

Media freedom *IN UGANDA*



Analysis of inequitable legal limitations

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legal limitations

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Who we are

Human Rights Network for Journalists-Uganda (HRNJ-Uganda) is a network of human rights journalists in Uganda working towards enhancing the promotion, protection and respect of human rights through defending and building the capacities of journalists, to effectively exercise their constitutional rights and fundamental freedoms for collective campaigning through the media.

This organization was established in 2005 and registered in 2006 by a group of human rights-minded journalists who developed a sense of activism amidst a deteriorating context and glaring abuses targeting the media. The identity of HRNJ-Uganda lies with its diverse membership including print and electronic media, freelance, investigative journalists and individuals from other professions.

We research, monitor and document attacks and threats aimed at journalists, as well as abuses of press freedom in Uganda. We offer legal support to journalists who are in need of these services because of their work.

We endeavor to provide medical and psycho-social support to media practitioners injured in the course of their duty. Through training and educating journalists on various thematic issues, we enhance their competence and capacities on human rights and good governance.

It is our vision that one day, we shall see a respectful society informed of their rights and obligations and free from human rights abuse.

Acknowledgement

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Foreword

A legal regime that facilitates the enjoyment of freedom of expression and access to information in a country fosters development and empowers its citizens to participate in the governance agenda. Easy access and availability of information is therefore desirable and ideal in the promotion of good governance, rule of law and human rights. Stringent laws and policies with overly broad interpretations narrow the possibility of enjoying these fundamental rights as enshrined in the Constitution, regional and international instruments.

The media is an important facet in information dissemination and journalists are key players. Media regulations must be geared towards making it easier for the fourth estate to carry out its duty of information gathering and dissemination. Restrictions in this regard must be narrowly defined and justifiable in a free and democratic society. Sweeping and unlimited powers granted to media regulatory bodies do not augur well in a free society, suppress free speech and kills democracy. Efforts must be made to ensure that restrictive laws are repealed or amended for the good of our societies.

A knowledgeable society is an empowered community. To be informed, information must be available and easily accessible. Governments should facilitate processes that promote collection and easy access to information for all its citizens. A government which is open and responsive to its people will easily promote democratic growth whilst an ill informed society is easily manipulated, has no respect for democratic values and is less conscious of human rights.

This book provides a basic understanding of the media regulation in Uganda and a basis on which to judge whether these laws meet international standards. As we read it, we should note that Uganda is obliged to ensure that limitations to enjoyment of freedoms should be legitimate and necessary.

Ms. Margaret Sekagya

***UN Special Rapporteur on the Situation of Human Rights Defenders, &
Executive Director - Human Rights Centre - Uganda***

Preface

The media plays a fundamental role in preserving a free and open society through dissemination of information that fosters debate and contributes to good governance in Uganda. It is therefore, imperative that a favorable regulatory framework is set up by the government to buttress and bolster the growth of the media to maintain high ethical standards, professionalism and competence of journalists.

A number of existing laws in Uganda currently do not safeguard the growth of media, but rather seek to control and criminalize the work of journalists. This analysis aims at steering public debate on the undue restrictions on the media and advocating for reforms that will decriminalize speech and facilitate the enjoyment of freedom of expression in Uganda.

Robert Sempala

National Coordinator - Human Rights Network for Journalists-Uganda

Introduction

The analysis discusses the limitations to media freedom in Uganda reflected in the various provisions of a wide range of laws. It notes that whereas not all laws mentioned herein are inimical to media freedom, most possess retrogressive provisions that are not in-tandem with Uganda's international human rights obligations, are contrary to, and seek to water down the Constitutional guarantees on freedom of expression embedded in the Constitution of the Republic of Uganda, 1995.

The analysis is divided into two parts with the first part entailing the international legal obligations and standards that govern freedom of expression and media rights. These are reflected in the various international human rights instruments at the UN, African Union and East African Community spheres that Uganda is party to. Part two of the analysis discusses the national legal framework, a dissection of the diverse laws impacting both directly and indirectly on freedom of expression and media rights.

Also discussed are the different institutions both nationally and internationally and how they can be used to bastion the defence of media rights and freedom of expression. These include treaty bodies, judicial and quasi-judicial mechanisms such as the African Commission on Human and Peoples' Rights; African Court on Human Rights and Justice among others. The analysis concludes that unless these unjustly restrictive provisions are amended or struck out from law books, they remain an obstacle to exercising freedom of expression and media rights. As such, the centrality of these judicial and quasi judicial institutions in the effort to promote and protect freedom of expression cannot be under stated.

International standards on freedom of expression and media

The right to freedom of expression is central in enhancing the running of a democratic society. This freedom has been conceptualized widely to include the right to hold diverse opinions without hindrance and the rights to convey, seek, and obtain information and ideas, not considering form, content, or source. It is a fundamental conduit through which citizens express their views with the aim of seeking to influence their leaders and ultimately the governance of their particular communities. This freedom of expression is guaranteed by several international and regional human rights instruments to which Uganda is a party.¹ Consequently, these international standards form part of Uganda's legal framework on freedom of expression and the attendant media rights there under.

Status of International Human Rights Law in Uganda's Legal Framework

It should be noted that the various international human rights instruments Uganda is party to are not directly enforceable in her domestic legal framework. Uganda subscribes to the dualist school of thought based on the understanding that domestic and international law make two dissimilar legal systems; consequently for international law to be binding and be directly applicable by the Judiciary in adjudication of cases, it must be domesticated or incorporated into the domestic law by way of an Act of Parliament.

The above short coming notwithstanding, there are various provisions under the Constitution which direct Uganda's observance to international law. Under the National Objectives and Directive Principles of State Policy, in particular Objective 28 (XXVIII) (b) under the Foreign Objectives, the Constitution mandates absolutely that the foreign policy of Uganda shall be based on the principles of respect for international law and treaty obligations.²

¹ Hrea.Org, '*Freedom of Expression*,' Accessed at <http://www.hrea.org/index.php> accessed on 27/02/2014.

² Note that Article 8A of the Constitution provides that Uganda shall be governed based on principles of national interests and common good enshrined in the national objectives and directive principles of state policy. This therefore makes them justiciable.

Additionally, the Constitution of the Republic of Uganda, 1995, under Article 287, saved all the earlier treaties, agreements or conventions that the previous governments had entered into with any country or international organization on or after the 9th of October, 1962 (when Uganda got her independence from Britain); that were still in force immediately before the coming into force of the Constitution. The two provisions emphatically treat international law as a central component in the governance of the country.

In the same vein, Article 119 provides guidelines on reception, incorporation and application of international law in Uganda. Article 119 (4) of the Constitution grants the Attorney General the duty to draw and peruse agreements, treaties, conventions and documents whatever name called to which the government is a party or in respect of which the government has an interest. Article 119 (5) further provides that the government cannot enter in any of the above commitments and cannot conclude them without the legal advice from the Attorney General except in such cases and subject to such conditions as Parliament may by law prescribe. Article 123 (1), states that the execution of international treaties, conventions and agreements is a preserve of the Executive arm of government i.e. the President or his or her delegate. Article 123 (2) provides for Parliament to make laws to govern the ratification of treaties.

International law has therefore continued to inspire various provisions within the domestic legislations. Judicial activism has also played a key role in contributing to the use of international human rights instruments including provisions relating to freedom of expression and media rights. This has been more pronounced in cases requiring constitutional interpretation where courts have relied on some of these international human rights instruments to arrive at progressive conclusions.

International Legal Framework

Among some of the International Conventions which have been adopted by Uganda to propel freedom of expression include; the Universal Declaration for Human Rights;³ International Covenant Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 all collectively constituting the International Bill of Rights.

The International Covenant on Civil and Political Rights (ICCPR), which Uganda acceded to on 21st January 1987; under Article 19 of the ICCPR, guarantees the right to freedom of expression in the following terms;

(1) Everyone shall have the right to freedom of opinion.

(2) 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.

The UN Human Rights Committee, the oversight body for the implementation of ICCPR by State parties, adopted General Comment 34, which is an additional interpretation guideline of the freedoms of opinion and expression guaranteed by Article 19 among other provisions. The General Comment is aimed at uniformity in interpretation of the provisions of the ICCPR and also offers guidance to the various stake holders namely the State, the Civil Society fraternity, the Judiciary and legislative arms of the State on how to best interpret and adjudicate matters concerning this freedom in Uganda.

³ Adopted in 1948 by the UN General Assembly was the first to guarantee Freedom of Expression under Article 19 by expressly providing as follows;

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

The UDHR is not a legally binding instrument on States including Uganda since it is a UN Declaration but scholars maintain that it ‘constitutes general principles of law and are widely held as having acquired legal force as customary International Law since its adoption in 1948.’ see M. Akehurst, “*Custom as a Source of International Law*”, 48 BYBIL 1974 – 1975 pg. 1-53 Accessed on <http://www.hrw.org/news/2013/12/19/amicus-curiae-freedom-expression-and-academic-freedom> accessed on 23rd February 2014.

This General Comment is therefore central in the quest for promotion, protection and respect for freedom of expression. It addresses emerging issues concerning freedom of expression especially in light of the technological advancements such as internet-based expression avenues like blogs and websites and other information/communicative technologies. The General Comment recommends that States take all necessary steps to foster independence of these new media and ensure access of individuals to them.⁴

International Institutional Supervisory Mechanisms

At the international level are various institutions that have been established to provide oversight on State promotion and protection of human rights including freedom of expression and media rights. They include;

UN Special Rapporteur on Freedom of Opinion and Expression

The Office of the UN Special Rapporteur on Freedom of Opinion and Expression is an outcome of a resolution of the UN Commission on Human Rights in 1993. The Special Rapporteur is mandated to gather information from governments, NGOs among other stakeholders on various issues concerning freedom of expression and opinion. This, he/she does through state visits (on site visits) often done at the invitation of the host State. The works of the Rapporteur are often contained in an annual report and any country specific reports detailing the situational overview of promotion and protection mechanisms of the freedom available in a particular country. Depending on the situation at hand, the rapporteur's focus can both be widespread on thematic emerging issues or individual specific consistent cases of violation. The Rapporteur provides diverse recommendations on how to best promote freedom of expression in the report submitted to the UN Human Rights Council.

⁴ Human Rights Committee, 102nd session, Geneva, 11-29 July 2011, Accessed at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> accessed on 25/02/14, Para 15

Continental and Regional standards on media freedom

The African Charter on Human and Peoples' Rights (ACHPR)⁵ – guarantees the right to freedom of expression. These guarantees are largely similar to those found in the ICCPR.⁶ The Charter under Article 9 states;

- (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.*

Additionally, the African Commission on Human and People's Rights in its 32nd Ordinary Session meeting on 17th to 23rd October 2002 adopted the Declaration of Principles on Freedom of Expression in Africa.⁷ According to the Declaration, freedom of expression is '...an individual human right... a cornerstone of democracy and... a means of ensuring respect for all human rights and freedoms ...'. Principle 1 of the Declaration is to the effect that:

- (1) Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.*
- (2) Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.*

The Declaration elaborates a number of principles and standards on freedom of expression and enjoins State parties to the African Charter on Human and Peoples' Rights to make every effort to give practical effect to these principles.⁸

It should however be noted that these human rights instruments also provide for responsibilities and duties incumbent on the rights holders to ensure that

⁵ Adopted 26 June 1981, entered into force 21 October 1986.

⁶ The Charter was adopted 17th June 1981 in force 21st October 1986 which Uganda ratified on 10th May 1986.

⁷ Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights 32nd Session 17-23 October 2002: Banjul, The Gambia.

⁸ Ibid, Article 16

the freedom to expression is not misused or abused to the detriment of other individuals. Consequently, limitations or restrictions on this freedom are acceptable and permitted under human rights law as long as they are not used to trample but regulate. Thus, Article 20(2) of the ICCPR requires State parties to prohibit 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.' Article 19 ICCPR further stipulates that these limitations 'shall only be such as are provided by law and are necessary: a) for respect of the rights or reputations of others; b) for the protection of national security or public order, or of public health or morals.' The International Convention on Elimination of All forms of Racial Discrimination also enjoins State parties to make illegal certain hostile expressions.

The African Charter on Human and Peoples' Rights under chapter 2 introduces duties that every individual should accord to his/her family, society and international community. The rights and freedoms such as expression carry with them duties including the duty to respect and not discriminate against fellow human beings but rather maintain mutual respect and tolerance. Under Article 29, as one exercises his rights and freedoms, he or she has a duty not to compromise the security of the State; has a duty to preserve and strengthen social and national solidarity. More centrally however, Article 27 provides an express limitation to the effect that 'the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.' The individual rights are subjected to the right of others for societal harmony.

The African Court on Human and Peoples' Rights

This Court is continental, established by African Union to ensure protection of human and peoples' rights on the African continent. It is complementary to the African Commission on Human and Peoples' Rights. It is governed by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, (the Protocol) adopted in Ouagadougou, Burkina Faso, in June 1998, coming into force on 25 January 2004 after it was ratified by more than 15 countries including Uganda.

The Court has powers on issues concerning the interpretation and application

of the African Charter on Human and Peoples' Rights, the (the Charter), the Protocol and any other relevant human rights instrument ratified by the States concerned. Under Article 5 of the Protocol and the Rules (Rule 33), the Court can receive complaints and/or applications from the African Commission of Human and Peoples' Rights or State parties to the Protocol or African Intergovernmental Organizations. Non-Governmental Organizations that have observer status before the African Commission on Human and Peoples' Rights and individuals from States which have made a Declaration accepting the jurisdiction of the Court can also bring cases directly before the Court. The African Court can be a central institution in promoting and protecting freedom of expression and media rights in Uganda at a continental level.

African Commission on Human and Peoples' Rights

Under the regional human rights system—the African Union, the African Commission on Human and Peoples' Rights has mandate to oversee the implementation of the African Charter provisions by member states. The Commission is established under article 30 of the African Charter. It has power to interpret all the provisions of the African Charter. It acts as a quasi judicial body with power to hear communications (cases) alleging violations of the charter provisions by a particular State party as provided for under Article 47. It has power to examine State progress in implementation of the provisions of the Charter through the process of State reporting.⁹ In its mandate, the Commission has dealt with the right to freedom of expression in various cases. In *Sir Dawda K. Jawara v. The Gambia*, the Commission found that the failure of a state to investigate attacks against journalists violates their right to express and disseminate information and opinions and also violates the public's right to receive such information and opinions.¹⁰

⁹ Under article 62 of the Charter, every state is obligated to 'submit a report every two years on the legislative or other measures it has undertaken with a view to giving effect to the rights and freedoms recognized and guaranteed by the Charter.'

¹⁰ *Sir Dawda K. Jawara v. The Gambia*, Communications 147/95 and 149/96 11 May 2000, Communication Nos. 147/95 and 149/96 (African Commission on Human and Peoples' Rights), Theme: Miscellaneous Sub-Issues: Harassment of government critics Test: Penalty: Arrest/detention Decision: Violation of the right to freedom of expression (Article 9 ACHPR) Jurisdiction: African Commission on Human and Peoples' Rights (The Gambia)

In Article 19 v. Eritrea, Communication, revolving on the issue of incommunicado detention of journalists in Eritrea, the Commission decried the encroachment on media freedom, a central tenet of freedom of expression and found that unfairly imprisoning journalists without subjecting them to a fair trial and banning free press in the country was a violation of Article 9 of the African Charter.¹¹ In further deliberating on the centrality of freedom of expression in Media rights Agenda et al. v. Nigeria Communications, the Commission noted that 'Freedom of expression is vital to an individual's personal development, his political consciousness and participation in the conduct of public affairs in his country.'¹²

The UN Special Rapporteur on the Promotion and Protection of the Freedom of Opinion and Expression has been key in the call for diversity of media ownership explicit in passing the, Declaration on Diversity of Broadcasting on 14 December 2007.

The declaration condemns the continued attacks on journalists and the potential obstacles to editorial autonomy posed by concentration of media ownership in a few hands.¹³ The Declaration calls for diverse broadcasters as a fundamental necessity to allow unrestricted flow of ideas, opinions and information in the community. The Declaration also recognizes the interdependence of a liberated media and an independent judiciary which is the custodian of civil liberties. Additionally, the Declaration counters criminal defamation as used in some countries as an indefensible constraint on freedom of expression.

Under the African Union is the Special Rapporteur on Freedom of Expression and Access to Information. The mandate of this Special Rapportuer is to 'analyze national media legislation, policies and practice within Member States, monitor their compliance with freedom of expression and access to information standards in general and the Declaration of Principles on Freedom of Expression in Africa in particular.'

11 Article 19 v. Eritrea, Communication 275/2003 Comm no 275/2003, 41st Ordinary Session (16-30 May 2007), 22nd Annual Activity Report (2006-7), (2007) AHRLR 73 (ACHPR 2007), (2007) 15 IHRR 880, IHRL 3033 (ACHPR 2007), May 2007, African Commission on Human and Peoples' Rights [ACHPR] Accessed at <http://opil.ouplaw.com/view/10.1093/law:ihrl/3033acomhpr07.case.1/law-ihrl-> accessed on 26/02/14.

12 Media rights Agenda et al. v. Nigeria Communications 105/93, 128/94, 130/94 and 152/96.

13 The declaration was a joint effort with the Organization for Security and Co-operation in Europe (OSCE), Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.

He or she also advises Member States accordingly; undertakes fact-finding missions to Member States from where reports of systemic violations of the right to freedom of expression and denial of access to information have reached the attention of the Special Rapporteur and makes appropriate recommendations to the African Commission.¹⁴ The past Special Rapporteurs of the African Union have concentrated efforts aimed at ridding the continent of criminal defamation, libel and sedition laws which are remnants of colonial rule aimed at silencing legitimate criticism of the powerful and therefore an obstacle to media and expression freedoms.¹⁵

East African Court of Justice

It has been argued that the East African Court of Justice has no jurisdiction to hear and determine matters of human rights violations including violations on freedom of expression.

It was however held by Justices of the Court in Reference No. 1 of 2007¹⁶, that the jurisdiction of the EACJ with respect to human rights requires a determination of the Council (Heads of State) and a conclusion of a Protocol to that effect, however while the Court will not assume jurisdiction to adjudicate on human rights disputes before the Protocol is concluded, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the Reference includes allegations of human rights violations. The role of the courts is to maintain the rule of law and to take steps to do so.

Denotative reading of The Treaty for the Establishment of the East African Community under Article 6(d) and 7(2) emphasize good governance, adherence to the principles of democracy, promotion and protection of human rights. Despite the inexistence of the Protocol, I believe on the face of it, these principles are positive commitments the member countries have undertaken to abide by. Freedom of expression is a tenet of good governance and democracy which falls within the scope of the two Articles.

¹⁴ See Human Rights Network for Journalists, 'Understanding the Justice System in Uganda; A Training Manual for Journalists,' 2013 at 69-70.

¹⁵ Tom Rhodes/CPJ East Africa, 'A bid to rid Africa of Criminal Defamation, Sedition Laws.'

¹⁶ James Katabazi vs. Secretary General and A.G of Republic of Uganda

Legitimate Limitations to Freedom of Expression

Article 43 (1) of the Constitution of the Republic of Uganda, 1995, states that in the enjoyment of the rights and freedoms prescribed in the Constitution, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest. Public interest shall not permit any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution under Article 43 (2) (c).

It should be noted that seeking, receiving and imparting of information is not absolute and can be limited when it is in conflict with other rights. Under international human rights law, national laws which restrict freedom of expression must comply with the provisions of Article 19(3) of the International Covenant on Civil and Political Rights and Article 13(2) of the African Charter on Human and People's Rights. International law declares freedom of expression to be the rule; limitations are the exception, permitted only to protect¹⁷: the rights or reputations of others, national security, public order, public health and morals. Limitation is legitimate if it falls within the very narrow conditions defined in the three-part test in Article 19(3) of the ICCPR: Article 19, a Media Rights Organization has clearly discussed the three-part test as summarised below:

¹⁷ www.article19.org/pages/en/limitations.html 1/4

1. ‘...PROVIDED BY LAW...’

The right to freedom of expression cannot be limited at the whim of a public official. They must be applying a law or regulation that is formally recognised by those entrusted with law making. The law or regulation must meet standards of clarity and precision so that people can foresee the consequences of their actions. Vaguely worded edicts whose scope is unclear will not meet this standard and are therefore not legitimate. For example, vague prohibitions on ‘sowing discord in society’ or ‘painting a false image of the State’ would fail the test.

The rationale

It is only fair that people have a reasonable opportunity to know what is prohibited, so that they can act accordingly. A situation where officials can make rules on a whim is undemocratic. Decisions limiting human rights must be made by bodies representing the will of people. Vague laws will be abused. They often give officials discretionary powers that leave too much room for arbitrary decision-making. Vague laws have a ‘chilling effect’ and inhibit discussion on matters of public concern. They create a situation of uncertainty about what is permitted, resulting in people steering far clear of any controversial topic for fear that it may be illegal, even if it is not.

2. ‘...LEGITIMATE AIM...’

There must be a legitimate aim to limit the right to freedom of expression. The list of legitimate aims is not open-ended. They are provided for in Article 19(3) of the ICCPR: ‘...respect for the rights and reputations of others, and protection of national security, public order, public health or morals’. They are exclusive and cannot be added to.

The rationale

Not all the motives underlying governments’ decisions to limit freedom of expression are compatible with democratic government. For example, a desire to shield a government from criticism can never justify limitations on free speech. The aim must be legitimate in purpose and effect. It is not enough for a provision to have an incidental effect on one of the legitimate aims. If the provision was created for another reason, it will not pass this part of the test.

3. ‘...NECESSITY...’

Any limitation of the right to freedom of expression must be truly necessary. Even if a limitation is in accordance with a clear law and serves a legitimate aim, it will only pass the test if it is truly necessary for the protection of that legitimate aim. If a limitation is not needed, why impose it? In the great majority of cases where international courts have ruled national laws to be impermissible, limitations on the right to freedom of expression, it was because they were not deemed to be ‘necessary’.

The rationale

A government must be acting in response to a pressing social need, not merely out of convenience. On a scale between ‘useful’ and ‘indispensable’, ‘necessary’ should be close to ‘indispensable’. A government should always use a less intrusive measure if it exists and would accomplish the same objective. For example, shutting down a newspaper for defamation is excessive; a retraction (or perhaps a combination of a retraction and a warning or a modest fine) would offer the victim of defamation adequate protection.

The measure must impair free expression as little as possible. It should not restrict in a broad or untargeted way, as that could interfere with legitimate expression. For example, it is too broad to ban all discussion about a country’s armed forces in order to protect national security

The impact of the measure must be proportionate and the harm that it causes to free expression must not outweigh its benefits. For example, a limitation that provides only partial protection to someone’s reputation but seriously undermines free expression is disproportionate

A court must take into account all of the circumstances at that time before deciding to limit freedom of expression. For example, it could be legitimate to limit freedom of expression for national security reasons during a conflict but not during peacetime

The European Convention on Human Rights (ECHR) narrows the third test by

requiring limitations to be 'necessary in a democratic society'. This wording is preferable as it clarifies that the purpose of the limitation must never be to shield governments from either criticism or peaceful opposition.

What is limitation or restriction?

International courts have generally judged that any action by a public body that has an actual effect on people's freedom of expression constitutes a 'restriction' or 'limitation'.

- The nature of the action is irrelevant. It could be anything from a law to an internal disciplinary measure
- The nature of the public body is irrelevant. It could be legislative, executive or judicial, or a publicly owned enterprise
- The extent of the action's impact is irrelevant. Any discernible effect on the ability of one or more people to express themselves freely is a restriction.

The European Court of Human Rights again narrows the definition of a limitation, requiring the three-part test to apply to any "formalities, conditions, restrictions or penalties" under Article 10(2).

National Laws that unduly restrict media freedom

Uganda has a number of laws that criminalize freedom of expression. The legal regime undermines, stifles, restricts and curtails the enjoyment of freedom of expression guaranteed by the Constitution of the Republic of Uganda, 1995. Article 29 (1) (a) provides for every person's right to 'freedom of speech and expression which shall include freedom of the press and other media' while Article 41(1) states that every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.

The Penal Code Act, Cap 120

This is the basic criminal law for Uganda introduced by the colonialists in 1950. It provides for a wider array of criminal offences. This colonial law has several provisions which undermine the enjoyment of freedom of expression. Sections 53 and 179 criminalize defamation while section 41 under the guise of preventing incitement to tribal segregation, criminalizes speech and effectively bars the media and the public from questioning the imbalance in distribution of national resources. Section 33-36 grants the minister absolute powers to stop importation of publications that are deemed unfit for public consumption and whoever imports, sells, offers to sell or distributes them is liable to imprisonment. Sections 49, 51 and 52 unduly restrict and stifle free debate on matters of public interest by creating offences of wrongly inducing a boycott, incitement to violence and incitement to refuse or delay payment of tax respectively.

The Supreme Court of Uganda in 2002 unanimously nullified section 50 of the Penal Code Act that criminalized publication of false news. In 2007, the Constitutional Court nullified Section 32 of the Police Act that gave police powers to control public assemblies and demonstrations and in 2010 the same court annulled section 40 of the Penal Code Act that created the offence of sedition. Unfortunately, in 2009, the Constitutional Court retained section 179 of the Penal Code Act which creates the offence of defamation. The court argued that:

“...Most certainly therefore defamatory libel is far from the core values of freedom of expression, press and other media. It would trivialize and demean the magnificence of the rights guaranteed by the Constitution if individual members of the public are exposed to hatred, ridicule and contempt without any protection. In fact, the press would be doing a disservice to the public by publishing defamatory libels.”

The Justices of the Constitutional Court further argued that: The applicants in this case cannot say that they are being tried under an unconstitutional law. The applicants’ complaint and defence should not, therefore, be that section 179 of the Penal Code Act is bad law. The freedom of expression in Uganda should be enjoyed within the restrictions imposed by section 179 of Penal Code Act. Holding that section 179 is unconstitutional would mean that the right of freedom of expression is unlimited and thus this would contravene Article 43 of the Constitution... In summary, Section 179 of the Penal Code Act (Cap 120) is not inconsistent with Article 29(1) (a) of the Constitution... Sections 179 of the Penal Code Act is a restriction permitted under Article 43 of the Constitution as being demonstrably justifiable in a free and democratic society.”

The Press and Journalist Act 2000

This law was enacted in 1995 by the National Resistance Council that acted as the National Assembly of the Republic of Uganda. In 2000, it was proclaimed an Act of Parliament. Its commencement on 28 July 1995 repealed the Newspaper and Publications Act Cap 305 and the Press Censorship and Correction Act Cap 306 both of which were colonial laws.

The promoters of The Press and Journalist Act in 1995 argued that it was intended to professionalise journalism just like the legal and the medical profession by creating structures and processes through which one can become a journalist and practice journalism as a profession. According to the promoters, the law was to make the practice of journalism better, get rid of the ‘quacks’ and make it a preserve for the educated.

The preamble of the Act partly provides that “An Act to ensure freedom of the press...” however, the content and provisions of the law unjustifiably restrict freedom of expression which include the freedom of the press and pose a serious threat to the right to seek, receive and impart information.

The Act is a danger to the right to communication which is guaranteed by the Constitution of the Republic of Uganda. It criminalizes practice of journalism without a practicing certificate issued by a statutory body under the control of the minister of Information; it conscripts journalists into one association and sets an onerous process of enrolling as a journalist before receiving a practicing certificate. The law defines a journalist as ‘a person who has enrolled as journalist under the law’.

The Council of Europe’s Committee of Ministers issued a recommendation in 2000 that defined a “journalist” as “any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication.”¹⁸

Courts have also ruled that a nontraditional journalist “must have some nexus, relationship, or connection to “news media”, “first, a connection to news media, second, a purpose to gather, procure, transmit, compile, edit or disseminate news, and third, that the materials sought were gathered in the course of professional activities.”¹⁹ In this regard, it is therefore not necessary for journalists to enroll and acquire practicing certificates in order to receive, impart and disseminate information.

Sections 5, 6 and 7 of the Act provide for the compulsory registration on the editor with the Media Council which is a government body, functions and parameters within which an editor should conduct his duties and the procedure for

¹⁸ See Council of Europe, Committee of Ministers, “Recommendation No. R(2000) 7 of the Committee of Ministers to Member States on the Right of Journalists Not to Disclose Their Sources of Information,” 8 March 2000.

¹⁹ *Too Much Media, LLC v. Hale*, No. A-7-2010, 2011 N.J. LEXIS 629 (N.J. 2011)

disqualification of an editor from his job. Section 5 makes it obligatory for a mass media organization to submit to the Media Council particulars of an editor within thirty days of appointment. However, the term editor is vaguely defined in the law to “include a person who is, at any given time, in charge of programme production at a radio or television station.” The definition does cater for an editor in print media. Mass media on the other hand is defined in the Act to

“include newspapers, posters, banners and electronic media published for public consumption”. The law makes it a criminal offence not to submit the details of an editor to the Media Council, attracting a sentence of imprisonment for a period not exceeding three months or a fine.

Section 6 of the Act spells out the functions of an editor to include ensuring that what is published is not contrary to “public morality”, retain a copy of what is published for a period of not less than ten years and in case of broadcast, for a period not less than thirty days. Determining what is not contrary to public morality according to the law is unclear. Although the law spells out the journalism code of ethics, the explicit definition of public morality still remains ambiguous and vague.

Section 7 spells out conditions of non-qualification for the post of editor which includes failure to be enrolled and granted a practicing certificate by the statutory Media Council. In other words, the law mandates all editors to fulfil the requirements and processes of enrolling and acquiring practising certificates in order to be legitimate in the journalism profession. These provisions of the law erode the principle of editorial independence an internationally known and recognized principle of media freedom and freedom of expression.

The law establishes a Media Council composed of government and non-government officials all appointed by the Minister in Charge of Information. Section 8 (3) of the Act makes it mandatory for the Minister to appoint members of the Council, and the Secretary to the Council must be a senior government official from the Ministry of Information.

According to Section 9 of the Act, the functions of the Council include to: regulate the conduct and promote good ethical standards and discipline of journalists; exercise disciplinary control over journalists, editors and publishers; censor films, videotapes, plays and other related apparatuses for public consumption; and to exercise any function that may be authorised or required by any law. The section contains overly broad terms which grant the Council powers to control the practice of journalism and stop dissemination of information. Terms like 'exercise disciplinary control over journalists', censor and exercise any function that may be required are too broad and the Council on various occasions has hidden under this vagueness and ambiguity of the law to "discipline" journalists and to block plays which they allege are 'politically and morally wrong' from being staged.

In 2012, the Media Council banned a play and stopped another under the pretext of 'exercising any function that may be authorized or required by any law'. Under section 30 of the Act, the Council formulates a disciplinary committee composed of the Chairman and one senior government official who acts as the secretary of the Disciplinary Committee. Section 33 (b) and (c) give the Disciplinary Committee powers to suspend a journalist from conducting his duties for a period not exceeding six months and to order the media organization which published the matter that led to the disciplinary action to compensate the aggrieved party. On different occasions, the Media Council has used this provision to impose harsh monetary penalties on media houses.

The Council is also empowered to decide who should practice journalism in Uganda. Section 27 of the Act gives the Council powers to issue a practicing certificate valid for only one year. Besides, Section 28 empowers the Council not to allow a journalist to practice by refusal to grant a practicing certificate if that journalist is not enrolled; or (b) he or she has failed to comply with any order made under this Act.

Under the law, the Media Council is remunerated by the Minister; it reports to the minister annually and has powers to determine how it conducts its business by amending the Fourth Schedule of the Act which provides for meetings of

the Council. This puts the Council under the direct control of the Minister of Information which compromises its independence.

The Press and Journalist Act falls short of legal guarantees on independence of the Council as well as the manner in which members of this regulatory body are chosen. The fact that the Minister determines the remuneration of members, the budget and houses the Council within the premises of Ministry of Information, the shield of independence and freedom from interference from the government are watered down.

The African Commission on Human and People's Rights in the Declaration of Principles of Freedom of Expression in Africa of which Uganda is a party provides that: *Any regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference. Its powers shall be administrative in nature and it shall not seek to usurp the role of the courts.*

The Media Council created under the Press and Journalist Act does not meet this criterion of an independent complaints body.

The Press and Journalist Act further establishes the National Institute of Journalists of Uganda (NIJU) which is supposed to enroll all journalists in the country. A journalist who is not enrolled by the Institute is not eligible for a practicing certificate. Section 15 of the Act categorizes membership into full, associate and honorary and limits full membership of the Institute to journalists who are degree holders. Section 15 (2) (a) and (b) provides that: *A person shall be eligible for full membership of the institute if— (a) he or she is a holder of a university degree in journalism or mass communication; or (b) he or she is a holder of a university degree plus a qualification in journalism or mass communication, and has practiced journalism for at least one year.*

Full members have discretionary rights to determine and vote on who qualifies to become an associate or honorary member of the Institute. Section 15 (5) denies associate members the right to vote. It provides that: An associate or honorary

member shall not be eligible to vote. The fate of a journalist who does not poses a university degree is determined by colleagues who are degree holders, however, that journalist must be a member of the Institute in order to obtain the certificate of enrolment.

The law sets a burdensome process of enrolment of journalists. Section 16 (1), (2) and (3) sets out tedious and time consuming enrolment criteria which can take up to a year or more. Anybody who wants to be enrolled must apply to the executive committee which verifies the application and if it is convinced that the applicant qualifies for any category of membership, forwards the application to the general assembly which meets once in a year. When the general assembly approves that applicant, then the General Secretary of the Institute issues an enrolment certificate upon payment of a fee.

However according to the Third Schedule to the Act , applications of members can only be considered under clause 1 (2) (c) that deals with 'any other business'. The mere fact that you poses a degree in journalism or in any other discipline and a qualification in journalism does not allow you to practice journalism until when you are enrolled with the institute and offered a certificate of enrolment.

This arrangement is in total disregard of section 7 (1) of the Declaration of Principles of Freedom of Expression in Africa which provides that: Any registration system for the print media shall not impose substantive restrictions on the right to freedom of expression. Besides, compulsory registration of journalists is against international protocols of which Uganda is a party, because it affects the enjoyment of freedom of expression. The African Court on Human and People's Rights has ruled that: "...compulsory accreditation of journalists has been held at both national and international levels to be a hindrance to the effective enjoyment of the right to freedom of expression."

The Press and journalist Act criminalizes the practice of journalism which involves seeking, receiving and dissemination of information without a practicing certificate issued by the Media Council of Uganda after enrolment by the National Institute of Journalists of Uganda. Section 27 (3) and (4) of the Act provides that:

No person shall practise journalism unless he or she is in possession of a valid practising certificate issued under this section. A person who contravenes subsection (3) commits an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings and in case of failure to pay the fine to imprisonment for a period not exceeding three months.

The exercise of issuing practicing certificates to journalists in order to practice is against the national, regional and international protocols on freedom of expression. Various courts have ruled that procedure is incompatible with the right to seek, receive and disseminate information.

In the Zambian case of Francis Kasoma v The Attorney-General²⁰, where compulsory registration of journalists ordered by the Zambian government was declared unconstitutional by the Zambian High Court in 1997. According to the complainants, in that case, journalists were obliged to become members of a Media Association of Zambia and to register with a statutory Media Council. They submit that the High Court of Zambia quashed the decision and among the reasons given by the High Court Judge:

'I do not in my view consider the decision to constitute the Media Council of Zambia to be in furtherance of the general objectives and purpose of the Constitutional powers, among them, to promote democracy and related democratic ideals such as freedom of expression, and press freedom in particular ... The decision to create the Media Council of Zambia is no doubt going to have an impact ... on freedom of expression in that failure of one to affiliate himself to the Media Council of Zambia, or in the event of breach of any moral code determined by the council would entail losing his status as a journalist, and with the denial of the opportunity to express and communicate his ideas through the media... in light of the above it cannot be seriously argued that the creation of the Media Association or any other regulatory body by the government would be in furtherance of the ideal embodied in the Constitution, vis-à-vis freedom of expression and association. Consequently, I find that the decision to create the

20 Zambia High Court civ. Case N0. 95/HP/2959

Media Association is not in furtherance of the objectives or purposes embodied in the Constitution in particular those protected in articles 20 and 21 [which guarantee freedom of expression and association].

The compulsory accreditation of journalists has been held to be a hindrance to the effective enjoyment of the right to freedom of expression. In its advisory opinion on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism²¹ the Inter-American Court of Human Rights emphasized the important role of the press in the development of a free and democratic society. The Costa Rican government approached the Court for an advisory opinion whether 'the compulsory membership of journalists and reporters in an association prescribed by law for the practice of journalism is permitted or included among the restrictions or limitations authorized by articles 13 and 29 of the American Convention on Human Rights'. In responding to the Costa Rican government's question, the court stated that a law providing for compulsory association and, thus, barring non-members from the practice of journalism was incompatible with the American Convention, as it would deny access to the full use of the news media as a means of expressing opinions or imparting information.

The Inter-American Court noted further that compulsory licensing of journalists or the requirement of a professional identification card does not mean that the right to freedom of thought and expression is being denied, nor restricted, nor limited, but only that its practice is regulated. Compulsory licensing, the Court held, 'seeks the control, inspection and oversight of the profession of journalists in order to guarantee ethics, competence and the social betterment of journalists ...'

The accreditation of journalists may thus be beneficial to the profession, provided though it is done in a manner that does not infringe on the effective enjoyment of the rights of journalists to freely express themselves or receive and disseminate information.

21 Advisory Opinion OC-5/85, 13 November 1985, Inter-Am Ct HR (Ser A) No 5 (1985)

Distinguishing the compulsory registration of persons of other professions from the registration of journalists, the Court held that:

"...within this context, journalism is the primary and principal manifestation of freedom of expression of thought. For that reason, because it is linked with

freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain professional ... The argument that a law on the compulsory licensing of journalists does not differ from similar legislation applicable to other professions does not take into account the basic problem that is presented with respect to the compatibility between such a law and the Convention. The problem results from the fact that article 13 expressly protects freedom 'to seek, receive, and impart information and ideas of all kinds ... either orally, in writing, in print ...' The profession of journalism — the thing journalists do — involves, precisely, the seeking, receiving and imparting of information.

The practice of journalism consequently requires a person to engage in activities that define or embrace the freedom of expression which the Convention guarantees.

The Court went on to state that:

"This is not true of the practice of law or medicine, for example. Unlike journalism, the practice of law and medicine — that is to say, the things that lawyers or physicians do — is not an activity specifically guaranteed by the Convention. It is true that the imposition of certain restrictions on the practice of law would be incompatible with the enjoyment of various rights that the Convention guarantees ... But no one right guaranteed in the Convention exhaustively embraces or defines the practice of law as does article 13 when it refers to the exercise of a freedom that encompasses the activity of journalism. The same is true of medicine".

The African Commission has considered the opinion expressed by the Inter-American Court on Human Rights in the Costa Rican case²², and finds a great deal of persuasion in the reasoning and the approach adopted by the Inter American Court on the question of compulsory licensing of journalists. The Commission is convinced that the question of compulsory accreditation is the same as compulsory licensing which was addressed by the Inter-American Court. The Commission is inclined to accept the argument that compulsory licensing or accreditation amounts to a restriction of the freedom to practice the journalist profession where it aims to control rather than regulate the profession of journalism. Regulation is acceptable where it aims at the identification of journalists, the maintenance of ethical standards, competence, and the betterment of the welfare of journalists. In other words the aim of registration should be for purposes of betterment of the profession rather than its control, since control by its nature infringes the right to express oneself.

Articles 60 and 61 of the African Charter enjoin the Commission to seek inspiration from other international human rights instruments, precedent and doctrine.

The Anti-Terrorism Act of 2002

Under Section 9, this worrisome law provides that any person, who establishes, runs or supports any institution for...publishing and disseminating news or materials that promote terrorism...commits an offence and shall be liable on conviction to suffer death. The critical issues with this provision are that the draftsmen invoked political rather than legal imperatives. Terrorism in itself is not defined leaving its parameters so elastic that the provisions can be exploited to prefer any sort of charges against individuals or groups of individuals. The same offence is provided for in the Penal Code Act section 26 where terrorism is defined to mean:

22 Scanlen and Holderness v Zimbabwe (2009) AHRLR 289 (ACHPR 2009)

“...the use of violence or a threat of the use of violence with intent to promote or achieve political ends in an unlawful manner and includes the use of violence or a threat of the use of violence calculated to put the public in such fear as may cause discontent against the Government.”

The Access to Information Act (2005) and the Access to Information Regulations 2011

This law is an offshoot of Article 41 (1) of the Constitution which provides for the right of every citizen of access to information in the possession of the State or any other organ or agency of the State. The Article provides for exceptions where the release of the information can be denied if it will prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.

The main purpose of the Act is: ‘to empower the public to effectively scrutinize and participate in “government decisions that affect them”. It is supposed to promote an efficient, effective, transparent and accountable government by providing the public with timely, accessible and accurate information in the confines of the government agencies.

The Act also provides for the classes of information that can be obtainable from the government agencies; the procedure to be followed in accessing information sought, and any other matters incidental or related thereto. The Act seeks to provide a platform for the media fraternity to use and access what has always been hard to get information from the government agencies. However, on numerous occasions, journalists have been denied information by public officials on flimsy grounds.

On the 8th February, 2013, an investigative journalist submitted to the Inspector General of Government (“IGG”) a statutory request for information regarding “the wealth declarations of all permanent secretaries of all ministries in Uganda, under the Access to Information Act, 2005 and the Access to Information Regulations 2011 (“the Regulations”). The request was refused on the basis of four grounds:

- That the information requested for was omnibus in nature and the IGG was thus concerned about the high costs associated with the retrieval and reproduction of this information;
- The Leadership Code Act does not yet provide for a prescribed form through which the IGG can divulge the information requested for to the public;
- The Access to Information Act does not apply to information submitted to the Inspectorate under the Leadership Code Act; and
- The IGG and Attorney General could be sued for breach of right to privacy for indiscriminately releasing the information requested for because it extends to the affairs and property of leaders' spouses, children and dependants, especially since the requester could publish these details in the press once they are divulged to him.

The IGG in her response raised questions of law of great and general importance to the public. The complexity of these questions is compounded by the fact that the request in question universally touches on the perceived rights of an elite group of leaders, of which the trial magistrate and appellate judges are members. Whatever the reasons for justifying the refusal complained of by the requester, it cannot be gainsaid that the IGG raised substantial questions that beg for extensive and intensive research and analysis from a legal, political and constitutional perspective.

It is worth noting that the Access to Information Act was passed without repealing the Official Secrets Act of 1964 (OSA). This OSA directly counters what would have been fruits of the Access to Information Act 2005 but further provides for the protection of 'official information' more particularly the information concerning national security. It makes it an offence to 'obtain, collect, record, publish or communicate in whatever manner to any person'. As such, the continued existence of this Act has equipped some officials of government with the means to deliberately deny the public access to information by classifying it as official and subject to the Official Secrets Act and cannot be released to the public.

Additionally, is the Public Service Standing Orders bar any officers from disclosing information that is privy to them for official use unless authorized by a superior not lower than the rank of a Permanent Secretary in the department or institution with the authority to release the information on request.

Uganda Broadcasting Corporation Act 2005

This law was enacted in 2005 to merge the two existing government information dissemination machinery, Radio Uganda and Uganda Television into one body, Uganda Broadcasting Corporation (UBC) with a view of creating a public broadcaster for the country.

Section 5(1) (d) of the Act provides for the functions of the UBC to include: establish autonomy of management in rendering public broadcasting services. However the Act falls short of the basic tenets of a public broadcaster financed and controlled by the public. The Act created a government broadcasting company, a model untenable in the present day democratic dispensation.

Section 3 (1), (2) and (3) of the Act outline the establishment and ownership of the UBC. It provides that:

- (1) There is established a corporation to be known as the Uganda Broadcasting Corporation.
- (2) The Corporation is the successor of the state media known as "Uganda Television" and "Radio Uganda".
- (3) The Corporation shall be wholly owned by the Government.

Providing in the law that the UBC shall be owned by the government, the Uganda government went against its commitment it made under part six of Declaration of Principles of Freedom of Expression in Africa which provides that:

State and government controlled broadcasters should be transformed into public service broadcasters, accountable to the public through the legislature rather than the government, in accordance with the following principles:

- *Public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;*

- *The editorial independence of public service broadcasters should be guaranteed;*
- *Public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets;*
- *Public broadcasters should strive to ensure that their transmission system covers the whole territory of the country; and*
- *The public service ambit of public broadcasters should be clearly defined and include an obligation to ensure that the public receives adequate, politically balanced information, particularly during election periods.*

The UBC Act is in total deviation of the principles laid down in part six of Declaration. Section 7(2) mandates the Minister of Information to appoint the Board of Directors and where there is a vacant position; section 7(5) allows the minister to fill it. The Minister is empowered to direct the board in the course of its works under section 6 (a) and (d) which undermines the independence of the board. Besides section 10 of the Act entrusts the Minister of Information to determine the remuneration of the board. In addition, the Minister is further empowered under section 11 (2) of the Act to approve the appointment of the managing director of the Corporation by the Board of directors.

The UBC Act falls short of creating a public broadcaster and has instead set up a State owned company to disseminate government controlled information which is unsustainable in the current era of free flow of information. Public broadcasting has been described in the following manner²³:

“The “public” is the entire population of the country (or region) which the public broadcaster is responsible for serving. “Entire population” has a twin meaning:

Firstly, in terms of technical coverage, it means that ideally every household in the service area should be in a position to receive the programme service. This is akin to the universal service concept which is familiar in other – result-oriented – public services such as water, gas, electricity, telephony and public transport.

23 A book published by ITU/BDT and UNESCO and written by Dr Werner Rumphorst

- Secondly, it means all groups and sections of society: rich and poor, old and young (and in-between), educated and less well educated, people with special interests (whether they be cultural, religious, scientific, sporting, social, economic or anything else), but also society as a whole. The entire population, in this sense, must be served by public service programming (even though it is impossible to please everybody all the time).

If, positively expressed, public service broadcasting is made for the public, for the entire population, it follows, negatively expressed, that it is not made for the

government, Parliament, or President, for a political party or a church or for any other (private) interest group or for shareholders. It must be independent of all of these, serving “only” the interests of the population, of people as citizens rather than as consumers.

Thirdly, as long as there is funding from the State budget, the broadcasting organization is likely to be a State company, with all the constraints that that implies. In particular, the broadcasting organization is probably bound by a State salary structure, which is a critical handicap in a system where there is direct competition with commercial broadcasters. Where there is licence fee funding, it may be assumed that the broadcasting organization also has the right of self-administration (whilst naturally being subject to public control).

Therefore, if it is clear that State broadcasting is no longer viable, the prospects for public service broadcasting as the democratic replacement of State broadcasting should not be too bad.”

Referendum and Other Provisions Act, 2005

This law was enacted in 2005 to govern the conduct of referenda in the country as provided for in the Constitution of the Republic of Uganda. Section 23 of the Act sets the procedure of media engagement during the canvassing of support for each side in the referenda. It makes mandatory for the State owned communication

media to offer all sides in the referendum, time to canvass support. However, the section contains stringent measures that can affect free expression and healthy debate during the campaigns through media.

The section prohibits the media from printing, publishing or distributing a newspaper or circular containing an article, report, letter or other matter concerning the issue of the referendum without the full details of the author. Failure to abide by this provision attracts a six months term in prison or fine or both. The provision within the law suffocates views of those who would not want to expose themselves and is against the right seek, receive and impart information. The provision also contravenes the principle of protection of sources of information which is re-stated in section 38 of the Press and Journalist Act providing that: a journalist shall not be compelled to disclose the source of his or her information except with the consent of the person who gave him or her the information or on an order of a court of law.

Section 23(5) of the Act spells out several statements that should not be made by either side of the referendum when canvassing support and section 23 (6) makes it an offence for the proprietor or operator of electronic media to allow the prohibited statement to be aired or published. The law defines electronic media to mean: television, radio, internet and email and “any similar medium”. The statements that are prohibited include false, malicious, abusive, insulting, derogatory or those containing sectarian or mudslinging words.

Presidential Elections Act 2005

It was enacted in 2005 to cater for the qualifications of those aspiring to contest for the presidency of Uganda, disqualification, conduct of campaigns, declaration of results and the procedures of challenging the outcomes of the presidential elections. Although the law is not directed to the media per say, it contains provisions that affect its operations and freedom of expression in general.

Section 23 (1) and (2) of the Act guarantees all presidential candidates equal treatment by public institutions and authorities during campaigns as well as

enjoyment of “complete and unhindered” freedom of expression and access to information. However, section 23 (3) (a) and (b) of the Act bars candidates from using language that “constitutes incitement to public disorder, insurrection or violence or which threatens war; or (b) which is defamatory or insulting or which constitutes incitement to hatred.”

A candidate who does so is liable to imprisonment to a period not exceeding one year. The criminal sanctions imposed on the candidates in this section already exist in the Penal code Act and it is unclear whether the person who uses the language referred to in the law cannot be charged under the Penal code Act. Besides, it takes away the guarantees offered to the candidate in the same section of complete and unhindered freedom of expression and promotes self-censorship. Candidates and their agents might not be aware of what constitutes incitement to public order, insurrection and violence during a campaign period. The discretion to determine is left to the prosecutor to determine and assess whether the statements uttered warrant prosecution or not.

Section 24 of the Act imposes unjustifiable and broad restrictions on the right of candidates and the media as well penalties. The Section provides that:

- (1) All presidential candidates shall be given equal treatment on the State owned media to present their programmes to the people.
- (2) Subject to any other law, during the campaign period, any candidate may, either alone or in common with others, publish campaign materials in the form of books, booklets, pamphlets, leaflets, magazines, newspapers or posters intended to solicit votes from voters but shall, in any such publication specify particulars to identify the candidate or candidates concerned.
- (3) A person shall not, during the campaign period print, publish or distribute, a newspaper, circular or pamphlet containing an article, report, letter or other matter commenting on any issue relating to the election unless the author’s name and address, or the authors’ names and addresses, as the case may be, are set out at the end of the article, report, letter or other matter or, where part only of the article, report, letter or matter appears in any issue of a newspaper, circular, pamphlet or matter at the end of that part.

(4) Except as otherwise provided in this section, a candidate may use private electronic media for his or her campaign.

(5) A candidate shall not while campaigning, do any of the following—

(a) making statements which are false—

(i) knowing them to be false, or

(ii) in respect of which the maker is reckless whether they are true or false;

(b) making malicious statements;

(c) making statements containing sectarian words or innuendoes;

(d) making abusive, insulting or derogatory statements;

(e) making exaggerations or using caricatures of the candidate or using words of ridicule;

(f) using derisive or mudslinging words against a candidate; or

(g) using songs, poems and images with any of the effects described in the foregoing paragraphs.

(6) The proprietor or operator of a private electronic media shall not knowingly use the media or allow it to be used to do any of the acts prohibited in subsection (5).

(7) A person who contravenes any of the provisions of subsections (2), (3), (4), (5) and (6) commits an offence and is liable on conviction—

(a) in the case of an offence under subsection (3), to a fine not exceeding twenty four currency points or imprisonment not exceeding one year or both; and

(b) in any other case to a fine not exceeding forty eight currency points or imprisonment not exceeding two years or both.

(8) In this section “electronic media” includes television, radio, internet and email.

The section makes it an offence for the media to publish information which does not contain the full details of the author as well as ‘knowingly’ allows the candidates to use the media to convey the criminalized speech stated in the section of the law.

These limitations on the enjoyment of freedom of expression are constitutionally invalid and do not conform to the universal values and principles in a democratic society. The Constitution of the Republic of Uganda provides under Article 43 (2)

(c) that: “any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.”

It is burdensome for a proprietor or the operator to know when a candidate will make abusive or derogatory statements in order to be stopped as well as know what constitutes a derogatory, mudslinging or exaggerations. The Supreme Court of Uganda has ruled that such sections in the law “... lack sufficient guidance on what is, and what is not, safe to publish and consequently places the intending publisher, particularly the media, in dilemma. In my view, given the importance of the role of the media in democratic governance, a law that places it into that kind of dilemma, and leaves such unfettered discretion in the State Prosecutor to determine, from time to time, what constitutes a criminal offence, cannot be acceptable, and is not justifiable in a free and democratic society.”

Section 66 and 69 of the Act criminalize the publication of false statements on the health and character of candidates and whoever does it is liable to imprisonment between the periods of six months to one year. The arguments raised above qualify for these two sections.

Parliamentary Elections Act 2005

This Act like the Presidential Elections Act was enacted in 2005 to provide for the qualifications, disqualification and the conduct of parliamentary campaigns. Although it does not directly concern the practice of journalism, it has provisions that directly impact on media. Sections 21, 22, 70 and 73 provide similar limitations and restrictions on freedom of expression and media as the Presidential Elections Act. The wordings of the provisions in the Act are exactly the same as those in the Presidential Elections Act. The arguments provided for under the Presidential Elections Act qualify for the same provisions in the Parliamentary Elections Act.

The Public Order Management Act, 2013 (POMA)

The POMA was enacted to provide a regulatory framework for public assemblies. It however gives wide discretionary powers to the Uganda Police Force to deny and disperse any assemblies. It controls rather than regulates assemblies when it subjects free expression to the whims of the Inspector General of Police to determine whether people as individuals or collectively as associations can freely exercise the freedom of expression. It goes beyond to control the content of the meeting or gathering- discussions on politics or examining the performance of the elected government, not least its failures.

The law contravenes Articles 20 (1) (2) and 29 (1) (d) of the Constitution of the Republic of Uganda for its provisions reverse a Constitutional Court ruling which repealed sections 32 (2) of the Police Act that granted the police powers to prohibit public assemblies and processions in the case of *Muwanga Kivumbi vs Attorney General*.²⁴

The Regulation of Interception of Communication Act 2010

The Regulation of Interception of Communications Act 2010 was enacted on the wheels of the fight against terrorism. It aims at tracking, intercepting and monitoring communications (telecommunications and any other related mode of communication) of suspected criminals in pursuit of their illegal activities.

The Act provides for an 'interception warrant' to be issued by a judge when he or she receives an oral application from government if that agency has 'reasonable grounds' to believe that: a) felony has been or will probably be committed; b) the gathering of information concerning an actual threat to national security or any national economic interest is necessary; c) the gathering of information concerning a potential threat to public safety, national security, or any national interest is necessary; or d) there is a threat to the national interest involving the state's international relations or obligations.

²⁴ Constitutional Petition No. 9 of 2005

The Act puts the work of journalists in harm's way in as far as it subjects their communications to interception, a mechanism that can potentially reveal the sources of the journalists hence endangering their safety. It adds to the enormous number of laws that are prohibitive of freedom of expression in Uganda and is parametrical with the Computer Misuse Act of 2011. It grants overreaching powers to the Minister of Security and the line ministers charged with providing oversight for enforcement and effecting penalties for any breaches as opposed to courts of law.

Uganda Communications Act 2013

This law came into force on the 18th of January 2013 to consolidate and harmonise the Uganda

Communications Act Cap 106 and the Electronic Media Act Cap 104; to dissolve the Uganda Communications Commission and the Broadcasting Council and reconstitute them as one body known as the Uganda Communications Commission; and to provide for related matters.

The law under section 3, through the Uganda Communications Commission is primarily concerned with developing a modern communications sector, which includes telecommunications, broadcasting, radio communications, postal communications, data communication and infrastructure by; establishing one regulatory body for communications in accordance with international best practice among other roles.

It is clear in the objectives of this law that the draftsmen envisaged to promote freedom of expression and access to information, however, numerous provisions of the law lack the guarantees to freedom of expression, barring pluralism and diversity of the media.

Sections 7, 9 (3), 11 (2), (3) & (4), 13, 14 (5), 16 (4)(d), 46 (2), 60 (5), 61(b), 63(2) & (4), 67(1)(f) &(2), 72(1) & (2) (c), of the Act enormously empower the Minister of Information and Communication Technology (ICT) to interfere with the operations of the Commission, contrary to Section 8 of the same law which provides that the

Commission shall exercise its functions independently of any person or body. Section 7 provides that the Minister may in writing give policy guidelines to the Authority regarding the performance of its functions. Clause 2 of the section further provides that the Authority shall comply with the policy guidelines given by the Minister under the clause.

Section 9(3) vests appointing powers of all the members of the Board of the Uganda Communications Commission in the hands of the Minister with approval of Cabinet. The composition of the Board however is arguable in as far as it does not constitute some relevant sections of the public whose views may not be adequately represented like Media owners or media practitioners who are largely governed by the law.

It is also critical that members to the board are appointed in an independent manner and protected by law against unwarranted dismissal. Similarly, section 11 (2) provides that the Minister shall determine that a member vacates office, clause (3) provides that a member of the Board may resign from office in writing to the Minister, while clause (4) mandates the Minister to appoint another person to replace a member who vacates the board within three months to hold office for the remainder of the term of the previous member. Further, 16 (4) (d) provides that the Executive Director may be removed from office by the Minister on the recommendation of the Board and on vague grounds of misbehavior.

Section 13 provides that the members of the Board may be paid remuneration or allowances approved by the Minister in consultation with the Ministers responsible for public service and finance. Section 14(5) gives the Minister powers to approve and determine allowances payable to members of board Committees appointed under the section.

Section 46 empowers the Uganda Communications Commission to institute inquiries; however, these powers are again usurped by the Minister who within the same clause can direct the authority to carry out inquiries.

The Minister's interference is further witnessed in section 60 (5) which obliges him to identify and appoint technical advisers to the tribunal. Section 61 (b) provides for the sources of funds of the tribunal to consist of grants, gifts, donations from Government or other sources acceptable to the Minister and the Ministers responsible for Finance. Under section 63(2) & (4), a vacancy of office of a member of the Tribunal or technical advisor shall be determined by the President on the recommendation of the Minister.

The funds of the Commission shall consist of loans, grants or donations from Government and other sources made with the approval of the Minister, the Minister responsible for finance and Parliament under 67(1)(f) &(2) of the Act. In addition, the Commission is mandated to declare any surplus funds it may have at the end of the financial year and also to invest it in a manner determined by the Board with the approval of the Minister. This interference cannot protect the Commission from coercive budgetary pressures.

UNESCO's consultants on broadcasting and communication regulations, Toby Mendel and Eve Salomon, reason that:

"It is important to look at how the regulator is funded as an indicator of both independence and its ability to do its job. In countries with an underdeveloped commercial broadcasting sector (or one which is struggling to make money), it is normal for the regulator to be funded mostly or entirely out of the State budget. This can be a recipe for political interference, as government can 'punish' the regulator by not allocating sufficient funds to enable it to do its work. Conversely, a regulator which is funded entirely by industry fees and levies can be suspected of being subject to 'regulatory capture'. Neither solution would therefore seem to be ideal, although in practice, steps can be taken to reduce the risk of interference and influence from both State and industry sources of funding. In any case, what is important is to build in appropriate and effective methods of accountability for the regulator.

What is particularly important is to provide for the regulator to set its own budget, regardless of the source of funds. Ideally, the budget should be based on a sensible business plan which has been the subject of consultation. It is normal practice for the regulator's budget to be subject to parliamentary approval, and it has been

known for governments to seek to exercise indirect control over a regulator by not approving a budget. It is here again that the existence of a mature civil society can act effectively against political attempts to interfere with the regulator.”

It is also imperative that the Commission lays out a transparent, equitable, fair and impartial broadcasting and communications licensing procedure to enable easy access to information, growth and development of the ICT industry. The Commission ought to exercise its licensing powers within the set international standards. Regulations governing license allocation procedures should be precise, clear, fair, and applied openly, transparently and impartially. The licensing process must be protected from political and commercial interference or control by any vested interest. (African Charter on Broadcasting)

The African Charter on Broadcasting emphasizes best practices, standards and the independence of broadcasting or communications regulator. UNESCO's Media Development Indicators of 2008 set parameters on which to measure whether the regulatory authority is independent or not:

- Explicit legal guarantees of autonomy and independence from partisan or commercial interference
- Legal guarantees of the independence of the regulatory body
- Powers and responsibilities of the regulator clearly set out in law
- Members of the regulatory body chosen through a transparent and democratic process designed to minimize the risk of partisan or commercial interference (for instance, setting up rules on incompatibility and eligibility)
- Adequate and consistent funding for the regulator is guaranteed by law to safeguard its independence and/or protect it from coercive budgetary pressures

The Act falls short of these indicators and it is evident that the Uganda Communications Commission lacks independence and is under the control and restrictive exercise of authority by the line Minister. The Commission should be accountable to the public and not to the Minister because it is executing its duties for the people at large and not to an individual. The fact that the board of directors and a substantive Executive Director has never been appointed by the Minister,

it has provided fertile ground for the Commission to act in excess of its powers to gag the media as seen communication to Media houses to cease operation during the media siege in May 2013 among others.

The Anti-Homosexuality Act 2014

The law criminalizes what it terms promotion, aiding and abetting homosexuality. It seeks to punish anyone indulging in “participation in production, procuring, marketing, broadcasting, disseminating, publishing pornographic materials for purposes of promoting homosexuality; the funding or sponsoring of homosexuality or other related activities; the offering of premises and other related fixed or movable assets for purposes of homosexuality or promoting homosexuality; the use of electronic devices which include internet, films, mobile phones for purposes of homosexuality or promoting homosexuality”.

Persons found guilty of the ‘offence of promotion of homosexuality’ are “liable on conviction to a fine of five thousand currency points or imprisonment of a minimum of five years and a maximum of seven years or both fine and imprisonment”. In case the offender is a corporate body or a business or an association or a non-governmental organization, on conviction its certificate of registration shall be cancelled and the director or proprietor or promoter shall be liable on conviction to imprisonment for seven years.

This provision prohibiting the ‘promotion of homosexuality’ would most certainly criminalize the activities of the media fraternity that may engage in innocent publication and broadcast of issues concerning homosexuality for public debate. The provisions do not only threaten the work of individual journalists but can also lead to the closure of a media house if found culpable for the offence.

The same provision criminalizes and counters the freedom to associate and assemble as provided for by the Constitution to any individuals that may seek to do so. Any organization or association whatsoever with any ‘inklings’ of homosexuality related advocacy can be dubbed to be a promoter within the wide ambiguous definition

The Anti-Pornography Act 2014

The Act creates the offence of pornography; to provide for the prohibition of pornography; to establish the Pornography Control Committee and prescribe its functions; and other related matters.

Under Section 2, pornography is defined as any representation through publication, exhibition, cinematography, indecent show, information technology or by whatever means of a person engaged in real or stimulated sexual activities or any representation of the sexual parts of a person for primarily sexual excitement. Under Section 13, pornography is prohibited. The section provides that a person shall not produce, participate in the production or traffic in, publish, broadcast, procure, import, export, sell, and abet any form of pornography. Under Section 7, the Pornography Control Committee is mandated to develop and install software on electronic equipment such as computers, mobile phones and televisions for detection and suppression of pornography.

The Act encroaches on the freedom of expression in relation to cultural practices some of which are protected by the 1995 Constitution under Article 37 which provides to the effect that every person has a right as applicable to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others. The Constitution recognizes such customs, cultures and traditions for as long as they are not repulsive to natural justice or inconsistent with any of the provisions of the Constitution.

It is evident that a number of traditional or cultural practices in Uganda may portray state of undress or show body parts which are considered pornographic under the Act. Arguably, the enforcement of the Anti pornography Act will restrict regional cultural expression. Additionally, it uses ambiguous terms, in relation to the definition and constitution of pornography, publication and media rights, a loophole that can be abused easily to achieve ends counter to constitutionalism.

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