

POLICY ANALYSIS ON THE KENYA INFORMATION AND COMMUNICATIONS ACT

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Policy Analysis on the Kenya Information and Communications (Amendment) Act 2019

The Lawyers Hub affirms its commitment to promoting Human Rights as enshrined under the Bill of Rights in Chapter Four of the Constitution of Kenya. To this end, while we appreciate the Government's effort to promote regulation on the use of Social Media Platforms; we note with overwhelming concern the general restrictive nature of the proposed Bill to the Right to Online freedom of expression, association and access to information.

Background

Although Africa's internet penetration has grown from 2.1% to 24.4% over the last decade, its internet penetration still remains lower than that of other continents¹. Kenya distinguishes itself as a country with one of the highest internet penetration rates in Africa with a rate of 82.9% as of 2019 with nearly 46.8 Million people connected to the internet². It is no secret that Social Media sites have similarly over the last decade increased their dominance on the internet space much that they have for some people become synonymous with the internet itself. Increased internet connectivity has had a correlative increase in the use of social media platforms particularly Facebook as evidenced in countries like the Philippines and Myanmar³. Opera reports that in 2019, social media particularly Facebook is the most accessed platform on its browser in Kenya⁴. As of 2014 49% of mobile users in Kenya used what's app⁵, However, telecommunications have now increased usage of WhatsApp by providing affordable internet rates to Kenyans and this may be one of the largest used social media platforms in Kenya.

Despite increased uptake and use of social media, it has been evident that social media has been used as a medium of spreading **Disinformation** and **Misinformation** generally known as "fake news" across the world and in Kenya as well. The UK Committee report on disinformation and fake news defines disinformation as

"the deliberate creation and sharing of false and/or manipulated information that is intended to deceive and mislead audiences, either for the purposes of causing

¹ see

² <https://www.internetworldstats.com/stats1.htm>

³ <https://onezero-medium-com.cdn.ampproject.org/c/s/onezero.medium.com/amp/p/4ba1d86403fb>

⁴ <https://businesstoday.co.ke/facebook-most-accessed-platform-by-mobile-users-in-kenya/>

⁵ <https://techweez.com/2014/03/05/49-of-kenyans-mobile-users-on-whatsapp/>

harm, or for political, personal or financial gain" while **'Misinformation'** refers to the inadvertent sharing of false information⁶(lacking malice).

Kenyans have fallen victim to fake news particularly during the year 2017/2018 when the country had its general Election. Portland, a UK communication company resident in Nairobi, emphasize the heightened use of fake news on social media as at least 90% of Kenyans had seen fake news during the election period and at least 87% of the people believed the fake news was deliberate. They give an example of a fake circulation of the Daily Nation Newspaper claiming an aspirant of Orange Democratic Movement Party in Busia had defected to Jubilee (a party with less strong hold in the region) on the day of primaries that meant he would be discredited and loose votes⁷.

Further in their report on 'How Africa Tweets', Portland's explains the increased use of bots and accounts displaying machine like behavior in influencing political conversations on twitter during elections⁸. For 53% of the countries, the influencers didn't necessarily reside in the countries which the elections were held or they tweeted about. The report highlights the place of journalists and key influencers on fueling the twitter discussion around elections in Kenya. That said, it is no longer possible to ignore the platform and the worrying trend of dissemination of fake news. The election period also saw spread of false reports of post-election violence across the country which would have served to fuel more conflict⁹.

As social media continues to be the increased source of news for some Kenyans, there is need to ensure regulation so as to promote spread of free, fair and accurate information. To this end, we recognize that Governments around the world have developed ways to deal with social media regulation. Germany had initially allowed self-regulation for social media companies however as this was ineffective, the country resulted in legislation compelling companies to remove hate speech online or fine them 20 Million Euros. France has similarly allowed for Judges to

⁶ 'Disinformation and Fake News Interim Report: Government's Response to the Committee's fifth Report Session 2017-2019 <https://publications.parliament.uk/pa/cm201719/cmselect/cmcomeds/1630/1630.pdf>

⁷ <file:///C:/Users/hp/Downloads/The-Reality-of-Fake-News-in-Kenya%20-%20FINAL.pdf> pg 3

⁸ <https://portland-communications.com/pdf/How-Africa-Tweets-2018.pdf>

⁹

order the immediate removal of articles or information online that constitutes disinformation¹⁰.

Therefore, we recognize the need for stringent regulation and enforcement in order to ensure compliance and ultimate protection of the public from disinformation, hate speech and harassment online. It's from this position that we highlight and recommend the following:

REVIEW OF THE KICA AMENDMENT BILL 2019

Definitions

The bill defines **blogging** as the collecting, writing, editing and presenting of news or news articles in social media platforms or in the internet; The Media Act defines **Journalism** as the collecting, writing, editing and presenting of news or news articles in newspapers and magazines, radio and television broadcasts, and on the internet¹¹; UNESCO defines news as, " Verifiable information in the public interest and information that doesn't meet these standards doesn't deserve label of news¹²."

The result of this definition is that both blogging and Journalism are defined similarly however, looking at the definition of a journalist as provided under the Media Act, a blogger cannot always be a journalist. A journalist is defined as any person who holds a diploma or a degree in mass communication from a recognised institution of higher learning and is recognised as such by the Council, or any other person who was practising as a journalist immediately before the commencement of this Act, or who holds such other qualifications as are recognised by the Council, and earns a living from the practice of journalism, or any

¹⁰ Disinformation n 6

¹¹ The Media Act of Kenya 2013, s2

¹²

https://books.google.co.ke/books?hl=en&lr=&id=wW5vDwAAQBAJ&oi=fnd&pg=PA5&dq=UNESCO.+2018.+Journalism,+Fake+News+%26+Disinformation.+Paris:+UNESCO.&ots=UXo4Uj72yE&sig=w3p-ucs_nmWEAIs5EnRGUxARYX4&redir_esc=y#v=onepage&q=UNESCO.%202018.%20Journalism%2C%20Fake%20News%20%26%20Disinformation.%20Paris%3A%20UNESCO.&f=false

person who habitually engages in the practice of journalism and is recognised as such by the Council.

The debate to distinguish between journalism and blogging isn't novel and has many points of view¹³ however resulting to one conclusion which is blogging by nature different from traditional journalism but is essential to promote freedom of expression. As such it is important to define blogging as recognizing all different types of bloggers those who do it personally, present opinions on particular issues and report on News. If limited solely to news reporting then the question becomes how do we refer to blogs that don't necessarily deal with 'news' or what exactly constitutes news in order for all blogs to qualify to fit in this criterion?

To this end, we recommend the adoption of a broader definition to what constitutes blogging. *The Bill should first begin by defining what is a blog. Thereafter, a blogger should be defined as anyone who makes an entry published on the blog.* Article 19 defines a blogger as “any person who writes entries for, adds materials to, or maintains a **'blog' – a web log published on the Internet.** Blogs allow anyone to self-publish online without prior editing or commissioning by an intermediary (e.g. someone like a newspaper editor). They can be immediate and also anonymous if the blogger so desires. They reflect their authors' personal interests and preferences and vary enormously in style, content (from politics to gardening or fashion) or length (from short written pieces to longer ones closely resembling 'reportage').”

Licensing of Social Media Platforms

Section 84 IA provides that: The Commission may on application in a prescribed manner and upon payment of a prescribed fee, grant a licence authorizing any person to establish a social media platform for purposes of communication.

(2) A licence granted under this Part may be issued by an applicant subject to such terms and conditions as the Commission may think fit, and may include:

a) the establishment of a physical office in the country;

(b) the registration of all users of the social media platform using legal documents;

¹³ <https://thenextweb.com/us/2010/08/18/blogging-vs-journalism-the-ongoing-debate/>

(c) a requirement that the licensee shall keep all the data of the users of its platform and shall submit the same to the Commission when required; and

(d) a requirement that the licensee shall carry out due diligence to ensure that all its users, if natural persons are of age of majority.

The proposed conditions bring out the following challenges:

Vagueness of the law

Social Media platforms are a medium for which every person may exercise their right to freedom of expression and association. These rights are guaranteed under the Constitution and International Legislation which form part of Kenyan Law as per article 2(5) and (6) of the Constitution. Social Media has also been an effective tool of online protest and exercise of online right to associate in countries such as Uganda where the Government continues to muzzle dissemination of information on mainstream media. Over the recent past, African states have seen several attempts by their Governments to include internet regulation that stifles the right to online freedom of expression guised as need to legislate against misinformation and disinformation¹⁴. This era has also been eclipsed by internet shutdowns and digital taxation that continue to limit access to these social media platforms. It's clear that requirement for licensing will have the chilling effect of limiting the right to freedom of expression and association.

The test for limitation of the right to freedom of expression is clear and is a three-part test where the limitation must conform to the principle of legality as stated by the Special rapporteur on the Right to FOE for the African Commission, "*The law must be clear and unambiguous, drafted with such clarity as to inform the subject's behaviour.*" Secondly the law must serve a legitimate purpose that conforms to international law and finally, the limitation must be proportionate thus less restrictive means may be employed where possible.

The bill as is currently drafted leaves a lot to interpretation. It remains unclear whether the Commission will impose the stated conditions and at what point and to what degree he will impose them. The requirement to issue a licence subject to conditions the commission thinks fit is also arbitrary and open to abuse. Caution

¹⁴ <https://www.ft.com/content/1dc7f8f8-8ece-11e8-bb8f-a6a2f7bca546>

must be taken to ensure the fee prescribed by the commission isn't extremely arbitrary as to be unaffordable to promote registration by proposed licensees. Further the Bill has failed in its memorandum to clearly state the reason or object of introducing this section in order to carefully assess a less restrictive means of achieving the same.

Requirement for a physical office

Most used social media platforms in Kenya are Facebook, Instagram, twitter and Linked in which currently do not have an established office within Kenya. The nature of the internet is to transcend National Frontiers and be accessible to everyone. The role if the internet and social media platforms in promoting access to information cannot be gainsaid.

Article 19 of the ICCPR and UDHR promote the right to freedom of expression and respectively provides:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontier.

The United Nations and sovereign states have continued to recognize the place of digital media including social media in exercise and promotion of the right to freedom of expression and association. The African Commission on Human and People's rights through the Office of Special Rapporteur on Freedom of Expression and Access to Information in Africa states, "the power of the internet and social media as tools for economic, social and indeed political change may not be dismissed, and states need to forthwith recognise that that genie cannot be bottled and rather it should be harnessed to support development, and that ultimately states have legal commitments to ensure the rights to freedom of expression and access to information which they should fulfil."

While we recognized the need to curb the spread of misinformation, disinformation and internet abuse may necessitate stronger internet governance,

we recognize the imposition to have social media providers establish offices is one very difficult to implement. These are institutions incorporated in foreign institutions and operate on the cyber space which ideally remains areas of common heritage.

We affirm that the United Nations Principles on Business and Human Rights require states to regulate business domiciled in their territory/ jurisdiction to respect Human Rights throughout their operations which may include regulation of extra-territorial activities. However, we appreciate that this requirement relates to home states to regulate activities of these entities abroad¹⁵. We affirm that laws ideally ought to have legal enforceability and must serve a purpose. The requirement to compel social media companies to establish an office in Kenya will be of no business efficacy to these companies and may ultimately lead to the withdrawal of these service from the nation, an action that adversely affects freedom of expression.

Parliament should not be allowed to make laws that are in nature unenforceable which ultimately serves to degrade the legislative power of the assembly. The concept of enforceability of laws can be traced as far back to Austin's theory of Law as a command distinguished from wants and desires by the power and purpose of the person commanding it to inflict evil/ pain on person in case the desire is disregarded. However, even where the debate moves from enforceability to operability the point remains the law must be able to operate to the extent that there is no risk of defiance to it. In that case the operability and enforceability of this condition is largely unenforceable and should be done away with.

We recommend that the most efficient form of collaboration is that among states and private entities whose role in internet Governance can no longer be overlooked. We appreciate recent efforts activities by these private entities to participate in regulatory in the adoption of *the Paris Call for Trust and Security in the Cyber Space* where parties commit to Prevent activity that intentionally and substantially damages the general availability or integrity of the public core of the Internet¹⁶.

¹⁵ file:///C:/Users/HP%20x360/Downloads/GuidingPrinciplesBusinessHR_EN.pdf

¹⁶ https://www.diplomatie.gouv.fr/IMG/pdf/paris_call_cyber_cle443433-1.pdf

Registration using Legal Documents

It's our submission that this requirement is discriminatory to a class of persons residing in Kenya and violates the constitution. We reaffirm that the right to freedom of expression and association as granted by the Constitution and other Human rights instruments is granted to all persons. We seek to rely on the Court's interpretation on the term 'person' in *Eric Gitare v NGO Board*¹⁷, where the court stated "the word "person" is defined in the Oxford Concise English Dictionary as **"a human being regarded as an individual."** Black's Law Dictionary, 9th Edition, defines the term person as **"A human being, also termed natural person."** The Constitution thus extends the definition of "person" from only the natural, biological human being to include legal persons. Neither Article 36 nor the definition of "person" in Article 260 creates different classes of persons. There is nothing that indicates that the Constitution, when referring to "person", intended to create different classes of persons in terms of Article 36 based on sexual orientation. Moreover, Articles 20(3) and (4) of the Constitution provide that a Court shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom and promotes the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and objects of the Bill of Rights."

Borrowing from this premise we submit that the Bill cannot create a different class of persons based on nationality with an aim to limit their inherent rights to expression and association. We take notice of the fact that due to systemic discrimination in accessing legal documents of identification in Kenya¹⁸, about 5 million persons effectively lack citizenship documentation¹⁹. The African commission on Human and People's Rights found that Kenya's arbitrary procedures that restrict access to identity documents based on individuals religious or ethnic identity violated their rights under the African Charter on Human and People's Rights²⁰. To further deny them access to social media

¹⁷ & 4 others [2015] eKLR < <http://www.knchr.org/> <http://kenyalaw.org/caselaw/cases/view/108412/>>

¹⁸ [Portals/0/EcosocReports/KNCHR%20Final%20IDs%20Report.pdf](#)

¹⁹ Laura Goodwin, Director Citizenship Program Namati Kenya, Submission on Huduma Bill 2019, Delivered to the Cabinet Secretary, Ministry of Interior and co-ordination of National Government July 2019.

²⁰ <s://www.justiceinitiative.org/litigation/nubian-community-kenya-v-kenya>

platform would be to withdraw their most accessible medium of expression given the affordability of social media.

Denial of freedom of expression to children.

According to the Bill, Licensees are required to ensure every registered user is above the age of 18. We recognize the state has a mandatory obligation under national and International law to act in the best interest of children which includes measures to ensure child protection against abuse over the internet. We recognize that over the last year we have seen trending hashtags like #ifike wazazi, #nikita #consolata all which were detrimental to the children involved in terms of exposure of their identity online and opening them to public ridicule. The law has always served to protect the identity of children even in cases of criminal prosecution. it's thus grows necessary to have effective controls to sustain the protection of children online.

Nevertheless, the internet and social media have served to support child growth and development in promoting online campaigns for justified causes such as the environment and developing specific interest. It similarly serves as a platform for freedom of expression and access to information. Therefore, it is our recommendation that there needs to be a balanced approach to regulation of children's' use of the internet that offers both protection and exploitation as opposed to a blanket exclusion.

Sharing of Information

Section **84 IB** requires A licensee effectively the operator of a social media platform to share the information of a registered user where necessary to respond to a legal process.

Article 31 of the Constitution of Kenya guarantees every citizen the right to privacy which includes the right not to have (c) Information relating to their family or private affairs unnecessarily required or revealed or (d) the privacy of their communications infringed. Though we recognize the state does have under article 21 the obligation to observe, respect and promote the rights guaranteed by the Constitution of Kenya, we acknowledge that the right to privacy is not an absolute right. To this end, the right can be limited however to the extent limitation is justifiable in an open and democratic society based on human dignity, equality and freedom and having satisfied all factors under article 24 of the constitution.

In *Okiya Omtata v Communication Authority of Kenya*, Justice Mativo recognized the importance of the right to privacy by stating,

“Privacy is a fundamental human right, enshrined in numerous international human rights instruments. It is central to the protection of human dignity and forms the basis of any democratic society. It also supports and reinforces other rights, such as freedom of expression, information, and association. The right to privacy embodies the presumption that individuals should have an area of autonomous development, interaction, and liberty, a “private sphere” with or without interaction with others, free from arbitrary state intervention and from excessive unsolicited intervention by other uninvited individuals. Activities that restrict the right to privacy, such as surveillance and censorship, can only be justified when they are prescribed by law, necessary to achieve a legitimate aim, and proportionate to the aim pursued.

Data protection is an aspect of safeguarding a person’s right to privacy. It provides for the legal protection of a person in instances where such a person’s personal particulars (information) is being processed by another person or institution (the data user). Processing of information generally refers to the collecting, storing, using and communicating of information. The processing of information by the data user/responsible party threatens the personality in two ways: *a) First, the compilation and distribution of personal information creates a direct threat to the individual's privacy; and (b) second, the acquisition and disclosure of false or misleading information may lead to an infringement of his identity.”*

We therefore contend the requirement to collect personal information from their registered users is a violation of their right to privacy.

Subsequently we contend that the limitation of the right to privacy to ‘respond to a legal process’ is wide, arbitrary, subject to abuse and fails the test under article 24 of the constitution. Reflecting on the court’s decision in the *CORD Case*²¹, the Court allowed amendments to the National Intelligence Service Act introduced by the Security Laws (Amendment) Act as the limitation had a rational connection which was the prevention, detection and disruption of terrorism. The court took judicial notice of the rampant acts of terrorism and deemed it proportionate to limit

²¹ Coalition for Reform and Democracy & 2 others v Republic of Kenya & 10 others [2015]

privacy. Noteworthy however is the strong **Judicial Oversight** to which these was permissible. The court stated,

“The new section requires that the information to be obtained under Section 42(3) (c) *must be specific, shall be accompanied by a warrant from the High Court, and will be valid for a period of six months unless extended.*” The court continuously espoused sufficient judicial oversight in grant of warrants to access information that could threaten privacy of citizens.

There is always need to remember the limitation to privacy must be for a legitimate purpose as demonstrated in the CORD Case which was to secure National security that is in Public interest. To recap, the first is to consider the nature of the right sought to be limited, the importance of the purpose of the limitation, and the relation between the limitation and its purpose, and whether there are less restrictive means of achieving the intended purpose. A blanket limitation as provided by the Bill with insufficient judicial oversight cannot therefore be seen to pass this test.

It is therefore our recommendation that the intention to limit the right to privacy under the Bill must be for a specific purpose and not every legal procedure under the sun.

Social Media Users Responsibility

Section 84 IC states: A social media user shall ensure that any content published, written or shared through the social media platform:

a) **Does not degrade or intimidate a recipient of the content.**

The right to freedom of expression as granted by *article 33* of the constitution includes;

1) Freedom to seek, receive or impart information or ideas

Freedom of artistic creativity

Academic freedom and freedom of scientific research

2) The right however does not extend to:

a) propaganda for war

b) incitement to violence

c) hate speech or

d) advocacy or hatred that:

l) constitutes ethnic incitement, vilification of others or incitement to cause harm or;

ii) is based on any ground of discrimination specified or contemplated by article 27 (4).

3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

4)

The right to freedom of expression is contained in several International Instruments such as Article 19 of the **UDHR** and the **ICCPR** which form part of Kenyan law by virtue of Article 2(5) and (6) of the constitution of Kenya. **General Comment 34 on Article 19 of the ICCPR**²² the Human Rights Committee restated the importance of the right to freedom of expression by stating:

“Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.”

In the *CORD* case the court restated the decision in *S v Mamabolo*²³ where the South African emphasized the right to freedom of expression by saying:

Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore, we should be particularly astute to outlaw any form of thought-control, however respectably dressed.”

Over the recent past, Kenya has witnessed several attempts by the Government to introduce legislation that muzzles freedom of expression contrary to the Constitution of Kenya which include the Security Laws (Amendment) Act and

²² <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

²³ (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (11 April 2001) <<http://www.saflii.org/za/cases/ZACC/2001/17.html>>

the Computer Misuse and Cyber Crimes Act of 2018. In the recent of hearing of the petition (held on 23/10/2019) challenging the constitutionality of the 26 suspended sections of the Computer Misuse and Cyber Crimes Act, the Petitioner's and interested party restated the need to protect the right to freedom of expression from unjustified limitation by law.

The rules regarding the limitation of this right are clearly stated under article 24 of the constitution and re-stated in the CORD case where the court espoused a 3-part test to satisfy limitation of the right to freedom of expression. First limitation must be legally prescribed by a statute and be clear on the prohibition. Second, objective of limitation must be clear and substantial and important to society and finally legislation must meet the test of proportionality. The question is whether they are less restrictive means to achieve the purpose and not arbitrary, unfair or based on irrational considerations.

Article 19(3) of the ICCPR espouses condition in which freedom of expression may be limited which are in respect of the rights and reputation o others and protection of national security or of public order or public health or morals. In General Comment 34, the Committee re-states the 3part test. In addition, the committee states that laws limiting the right to freedom of expression "must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution enable them to ascertain what sorts of expression are properly restricted and what sorts are not."

The requirement by section 84 IC to not intimidate is thus too wide, arbitrary and vague as to be interpreted to meet the first arm of the three-part test. Requirement to not intimidate lacks a standard measure as to what is likely to intimidate another? It is clear that the vagueness of this provision leaves extremely wide discretion to law enforcement officers to determine the measure of intimidation contrary to international law. Comparison is drawn with the court's reasoning in the CORD case where the SLAA intended to introduce an offence against publication of **"insulting, threatening, or inciting material or images of dead or injured persons likely to cause fear and alarm to the general public or disturb public peace."**

The court stated, “who and how is one to determine what is likely to cause fear and alarm to the public? How is a determination of what will **“disturb public peace”** to be made? More critical, however, is the question: in what way is limiting freedom of expression by prohibiting certain publications so as not to cause fear or alarm to the public, or not to disturb public peace, a standard that is by no means clear, connected to fighting terrorism and national security?” the conclusion of the court as the wide and vague phrases limited the right to freedom of expression to a level the constitution did not anticipate for.

Section 84 IC offends the principle of legality by creating an offence with no specific Mens rea and establishing a punitive punishment consisting of jail term contrary to the Recommendations within General comment 34. Moreover, the requirement not to be intimidated is so wide and arbitrary as to be open to abuse. It's clear that the right to freedom of expression is internally limited by article 33 and the constitutional limitation against rights and injury to reputation of others is sufficient as opposed to enactment of section 84 IC. Further, the tort of defamation is sufficient and proportionate and in fact a less restrictive measure for violation of right or injury to reputation. We recognize the abolition of the offence of criminal defamation by Justice Mativo in his decision *in Jacqueline Okuta & another v the AG & 2 others*²⁴ where he recognizes the chilling effect of criminal defamation on the right to freedom of expression and determines the civil tort of defamation a proportionate remedy; less restrictive means as envisaged by the constitution.

The danger of wide, arbitrary and poorly drafted laws curtailing the right to freedom of expression is clearly evident in Uganda where draconian censorship laws have been used to curtail freedom of expression. Dr. Stella Nyanzi had been accused of the offence of cyber Harassment and Offensive publication contra to section 24 and 25 of the Computer and Cyber Crimes Act, 2011 of Uganda respectively and thereafter convicted for Cyber harassment over her poem criticizing the president of Uganda. She was convicted to 18 months imprisonment a clear warning of the looming danger to curtail freedom of expression. The Offence of cyber harassment is described under the Act as:

²⁴ [2017] e KLR

1. person who commits cyber harassment is liable on conviction to a fine not exceeding seventy-two currency points or imprisonment not exceeding three years or both.
2. For purposes of this section cyber harassment is the use of a computer for any of the following purposes—
 - a. making any request, suggestion or proposal which is obscene, lewd, lascivious or indecent;(Emphasis mine)
 - b. threatening to inflict injury or physical harm to the person or property of any person; or
 - c. knowingly permits any electronic communications device to be used for any of the purposes mentioned in this section.

Similarly the supreme court of India in *Singhal v Union of India*²⁵ struck down section 66A of the Information Technology act, 2000 of India which prohibited the dissemination of information by means of a computer resource or a communication device intended to cause annoyance, inconvenience or insult did not fall within any reasonable exceptions to the exercise of the right to freedom of expression. The court ruled this limitation was unjustifiable when measured against article 19 of the ICCPR.

It's therefore our conclusion that the requirement not to intimidate others is wide, arbitrary and unjustifiably violates and limits right to freedom of expression as envisaged by the constitution and therefore this provision ought to be deleted. Article 33 sufficiently describes the limit to freedom of expression.

Group Administrator's responsibilities

Section 84 IC (2) Where a social media platform is created for a group of persons, it shall be the responsibility of the group administrator to—

- (a) notify the licensee of the social media platform of his or her intentions to form a group platform:
- (b) approve the members of the group;

²⁵ AIR 2015 SC 1523 < <https://globalfreedomofexpression.columbia.edu/cases/singhal-v-union-of-india/>>

(c) approve the content to be published in the platform; and

(d) control undesirable content and discussion.

(3) Any person who contravenes the provision of this section commits an offence and shall be liable upon conviction to a fine not exceeding two hundred thousand shillings, or to an imprisonment of a term not exceeding one year.

We affirm that the constitution under Article 36 guarantees every person the right to freedom of association which include the right to join or participate in the activities of an association of any kind. It further requires that any legislation requiring registration of an association of any kind shall provide that Registration may not be withheld or withdrawn unreasonably.

We acknowledge that the United Nations and other international bodies and agreements such as the Paris Call for trust and Security in the Cyberspace re-affirm the need to protect offline human rights online. The latter specifically says, “We reaffirm that the same rights that people have offline must also be protected online, and also reaffirm the applicability of international human rights law in cyberspace.” As such we recognize the formation of online groups is an exercise of individual’s right to associate.

Further every person is guaranteed the right to freedom and security of the person which includes right not to be deprived of freedom arbitrarily or without just cause. It’s our submission that the imposing liability on a Social Media group administrator under this section amounts to unjust deprivation of liberty.

Moreover, According to Peter Western one fundamental tenet of the principle of legality is ‘No person ought to be punished in the absence of a guilty mind’²⁶.

Therefore, the offence offends the principle of legality as one it imposes a strict liability offence and one is convicted without proof of Mens rea.

We recognize that social media groups have in the past been used to spread misinformation, disinformation and contribute to prohibited speech under article 33 of the Constitution. Nevertheless, the culpability of the administrator is an overly punitive measure especially because the administrator may not necessarily be aware of the speech and can only respond to content once published on the

²⁶ https://www.jstor.org/stable/27652617?seq=1#page_scan_tab_contents

group. The volatility of administration in these groups where one may exit leaving another person who may be unaware of their 'admin' status to be liable. Subsequently one may be held liable for activities done before they were administrators. This law is one that in essence would require administrators to spend their time monitoring speech of others and effectively becoming prefects of speech.

India is one country that has imposed liability for social media group administrators however the court ruling in *Ashish Bhalla v. Suresh Chawdhury & Ors*²⁷ restated that administrators should not be held liable for content published in the group. It stated, "the administrator could not be held liable for defamatory statements made on the group. It is not that without the approval of the administrator, the members cannot make posts on the group. holding the administrator responsible for such content was the equivalent of making *the manufacturer of the newsprint on which defamatory statements are published* liable for defamation." Noteworthy is that administrators were compared to manufacturers of print and not editors as latter have actual control over what is published. Despite this ruling more arrests still ensue²⁸ and there is need to develop conclusive jurisprudence on the same.

In Kenya at least two WhatsApp group administrators have been arrested although in unclear circumstances one Mr. Longton Jamil the administrator of Kajjado Unity of Purpose WhatsApp group was arrested in 2017 for sending inappropriate messages to his group. Mr. Jamil however argued against it saying anyone can post anything in the group and he has on several occasions warned against posting unverified information.

It's our contention that the requirement to control content imputed on administrators is wide, unjust and stems to muzzle free speech and right to associate in a manner not envisaged by the constitution.

²⁷ CS (OS) No. 188/2016

²⁸ https://www.giswatch.org/sites/default/files/giswspecial2017_web.pdf 73

Registration of Bloggers

The Commission may upon application in a prescribed manner and subject to such conditions as it may deem necessary, grant a licence authorizing any person to blogs.

(2) The Commission shall keep a register of bloggers in a prescribed manner.

(3) Any person who blogs without a licence is guilty of an offence.

(4) Any person who contravenes the provision of this section commits an offence and shall be liable upon conviction to a fine not exceeding five hundred thousand shillings, or to an imprisonment of a term not exceeding two years.

As stated previously in this paper, laws must not be vague. The requirement to register is itself a limit to the right to freedom of expression. Tanzania is one country that has introduced license and registration fees for bloggers which sees a blogger pay up to \$930 annually in order to register their blog²⁹. This has muzzled the right to freedom of expression as many bloggers in the country are individual who can hardly raise the license fee required to register.

Any law that attempts to criminalize speech must be adopted with caution. We realize that Kenya has an international obligation to adopt laws encouraging speech and as previously stated, any attempt to limit this right must conform to the three-part test which this law on the face of it fails to meet. Similarly, an opinion of the InterAmerican Court of Human Rights issued in 1985 where the Court dismissed the argument that licensing schemes were necessary to ensure the public's right to receive truthful information or high standards of publication and found that such systems ultimately prove counterproductive.

Over the past year several journalists who have been charged under various laws for the publications they make particularly Robert Alai for publishing controversial photos of the President³⁰ and Cyprian Nyakundi for alarming posts on his blog about senior Government officials receiving a bribe to approve a

²⁹<https://qz.com/africa/1248762/tanzania-social-media-and-blogging-regulations-charge-to-operate-online/>

³⁰<https://www.capitalfm.co.ke/thesauce/k-o-t-share-their-two-cents-as-twitter-pundit-robert-alai-is-arrested-yet-again/>

tender³¹. The requirement to register may see bloggers who are critics of the government denied registration.

With regard to anonymity over the internet we adopt Article 19's submission in their paper; Right to blog where they state;

“Online anonymity has been extremely effective in promoting freedom of expression and has been an intrinsic part of the culture of the Internet and how it works. In many instances, it has given people the ability to express their opinions, even controversial ones, and it has contributed to the success of many blogs. Real name registration schemes can be easily abused by the authorities and can become a tool of repression, leading to the persecution and harassment of bloggers and their readers. In many countries, criticising the government is illegal and only the anonymous posting of such information online can ensure that authors are not at risk of reprisal.”

In summary the Lawyers Hub concludes by making the following recommendations:

Freedom of expression ought to be protected by adopting the following:

- Everyone should be allowed to access social Media platforms in absence of legal documentation to register.
- Bloggers should not be required to register and obtain a license to blog
- Any limitation to the right to freedom of expression must conform to the limitations under article 24 and 33 of the constitution and conform to the three-part test. This means the less restrictive measure should always be adopted.
- Any attempts to impute criminality on free speech should be prohibited.
- There needs to be more consultative approach to children protection online in line with the principle of the Best interest of a child to strike a balance between child safety and freedom of expression and association.
- Requirement to have social media platforms obtain a licence to operate, and establish an office in Kenya lack legal enforceability and thus this provision ought to be deleted.

³¹ <https://www.sde.co.ke/article/2001280406/controversial-blogger-cyprian-nyakundi-arrested-at-milimani-law-courts>

- The requirement to control content imputed on administrators is wide, unjust and stems to muzzle free speech and right to associate in a manner not envisaged by the constitution. As thus it should be prohibited.
- The responsibility on social media users not to intimidate another person is vague and leaves extremely wide discretion to law enforcement officers to determine the measure of intimidation contrary to international law. It fails to meet the first arm of the three-part test and therefore it should be deleted.

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