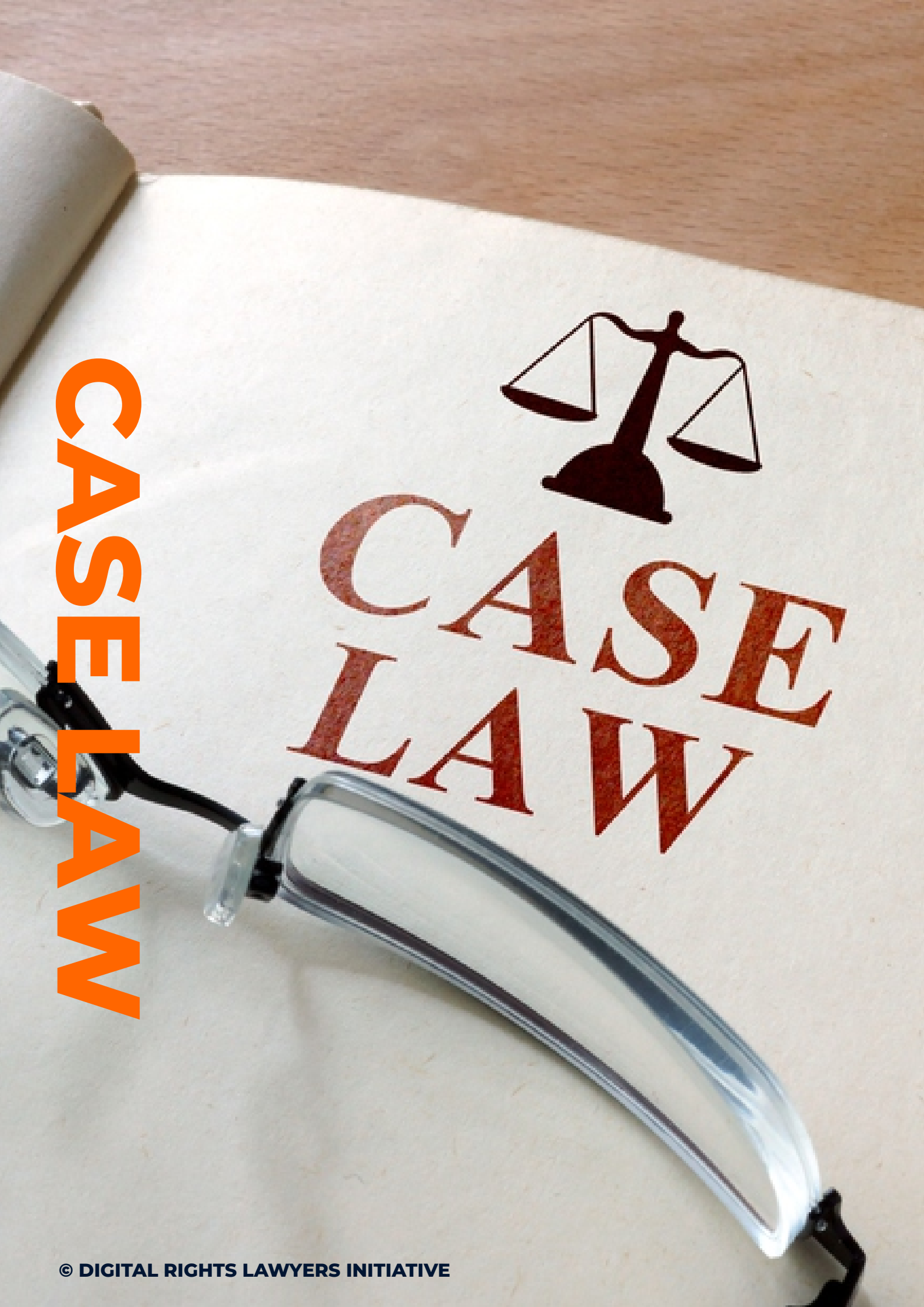
However, this right is not absolute and can be overridden by certain situations. Subsection 3(a) provides that this right can be taken away: *"To prevent the disclosure of information received in confidence, maintain the authority and independence of courts or regulating telephone, wireless broadcasting, television or the exhibition of cinematograph films."*
The vagueness of this provision means that sometimes it may be abused and people's rights taken away for no just cause.

- National Broadcasting Commission (NBC) Act[33]

The NBC Decree, later amended to the NBC Act, was enacted in 1992. NBC is vested with the responsibility of regulating and controlling the broadcast industry in Nigeria. Although this Act did not have online regulation in mind when it was signed into law, the online sphere too can be considered as part of its scope since a huge chunk of broadcasting is done online.

- Cybercrime (Prohibition, Prevention etc.) Act 2015

In 2015, the Nigerian legislature passed the Cybercrime Act which sought to provide a unified legal framework to regulate cybercrime in Nigeria and to promote cybersecurity in Nigeria. The Act has provisions that deal with identity theft, cyberstalking, hacking, child pornography, and so on. The Act also has some potentially problematic provisions. In Section 22 for example, the Act provides that a judge may order service providers to 'intercept' content data or traffic. It does not provide for what kind of action that will mandate this interception of data, so there is a lot of potential for abuse of this law. For example, someone's communications may be intercepted for criticizing the government, going against his freedom of expression.



CASE LAW

FOREIGN CASES

- **Valdelomar and Sibaja V. Costa Rican Superintendence of Telecommunication:**[34]

On the 30th day of July, 2010, the Supreme Court of Costa Rica stated that: On the 30th day of July, 2010, the Supreme Court of Costa Rica stated that

> *"Without fear of equivocation, it can be said that these technologies [information technology and communication] have impacted the way humans communicate, facilitating the connection between people and institutions worldwide and eliminating barriers of space and time. At this time, access to these technologies becomes a basic tool to facilitate the existence of fundamental rights and democratic participation (e-democracy) and citizen control, education, freedom of thought and expression, access to information and public services online, the right to communicate with the government electronically and administrative transparency, among others. This includes the fundamental right of access to these technologies, in particular, the right of access to the internet or World Wide Web".*[35]

The access to internet is a fundamental way in which people can not only learn, read and know what is happening to their environment but also a vital means to broadcast or express themselves and partake in the ecosystem and there should not be any form of ban or restriction to access the internet.

The internet is not only serve as a technological tools but also an important means that enhance the exercise of other right for a citizens in a country, in which it effective usage exhibit transparency and all other positive development. The court declared that:

> *"a restriction on internet access could effect the right to freedom of expression guaranteed under Article 13 of the American convention on Human Rights"* [pg 33].

In conclusion to this, there should be maximum access to the internet without any form of restriction by government or service provider to reduce the speed of the internet because this can violate the right of expression online.

- In June 2009, the Constitutional Council of France held that access to the Internet is a Basic Human Right and also struck down part of their laws that seem to inhibit the right.[36]

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- **Shreya Singhal V. Union of India:**[37] India's Supreme Court ruled in favor of freedom of expression on the internet when Shreya Singhal, a 21-year-old Law Student challenged the issue of online free speech and intermediary liability under India's Information and Technology Act. To this end, it's been entrenched in their jurisdiction that the freedom of expression online is embedded in the Freedom of Information guaranteed under the Constitution.

- **Defamation and Reputation:** According **to Article 17 of the ICCPR** provides for the protection against unlawful attacks on a person's honor and reputation. While **Article 19(3) of the ICCPR** also refers to the rights and reputation of others as legitimate grounds for limitation of the right to freedom of expression. An example of this has been illustrated in the case of **Isparta V. Richter**[38]**,** the South African High Court awarded damages for ZAR 40 000 for a Facebook post that the court held to be scandalous and suggesting that the plaintiff encouraged and tolerated sexual deviation and paedophillia.

- **Hate Speech:** Not all expression, communication, or even speech are protected under international law, as some forms of speech and expressions are required to be prohibited by states. **Article 20 of the ICCPR** is important in that respect. It provides that:

  > *"(1) Any propaganda for war shall be prohibited by law. (2) And advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law".*

- In the European case of **Kalda V. Estonia**[39], where the **European Court of Human Rights (ECTHR)** held that the right of the Applicants – a prisoner- to freedom of expression had been violated through the refusal to grant him access to the Internet to visit websites containing legal information, as this had breached his rights to receive information.

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- **Geoffery Andare V. Attorney-General:**[40] The High Court of Kenya found a provision criminalizing *"grossly offensive"* statements, and false statements that are annoying, inconvenient, or causing needless anxiety, to be unconstitutional because it was vague and unjustifiably limited freedom of expression. The case arose out of Geoffrey Andare's post in a community Facebook group accusing Titus Kuria, a representative of a scholarship trust, of using his position of authority to sleep with young girls seeking scholarships. Kuria brought a criminal complaint against Andare under Section 29 of Kenya's Information and Communication Act that broadly criminalizes indecent or false information. While the case was pending in criminal court, Andare brought a petition to challenge the constitutionality of Section 29. The High Court held that:

> *"Section 29 was unconstitutional because it unjustifiably limited freedom of expression and because it was worded in vague terms."*

Judge Mumbi Ngugi delivered the opinion of the High Court of Kenya, Constitutional and Human Rights Division;

The main issue before the court was the constitutionality of Section 29 of the Kenya Information and Communication Act. First, the Court discussed whether Section 29 was vague and overboard. The Court noted that the Act did not define the key operative words: *"grossly offensive", "indecent", "obscene", "menacing character", "annoyance", "inconvenience", "anxiety"*. The Court asserted that;

> *"the words are so wide and vague that their meaning will depend on the subjective interpretation of each judicial officer seized of a matter". [para. 77] Referencing the European Court of Human Rights judgment in Sunday Times v. the United Kingdom, the Court held that this left an unconstitutionally wide margin of interpretation and failed to provide certainty about the conduct that the Act sought to criminalize."*

Secondly, the Court discussed whether the provision unduly limited the right to freedom of expression. Referencing the **Ugandan Supreme Court** decision in **Onyango-Obbo V. Attorney-General;**

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> *"the Court stressed the importance of the right to freedom of expression in a democratic society and that the state had to demonstrate that the limitation was reasonable and justifiable in an open and democratic society. Moreover, the Court referenced Article 24 of the Constitution and the Canadian case of R. v. Oakes to highlight the State's duty to establish the purpose and importance of a limitation on freedom of expression, the relationship between the limitation and its purpose, and to demonstrate that no less restrictive means to achieve the intended purpose exist. The Court held that the State had failed to establish any of these requirements, providing further grounds for ruling that the provision was unconstitutional."*

The decision expands expression in Kenya because it highlights that for a restriction on freedom of expression to be legitimate, it must be prescribed by law. The decision also stresses that new laws should not be introduced simply because they deal with a new mode of communications, but that existing and less restrictive laws should still be applied. Lastly, the High Court relied on foreign jurisprudence in its ruling, which is a welcome development for global protection of freedom of expression.

- **Lastly, in the case of Media Rights Agenda and Others V. Nigeria:**[41] The African Commission on Human and People's Rights found the Republic of Nigeria to violate various articles of the African Charter on Human and Peoples Rights as well as Principle 5 of the UN Basic Principles on the Independence of the Judiciary. Niran Malaolu, the editor of an independent Nigerian newspaper, was unlawfully incarcerated for his alleged involvement in a coup. The Commission found that the sole reason for Malaolu's detention was his publications and this amounted to a violation of his right to freedom of expression. Moreover, the Court held that the Nigerian government also violated a whole host of other conditions including the right to be defended, the right to liberty, and impartiality of the court.

Sitting in Cotonou, the African Commission on Human and Peoples' Rights found Nigeria to have breached Articles 3(2), 5, 6, 7 (1) (a), (b), (c), (d), 9, and 26 of the African Charter and Principle 5 of the UN Basic Principles on the Independence of the Judiciary.

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The Commission decided that it was merely Malaolu's publication in his newspaper, the Diet, regarding *"an alleged coup plot involving Nigeria's' Chief of Staff and Second –in-Command, Lt. General Oladipo Diya and other military officers and civilians"* [para. 67] that led to his punishment and there was no evidence to suggest any other reasoning. The Commission, therefore, found that Nigeria had indeed violated Article 9 of the Charter given they had abused their position of authority to limit expression.

In conclusion, the Commission found that despite the actions of the Nigerian Government being conducted under a valid law at the time, they did breach various provisions of the Charter. This case expands freedom of expression as it reiterates that authorities cannot simply limit freedom of expression on their own accord. In this case, the Commission took expanding freedom of expression one step further by declaring violations of other Articles of the Charter for actions taken by Nigeria following their infringement of Malaolu's right to freedom of expression.

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LOCAL CASES

- **Solomon Okedara V. Attorney General:**[42] The Court of Appeal in Lagos dismissed a challenge to the constitutionality of section 24(1) of the Cybercrime Act, 2015 on the ground that it lacked merit. Affirming the judgment of Buba J. of the Federal High Court, the Court disagreed with the Appellant that the provision was vague, overbroad and ambiguous and threatened his rights to freedom of expression under section 39 of the Constitution and was not within the permissible restrictions under section 45 of the Constitution. Instead, the Court of Appeal found section 24(1) of the Cybercrime Act to be clear and explicit and not in conflict with the provisions of sections 36(12), 39, and 45 of the 1999 Constitution.

  Before reaching its judgment the court did discuss the importance of the right to *"Freedom of Expression"* as enshrined under the Constitution. In the words of the court, the court held while construing one of the issues for determination by the Appellant;

  Section 39 of the Constitution on the other hand provides that:

  > *"(1) every person shall be entitled to freedom of expression, including the freedom to hold opinions and to receive and impart ideas and information without interference.*

  Citing ***Din V. African Newspapers of Nig Ltd (1990) LPELR-947 (SC)*** *in support, the Court declared that under the Constitution it was clear that liberty of thought and freedom of expression was paramount.*

It noted that the freedom guaranteed under section 39 of the Constitution includes the freedom to hold an opinion and pass information without interference; and that this freedom presupposes the free flow of opinion and ideas essential to sustain the collective life of the citizenry. [p. 24] The Court, however, stressed that the right provided under section 39 is not open-ended or absolute, the right is qualified, and therefore subject to some restrictions by the provisions of section 45 of the Constitution.

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It is thus clear that the freedom of expression is a right that is guaranteed and isn't restricted to an offline right, In the words of the court it includes *"the freedom to hold an opinion and pass it information without interference"* the Constitution also recognizes that the passing of that information can be via any "medium" whatsoever which presupposes that, one could share is thoughts ideas online as well.

- **The Incorporated Trustees of Paradigm Initiative for Information Technology Development V. The Attorney General Of The Federation:**[43] The Court of Appeal in Lagos, Nigeria, dismissed an appeal in the challenge to the constitutionality and legality of sections 24 and 38 of the Cybercrimes Act, 2015 for lacking in merit. It affirmed the judgment of Idris J. of the Federal High Court who, sitting as a court of the first instance, had earlier struck out the application of the Appellants who had asked the court to declare sections 24 and 38 of the Cybercrimes Act, 2015 unconstitutional and illegal. The Appellants had expressly argued before the lower court that section 24 of the Cybercrimes Act was illegal, unconstitutional and violated their fundamental rights to freedom of expression and the press guaranteed by section 39 of the 1999 Constitution and Article 9 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act. The Appellants had argued before the lower court that section 38 of the Cybercrimes Act 2015 was unconstitutional, illegal and a violation of their fundamental rights to privacy, correspondence, telephone conversations, and telegraphic communications is guaranteed under section 37 of the Constitution of the Federal Republic of Nigeria 1999. The Court of Appeal in arriving at its decision reasoned that while section 24 of the Cybercrimes Act is a piece of criminal legislation enacted under sections 4 and 45 (i) (a) of the 1999 Constitution to enhance public welfare/wellbeing, section 38 of the Cybercrimes Act is a legislative tool that assists in the detection and investigation of crime for the public good.

  The Court of Appeal contracts rights to freedom of expression and privacy guaranteed under sections 39 and 37 of the Constitution of the Federal Republic of Nigeria 1999 respectively, when it dismissed the appellants' appeal and upheld the judgment of January 20, 2017, delivered by the Federal High Court that earlier found that sections 24 and 38 of the Cybercrimes Act are not unconstitutional and illegal.

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Though the appeal of the Appellant, in this case, was dismissed the question on the right to freedom of expression was addressed and acknowledged as a guaranteed right, though it isn't an absolute right and it could be limited which was the convention of the court as provided under section 45 of the Constitution.

The Court noted that *"fundamental rights are not absolute but qualified and limited by the provisions of section 45 of the 1999 Constitution and that making the provisions of section 45 follow these rights in the arrangement of the Constitution shows the limiting powers with which the drafters of the Constitution endowed section 45. The Appellate Court, therefore, opined that the National Assembly of the Federal Republic of Nigeria is empowered to pass an Act that will limit the rights to privacy and freedom of expression just as provisions of sections 24 and 38 of the Cybercrimes Act have done to provisions of section 39 and 37 of the 1999 Constitution."*

- **Ogwuche V. Federal Republic of Nigeria:**[44] The Plaintiff, Festus A. O. Ogwuche is a lawyer, broadcaster, and the head of the Crownfield Solicitors, a firm of solicitors that engage in human rights advocacy, the advancement of democracy and good governance, and sponsorship of radio and television broadcasts on the aforementioned subjects. He received a letter, dated May 30, 2014, titled *"Additional Regulation for Live Political Broadcasts"* from the Nigerian Government through the National Broadcasting Commission stating that because some political live programs were airing content that incited violence, was provocative or highly divisive and threatened the peace and unity of the country, the plaintiffs and all Broadcasting Houses must give 48 hours prior notification to the Commission before airing any live political program. The Commission also threatened to withdraw their broadcasting license, outright closure of broadcast outfits, direct censorship of all broadcast materials, and seizure of broadcast equipment when they fail to comply with the directives of the said letter. In response to these, the plaintiffs asked the Commission for any specific proof of abuse of transmission program which threatens the peace and unity of the country; the plaintiffs received no response. The plaintiff initiated a case at the ECOWAS Community Court of Justice on March 18, 2015. In its Preliminary Objection, the Government of Nigeria argued that the Court did not have jurisdiction because the issues raised in the suit by the plaintiffs are non-justifiable under the Nigerian Constitution of 1999, the National Broadcasting Commission was performing oversight as allowed under Nigerian law, and the suit was frivolous because no human rights violation occurred.

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The Court in giving its decision relied on various international instruments such as Article 9(4) and 10(d) of 2005 Protocol of the Court; Article 9 and 19 of African Charter of Human and People's Rights; Article 19 of the Universal Declaration of Human's Rights; Article 19(2) of the International Covenant on Civil and Political Rights. The Court held that it has jurisdiction over the matter because the essence of the 2005 Protocol of the Court is to enforce the fundamental human rights of its member states. Court held that when the Government of Nigeria failed to establish proof that Ogwuche's media programs constituted a sufficient threat to justify the restriction and that the restriction, as such, was an excessive burden. Therefore, the Court ordered that the Regulation be withdrawn.

- **Incorporated Trustees of Laws and Rights Awareness Initiatives V. Nigeria (2020):**[45]
The decision in this case was issued on 10 July 2020, in which the ECOWAS court held that section 24 of the Nigerian Cybercrime Act, 2015, violated the right to freedom of expression.

While the applicants also argued that section 24 of the Cybercrime Act had been used on various occasions to arrest and detain them in violation of their right to freedom of expression, the ECOWAS court found that insufficient evidence for this had been put forward, and so dismissed this argument. As such, the important part of the decision is that which examines the law in the abstract. After careful consideration of other international enactments, the court did find that the right to freedom of expression was violated.

The ECOWAS court first set out relevant precedent on how to approach cases alleging a violation of the right to freedom of expression. Under the **African Charter on Human and People's Rights,** that right is protected under **Article 9(2)** which provides that *"every individual shall have the right to express and disseminate his opinions within the law".* Importantly, (and unlike in Amnesty International Togo and Others v Togo), the court noted that the African Court on Human and People's Rights has held that the term *"within the law"* must be interpreted about *"international norms which can provide grounds of limitations on freedom of expression"* (Lohé Issa Konaté v Burkina Faso (2014).

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Referring to relevant international standards, not least Article 19(3) of the International Covenant on Civil and Political Rights (and its interpretation by the Human Rights Committee in its General Comment №34), the court concluded that assessment of whether **section 24** was *"law"* **for Article 9(2) of the ACHPR** required an assessment of

(i) whether it was clear and predictable,
(ii) pursued legitimate objectives, and
(iii) was necessary and proportionate to achieve those objectives.

In examining the final question of necessity and proportionality, the court referenced several relevant documents (such as the Declaration of Principles of Freedom of Expression and Access to Information in Africa) and precedents from different jurisdictions. It did not, however, spend much time extracting the relevant principles from these documents and precedents and then applying them to section 24. The closest it got was to note that;

> *"there was a strong precedent in Europe and the Americas for the proposition that criminal laws restricting freedom of expression should only be used as a last resort, and that restriction based on civil law was generally preferable."*

The court noted that, here, there were high penalties for the prohibited conduct (namely high fines and long maximum prison sentenced), and then immediately concluded that this meant that the provisions were not necessary and were disproportionate. As such, the court held *that "section 24 violated the right to freedom of expression under both Article 9(2) of the ACHPR and Article 19(3) of the ICCPR, and ordered Nigeria to repeal or amend the provision."*

LIMITATIONS TO FREEDOM OF EXPRESSION

LIMITATIONS TO FREEDOM OF EXPRESSION

Notwithstanding the provisions of section 39 of the Constitution of the Federal Republic of Nigeria, section 45 of the Constitution of the Federal Republic of Nigeria provides an exception to freedom of expression. Section 45 provide that:

> *"1. Nothing in sections 37, 38, 39,40, and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society*
> *(a) in the interest of defence, public safety, public order, public morality, or public health;*
> *(b) or for the purpose of protecting the rights and freedom of other persons."*

There are plethora of cases of Nigerian Courts that buttresses the fact that freedom of expression as a digital right is not absolute.

In **Director of Public Prosecution V. Chike Obi (1961)**[46], the court was faced with the task of determining whether constitutional provisions as set down in section 41 of the 1960 Constitution entitled Chike Obi to air his views against the Federal Government. Chike Obi had published and circulated a pamphlet titled *"The People: Fact You Must Know"* in which he stated as follows: *"Down with the enemies of the people, the exploiters of the weak and oppressors of the poor! The days of those who have enriched themselves at the expense of the poor are numbered. The common man in Nigeria can today no longer be fooled by sweet talk at election and treated like dirt after the booty of office has been shared among the politicians".*

The government viewed this as a seditious publication and prosecuted the author accordingly. It was argued in favour of the author that *"any law which punished a person for making a statement which brings a government into discredit or ridicule or creates disaffection against the government irrespective of whether the statement is true or false and irrespective of any repercussions on public order or security is not a law which is reasonably justifiable in a democratic society"*. This contention was however thrown out by the Supreme Court which held that to argue that under section 24 of the Constitution,

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"a law is only valid if the acts prohibited by it are, in every case, likely to lead directly to disorder, is to take too narrow a view of the constitutional provision, for it is justifiable to the reasonable precautions to preserve public order and this may involve the prohibition of acts, which, if unchecked or unrestrained, might lead to disorder, even though those acts would not themselves do so directly".

In **Queen V. Amalgamated Press Nig. Ltd, (1961)**[47] the accused press was charged with sedition under section 51 of the criminal code and with *"publishing false news, which is capable of causing fear and alarm",* contrary to section 59 (1) of the code. Affirming its decision in Obi's case, the Supreme Court upheld the constitutionality of these provisions, noting that section 25 of the Constitution which section 59 (1) of the code was alleged to have infringed upon *"guaranteed nothing but ordered freedom ..... and cannot be used as a license to spread false news likely to cause fear and alarm to the public".*

One critical issue in the consideration of constitutional guarantee of press freedom is whether "*a journalist or editor or a person charged to court on account of a particular publication maintain, on being asked to disclose his source of information that he cannot be compelled to disclose the source of his information.*"

In **Oyegbemi and other V. Attorney General of the Federation (1982)**[48], the police arrested Oyegbemi, Editor of the Daily Sketch, and a senior reporter, Mr. Yemi Folarin, and charged them with conspiracy to commit a felony, to wit: *"false report",* when they refused to disclose the source of a news item they published in their paper. The court held,"*in favour of the journalists, that no one, whether a reporter, an editor, or a publisher of a newspaper, can be forced to divulge his source of information received in confidence and that such non-disclosure does not amount to contempt of court."* However, it was noted that the right to withhold information is not absolute as it is subject to the interest of justice, public safety, public order, public morality, national security, prevention of crime or disorder, or protection of the welfare of persons.

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In the celebrated case of **Tony Momoh V. The Senate (1983)**[49], the question at issue was not that of *"incitement"* or *"spread of false news likely to cause fear and alarm to the public"*, but whether the power of investigation conferred on the Senate by section 82 (2) of the 1979 Constitution empowers the Senate "*to summon an editor for the purpose of asking him to disclose the sources of his information in respect of publication in his newspaper*". According to Senate submission on the matter, the Senate not only had the right to summon anybody, in Nigeria, but also *"a journalist to tell them about events in the country in which they had power to make laws"*. On his part, Tony Momoh, the Editor of the Daily Times (March 1976 May 1980), stated that the Senate had no power under section 82 (2) of the Constitution to invite him to disclose his source of information about an article published in the Daily Times of February 4, 1980. The Daily Times had, in its unsigned column called the Grape Vine published a story entitled *"MPs, Senators and Cards"* which ran as follows:

There are many of these floating around these days in utter disregard for the decorum, which attaches to important offices for MPs or Senators. A few of these people bring a sad name to their colleagues by barging into the offices of permanent secretaries, company directors, chairmen or ministers and insist that because they are senators or MPs they should be given contracts. Those who do this are advised to stop.

The Senate was furious about the piece and, condemning the publication in its entirety, it invited Tony Momoh and the Grape Vine "*to appear before the Senate of National Assembly to say all they know about the impropriety of members of the National Assembly who are in the pinnacle of law making and were expected to maintain a commendable level of probity*".

When the Senate resolution was communicated to Tony Momoh, he went to the Lagos High Court to stop the Senate from enforcing their invitation and also to get the court to quash the resolution.

On February 18, 1980, the court commenced hearing in the civil suit challenging the Senate for inviting Mr. Momoh for questioning in the House. Chief Gani Fawehinmi, counsel for Mr. Momoh, *"submitted that he was seeking the leave of the court to quash the resolution under orders one and two of the Fundamental Rights Enforcement Procedure Act of 1979"*.

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Chief Fawehinmi argued that the Senate resolution was a complete violation of the fundamental rights of Mr. Momoh under the Constitution. In his words, *"it is understandable if we are dealing with a legislative body but we are now being confronted by a monstrous circus, assuming an acrobatic and ludicrous jurisdiction that is clearly unconstitutional"*. In his ruling, Mr. Justice Candido Johnson granted the order sought, taking cognizance of section 36 of the Constitution.

In the course of his ruling, the learned judge made some vital statements on the issue of press freedom, which apparently did not go down well with the Senate and these made them take the case to the Federal Court of Appeal, Lagos. These *"offending"* statements are:

(a) the forty-nine wise-men who formulated the constitution of the country were conscious of the unsavoury consequences attendant to any attempt to deafen the public by preventing or hindering the free flow of information, news and ideas from them. Thus section 36 (1) of the Constitution of Nigeria is formulated to give Freedom of Expression subject only to the laws of the country as to libel, slander, injurious falsehood, etc. Even where such a situation arises, it would be a matter for a court of law to determine and not the legislature.

Any attempt to force a person as the applicant (Tony Momoh) who disseminates information through the medium of a newspaper to disclose the source of information apparently given in confidence is an interference with the *"freedom of expression without interference"* granted by section 36 (1) of the Constitution. The court in such circumstance is competent to grant redress to the person whose freedom is assailed. The Nigerian constitution separates the three arms of government executive, legislative and judicial and each is supreme in its area of authority but only in so far as it confines itself to, and acts within the powers conferred on it. If it exceeds such power or acts in contravention of it or in conflict with the provisions of the constitution it would be the duty of the judiciary to put it in check at the instance of an aggrieved party.

Sections 82 and 83 of the constitution which confer investigative powers on the National Assembly are limited to law-making powers of each House of National Assembly and have no application where the Issue involved bears no relevance, even remotely to law.

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Consequently, the Senate would be acting *"Ultra vires"* its power under the constitution to summon an editor for the purpose of asking him to disclose the sources of his information in respect of publications in his newspaper. Here, however, it is of utmost importance to declare the right of the applicant since the Senate was not aware that it had no power to testify on the matters requested as it purported to do.

The appeal by the Senate was heard by five judges of the Federal Court of Appeal on April 26, and May 12 and 13, 1982. Chief Rotimi Williams, standing for the Senate, argued that the doctrine of separation of powers was to be implied in construing the Constitution of the Federal Republic of Nigeria. According to him, since the doctrine forbids the interference of another organ or arm in the internal workings of the other, the judiciary had no power to question what went on in the National Assembly. He further argued that the judicial powers invested in the courts by section 6 of the Constitution did not cover the internal workings of the legislative houses. He submitted that *"the power of investigation conferred on the Senate by section 82 of the Constitution was a necessary power to inform those who make laws on what was going on in the country"*, adding that a newspaper editor had no right to withhold information that is in the public interest since section 36 of the Constitution 1979 did not confer power not to divulge information.

The respondent, Mr. Momoh (also a lawyer), appearing for himself, subscribed to the submission of Chief Williams that the doctrine of the separation of powers must be implied in construing the constitution of the Federal Republic of Nigeria. He, however, argued that the powers being separated belonged to the people of Nigeria and were only being delegated. He further argued that as sovereignty belonged to the people, the body saddled with the responsibility of monitoring the performance of organs of government was the press, as stipulated in section 21 of the 1979 Constitution *"Obligations of the mass media"*. The relevant section states that: *"The press, radio, television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in (chapter 2) and uphold the responsibility and accountability of Government to the people"*. Mr. Momoh submitted that in the spirit of the doctrine of separation of powers in relation to non-interference, no organ should interfere with the press in its internal operations such as the collection, processing and dissemination of information, adding that to question a journalist as regards his source of information or to intervene in the processing of information would be unconstitutional.

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Delivering judgment, P. Nnaemeka-Agu, Justice, Federal Court of Appeal, (as he then was) noted that section 82 of the 1979 Constitution *"does not constitute the house into a universal ombudsman"*, inviting and scrutinizing the conduct of every member of the public. He, however, stated that there was nothing in section 21 of the Constitution to entitle a pressman or any other media man to any separate treatment, other than the one granted to the ordinary citizen.

One vital point to note is that although the judgment was in favour of Mr. Mommoh, it painted a clear picture of the constitutional limitations of press freedom in Nigeria. Although it was acknowledged that the press has a very important role to play in any democratic system of government and could even be referred to as the *"court of public opinion"*, the government's stance is that the right to freedom of expression is one which belongs to all. There is no separate treatment for the mass media. Equating press freedom with individual freedom is just another way of saying that there should be no press freedom in Nigeria.

The Nigerian press can only enjoy freedom within the limit of Section 45(1) of the 1999 Constitution.

The relevant section states that:

> 1. Nothing in sections 37, 38, 39,40, and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society
>
> (a) in the interest of defence, public safety, public order, public morality, or public health; or
>
> (b) for the purpose of protecting the rights and freedom of other persons.

The critical question is: who determines the law that is *"reasonably justifiable"*?

In **Olawoyin V. Attorney General of Northern Nigeria (1961)**[50] Bate J. talked about the standards for determining what is "reasonably justifiable" These are:

1. There is a presumption that the legislature has acted constitutionally and that the laws which they passed are necessary and reasonable.
2. A restriction upon fundamental human right before it may be considered justifiable must:
   (a) be necessary in the interest of public morality or public order;
   (b) and not be excessive or out of proportion to the object which it is sought to achieve.

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Based on the decisions above, it is clear that the freedom to express oneself must be exercised between the bounds of the law. The court in arriving at a decision whether or not there has been a violation of one's expression must consider three factors.

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CONCLUSION

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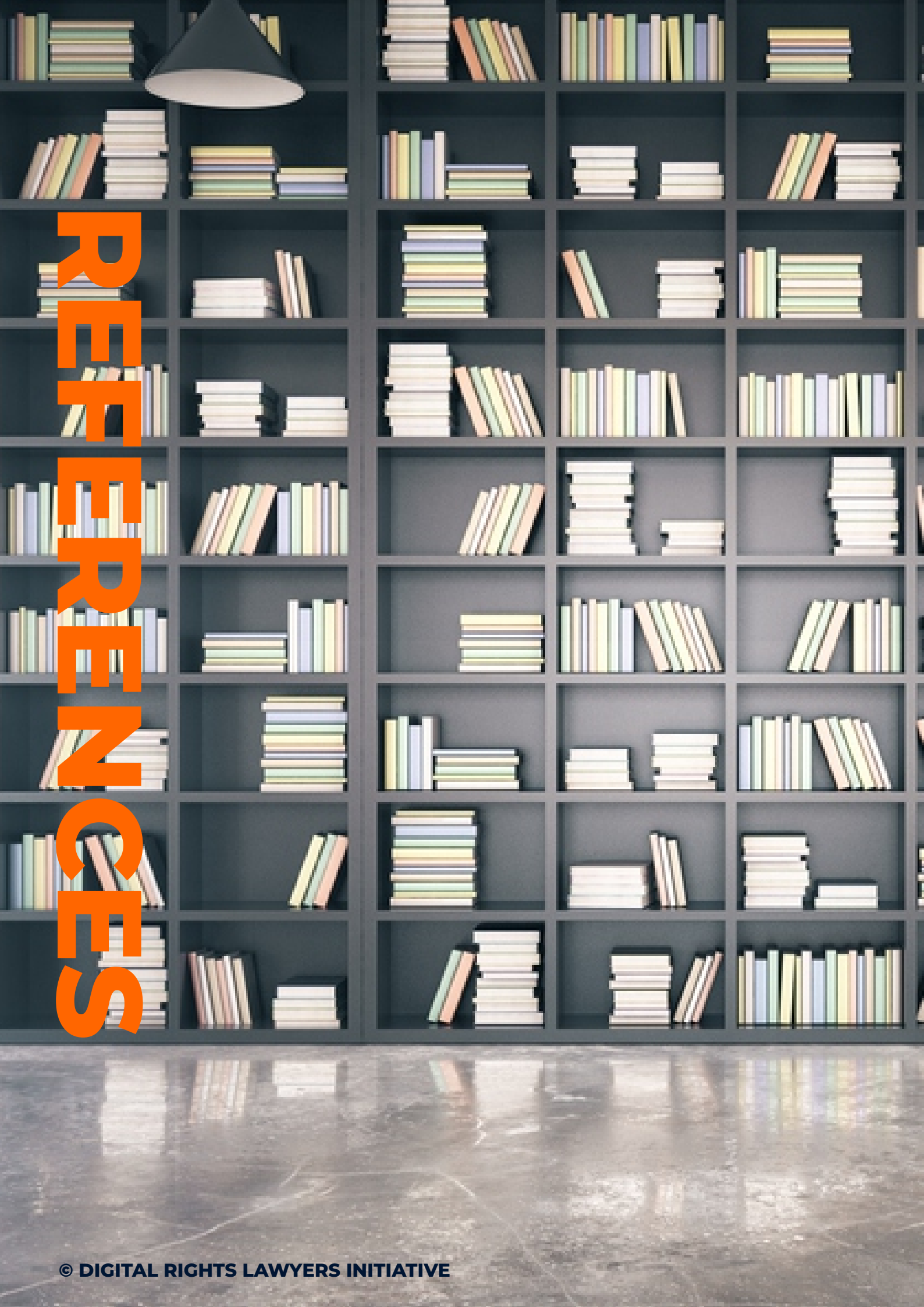
Conclusively, the impact of Online Expression as digital rights cannot be overemphasized; it is a well-established right in the digital world, as can be duly observed from the plethora of discussions canvassed above. This is just as well because most of the word has been digitalized and we spend most of our time on the internet, so expressing ourselves on it needs to be protected.

Efforts have been made to ensure this protection. Article 10 of the European Convention on Human Rights provided that *"Everyone has the right to freedom of expression"*. Also, the United Nations Human Rights Councils (UNHRC) during their 2016 Resolutions were reported to have equally said that the same rights that people have offline must also be protected online, in particular Freedom of Expression, which is applicable regardless of frontiers of communication.

One must note, however, that online expression has limitations, just like offline rights, and where a user of a digital tool transgresses this limitation, the user will be obliged to face the consequences. Such limitations among others are: defamation and reputation, breach of privacy, hate speech, and also fake news or discriminatory news; See the provision of Article 17 and 19(3) of the ICCPR respectively and the case of **Isparta V. Richter(22452/12/4 September 2013)** are instructive to this assertion.



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