## Topic: CRIMINALISATION OF THE RIGHT TO FREEDOM OF SPEECH AND EXPRESSION.

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### a). Abstract.

The right to freedom of expression is a fundamental human right in Uganda's Bill of rights. However, the Constitution of the Republic of Uganda does not define what constitutes the right to freedom of expression but only sheds on how the same is enshrined and should as a matter of state practice be recognised and protected by the constitution amidst the scholarly argument that some rights are not absolute and can always be taken away as a matter of limitation under Article 43 of the constitution.

Across the globe, there is a wealth of litigation and plethora of authorities in which this right has been subjected to adjudication all of which have clarified that the right is key in a free and democratic society and as such, states are obliged as matter of human rights compliance to keep the same intact.

In Uganda's jurisprudence, one of the classical cases is the authority of *Charles Onyango Obbo & Andrew Mujuni Mwenda versus Attorney General Constitutional Appeal No. 2 of 2002* where the Supreme Court has asserted that the actions of the state could not take away this fundamental right not even under Article 43. The Supreme Court invited the respodent to construe the constitution as a whole to permit the exercise of this right in a better, free and democratic society. It is a disgrace though that the recent technological developments have forced and persuaded the legislature to depart from both the constitutional provisions and the decision of the Supreme Court. The analysis hereunder captures what remains at stake in light of technology advancement, the right of freedom of speech and expression viz v democracy, related rights on privacy and access to information amidst the Computer misuse (Amendment) Bill, 2022 which is now law.

### b). Introduction.

The Computer Misuse (Amendment) Bill, No. 16 of 2022 (hereinafter referred to as the Bill), was tabled in parliament for first reading by Honourable Mohammed Nsereko, as a Private Members Bill pursuant to Article 94(4) (b) of the constitution in July 2022 to amend the Computer Misuse Act No. 2 of 2011 (hereinafter referred to as the principal Act). The objectives of the amendment proposes the criminalisation of the right to freedom of speech and equally proposes stringent penalties for the offences in the principal Act and those introduced by the Bill.

Subsequently and pursuant to Rule 129(1) of the Rules of Procedure of Parliament, the Bill was referred to the Committee on Information, Communication Technology and National Guidance for scrutiny, which gave its justifications as at 07th September 2022.

In this commentary of both the principal Act and the Bill, We set out as a matter of human rights jurisprudence that the

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intention of the legislator to curb down the abuse of cyberspace by Ugandans due to technological advancement; the Bill intends to criminalise fundamental rights.

c).**The Principal Act.**

The provisions of the principal Act have been summarised in two decisions to wit;

i). *Uganda versus Guster Nsubuga & 3 Others HCT 2012* where in the accused persons were arraigned before court on 4 counts of un authorised use under s. 15(1), interception of computer services under s.20, electronic fraud contrary to s. 19, un authorised access to data contrary to sections 12(2) and interception coupled with un authorised use in s.28 (3).

The High court convicted and sentenced A1 on the allegations advanced by prosecution however, the decision was appealed to the Court of Appeal as the Appellant court ordered their retrial after it was found that they had been tried without pleading to the amendment whereafter URA who were the principal complainants went to the Supreme court which reinstated the 20 years jail term.

ii). *Dr. Stella Nyanzi versus Uganda Criminal Appeal No. 0079 of 2019* wherein the appellant appealed the decision of the chief magistrate court at Buganda road wherein she was charged of cyber harassment contrary to section 24(1)(2)(a) of the principal Act that the communication which was made by the Appellant was obscene and indecent. The court ordered that the trial by the magistrate court was a nullity and the conviction was quashed.

d). **Significance of the two decisions.**

Whereas electronic fraud is the advent of computer use, it has been in existence in Most Developed Countries and now Least Developed Countries that have embraced information technology use in their infrastructure and institutions. However, the same does not take away the position that the allegations on fraud place the highest burden on he who alleges thus crucial for the justice system when such allegations in light of the principal Act arise. Thus, the state at all material times will bear the highest burden than that of a stranger before courts of law.

The importance of freedom of speech and expression is based on ones right to express his or her opinion by word of mouth, writing, printing and pictures or in any other manner. It includes the freedom communication and the right to propagate or publish opinion. This communication may be made through any medium, newspaper, or cinema.

From the foregoing, it mirrors democracy in the face of a country that recognises the rule of law since democracy is the government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential.

e). **The insight on the Computer Misuse (Amendment) Bill, 2022 in light of the Constitution.**

Reflective of an appreciation of emerging offences considering the progression of technology in present day, it is imperative for one to be cautious of how the same are

likely to hinder the freedom of expression and a likely contravention of the constitutional provisions on the same. The constitution under Article 29(1) of the constitution guarantees free speech and expression and equally secures press freedom the essence truth of which is to access democracy.

Further, the same right cannot stand alone without enhancing the right to privacy and access to information all of which emerge as a result of freedom of speech since one cannot guard against speech without thought. It is though crucial to note that speech may be verbal, print or electronic form through various technology devices to enhance its output. The danger in this is that an individual cannot foresee how his or her speech is likely to impact the public.

I beg to borrow the jurisprudence in the case decided by the *European Court of Human Rights in Akcam versus Turkey decided on January 25th, 2012* where the central issue before the court was to determine whether Akcam could be considered a victim of a rights violation. The court noted that the vague and broad wording of the charges suppressing freedom of expression meant that there was a continuous risk for people expressing their opinion on contentious issues were not able to reasonably foresee the application of the offence.

The significance of this decision is that the amendments of the Computer Misuse Act do not allow the foreseeability of its effects. It therefore, has both positive and negative impacts but largely, its adverse effects on the rights to freedom of speech and expression are at wide scale.

f). **The Provisions.**

Provisions are overly ambitious. The idea that for every message, meme and other piece of information the sharer is required to seek authorization of the involved parties should be considered in light of the speed at which this content is often shared via platforms like WhatsApp, facebook and twitter since the author of the same information at the moment overly dis engages him or herself from the communication channel and the general public is full of numerous events the sharing of which becomes a vicious cycle of content to the person sharing until the harm or damage it causes to the general public is identified.

Further the Amendment in its preamble presupposes that the essence of the amendment is to enhance the provisions of on unauthorized access to information or data, prohibition of sharing information relating to children without consent of their parents, prohibition of sharing information that promotes hate speech, and prohibiting public servants from holding public service in circumstances where they commit an offence prohibited by the Act. ***If this is not criminalization of the right to freedom of speech and expression, what is it?***

Firstly, on freedom of expression the provisions in the Constitution touching on fundamental rights ought to be construed broadly and liberally in favour of those on whom the right is conferred by the Constitution as simply put, some rights are non derogable but this does not override the fundamental aspect of other rights guaranteed.

Even if one is to argue the permissible exception under Article 43 of the constitution, the same must be read as a whole whose qualifier therein is that *pubic interest under the said provision shall not permit any limitation of the enjoyment of the rights and freedoms prescribed by chapter 4 beyond what is acceptable in a free and democratic society, or what is provided under the constitution. The position, which was fortified by the supreme court in the Charles Onyango Obbo case.*

Therefore, the Amendment undermines freedom of expression, especially in terms of public figures who often times are the subject of the ridicule targeted by the Act. The limits to what is characterized as "likely to ridicule, demean" are undefined, together with the idea of "without authorization". It is interesting to assume that reasonably speaking, many individuals would consent to or authorize their own criticism if this be the case, the entertainment industry would be in amess because their economic rights is hugely dependent on speech and imitation.

Further, whereas the right to freedom of expression is not absolute, its restriction must, under the constitution satisfy the tests under Article 43 as elaborated in *Charles Onyango Obbo case, the SC* essentially said that false expressions alone cannot justify a restriction on freedom of expression because there is a greater danger of smothering alternative views' of fact or opinion. The exigencies is that the prosecution of freedom of expression places the victim in the hands of the oppressor who will ordinarily expand that which was not stated in person.

Crux to note is that freedom of expression is applicable to not only information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society".

These principles are of particular importance as far as the press is concerned. Whilst the press must not overstep the bounds set inter alia, for the protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political issues just as those in other areas of public interest.

From the forgoing, not only does the press have the task of imparting such information and ideas; the public also has a right to receive. This explains why the tort of defamation, right away from the common law jurisdiction could not be criminalized because courts of law still served purpose of adjudicating over such tortious actions as civil wrongs and so should it be the case where there is infringement on some ones reputation on the basis that reputation built is worth protecting. The amendment merits grounds of litigation!

Therefore, even the information, which is malicious or misleading under section 26A of the Amendment, would still be protected under the right to freedom of expression in light of the threshold in Article 43(2) (c) "beyond what is demonstrably justifiable in a free and democratic society" since the principa[1]

Act nor the amendment give scope of what constitutes misleading or malicious information.

The Amendment also intends to protect leaders, the common subjects of ridicule on social media because it is so broadly worded. It could, as a result, be used by officials to evade accountability to the public and defeat criticism on grounds that the information so shared prejudices their rights and freedoms. In a tort of defamation, the power of speaking the truth is justifiable and thus follows that where ordinary citizens to criticize public servants, there exercise speech is no offence in the face of the law if the same utterance is true.

The notion is rightly so that leaders should grow hard skins like that of a rhino to bear, because subjects have a right to criticize their leaders rightly or wrongly thus the way section 23A of the amendment is crafted, is an endless catchment area, to the extent that it infringes one's right enshrined in Article 29(1) (a).

The Amendment does not define what constitutes hate speech. It is quite challenging for an ordinary person to know the implication of his or her speech owing to the position that the law has failed to lay down what constitutes the same. It thus states that a person shall not write, send or share any information through a computer, which is likely to ridicule, degrade or demean another person, or group of persons, create divisions among persons and create hostility against a person or group of persons all of which do not pass the test of a right of expression in a free and democratic society.

g). **What legislators ought to have put into account?**

Legislators would have put into account the proportionate test towards a democratic society; in the circumstances, the bar on hate speech is not proportionate because the law does not spell out the threshold and secondly, the creation of the same as an offence freezes the right to freedom of speech and expression.

The attachment of severe penalty of seven years is a clear manifestation of the criminalization of the right of freedom of expression/speech. Suffice to note that such legislation conflicts with international legislation, which Uganda is party to since Article 45 of the constitution presupposes reliance on international declarations and conventions.

Recourse made to the decision of the *African Court of Human and People's Rights in Lohe Issa Konate versus The Republic of Burkina Faso decided in December 5, 2014* where the applicant who had faced harsh criminal penalties levied by Burkina Faso following charges of defamation of publishing several newspaper articles that alleged corruption by a state prosecutor. The court found that the conviction was a disproportionate interference with the applicants guaranteed rights to freedom of expression.

The significance of the decision is that it establishes a binding or persuasive precedent within its jurisdiction. Uganda is a state party to the African Charter on Human and people's Rights and as such should pick a leaf because only in rare cases will defamation, which call for

crime/sanctions be, upheld as proper restriction of freedom of expression.

Thus, Uganda being a state party to the charter, should essentially disallow using criminal charges for hate speech/defamation without violating freedom of expression rules guaranteed under the charter and more so, Article 9(2) which guarantees this right.

In fact, as far as, the African Charter goes on restriction of the right to freedom of expression, even a civil war cannot be used as an excuse by the state for violating or permitting violations of the rights in the African Charter as was fortified in *Commission Nationale v Chad 2000 at para 21.*

In light of the right of access to Information, the amendment Act is discriminatory in nature since a law, which is discriminate in effect, is a discriminative one and in essence, there is no humane way to rule people against their will and un just law is no law at all.

h). **Nature of the Penalties**

The acts stated as offences in the latest Amendment are some of the most rampant in today's time, even where the offenders are not aware of their criminality. Yet, the fines imposed are high implying that majority of offenders will instead face imprisonment, the enactment is not legitimate in light of the principle of proportionality.

A sample of sections 12(7) and 24A, 26A (2) of the amendment states imprisonment as a punishment however, the same serves a number of purposes, the two most important of which are arguably reformation of the offender and protection of the public from this offender. Sharing mimicry and unsolicited information are hardly offences from which the public needs protection and the offenders need reformation.

The applicability of the provisions is unclear since most of the provisions lack allowance for contextual application, which goes back to how broad they are in application and effect. For instance on children under s. 22A the un authorized sharing of information about children does not spell out what kind of content it is, section 24A on unsolicited information equally does not stance the scope of such un solicited information since the same may be perpetrated by statutory corporations other than mere individuals.

i).**Access to democracy, a human right.**

Democracy is a universal benchmark and lifeline of human rights and freedoms since the exercise of the same is intended to achieve the effective realisation of human rights that is not limited to the rights to freedom of speech and expression.

The only scorecard of the amendment is on the right to privacy since the said right is a universal human right that international law protects to a high standard with some nations offering even stronger protection under their domestic legislation. Thus Article 17 of the International Covenant on Civil and Political Rights is to the effect *that no one should be subjected to arbitrary or un lawful interference with his or her privacy , family, home or correspondence nor to un lawful attacks on his or her privacy, family, home or correspondence nor to reputation*. This is the position in Article 27 of

Uganda's Constitution, which has been kept intact and can only be waived under permissible exceptions therein.

It follows therefore, Uganda a state party to several international legislations and protocols is under instruct to recognize and keep the instincts of democracy at play. Further, Uganda is subject to the periodic review mechanism on compliance to human rights standards in place by the UNCHR and ACHR.

The fundamental/core principle of human rights law is that all human beings irrespective of country, culture and context are born free and equal in dignity and rights and the linchpin being democracy as a policy it is not limited to measures to strengthen and protect the individuals opportunities for influence and measures to promote and guarantee respect for all rights.

The expression "all rights" does not negative the adherence to the rights to freedom of speech and expression in fact, it is the bedrock of a free and democratic society and thus the bar created by the principle and amendment Act is not tenable. A limitation on the enjoyment of a constitutional right, on the ground of public interest or political interest is valid only if it is acceptable and demonstrably justifiable in a free and democratic society.

Citizens as of right are entitled to participate in a democratic society. Therefore, Article 20(1) and (2) are a spur to this participation since therein, fundamental rights and freedoms of the individual are inherent and not granted by the state and further the rights and freedoms of the individual and groups enshrined in the constitution shall be respected upheld and promoted by all organs and agencies of government and by all persons.

In the premises, the amendment is likely to spur a constitutional litigation and where there is no appropriate remedy granted, the aggrieved vide; - the Exhaustion of Local Remedies Rule will if they think fit approach the EACJ or the ACHPR. This is due to the fact that "*...a person whose rights have been violated should make use of domestic remedies to right among a wrong, rather than first address the issue to an international committee, court or tribunal*"

Pursuant to Articles 55 and 56 of the ACHPR, a state party, individuals, NGO's have locus standi before the Africa Court and may decide to file their communique in light of the amendment of the principal Act where of local remedies have been exhausted to no success as it was in the *Communication No. 275/2003 Article 19 versus State of Eritrea.*

However, it is key to note that under the United Nations Commission on Human Rights there is a special rapporteur reporting mechanism. An individual or NGO may decide to take the state to the Human Rights Council or before the Special Rapporteur even when they have not exhausted the local remedies rule; since the special rapporteur operates on information basis. Of course, what will be in issue upon the recommendations made is whether they carry a binding force or not.

j). **Recommendations.**

As a developing country where human rights, gender equality and social justice is desirable, the state needs to examine the

challenges, opportunities and threats to media in the digital age. This we should learn from what developed countries and economic blocks have done to safe guard against the violation.

The state is the mandate holder of all rights and thus has an obligation as a matter of state practice to meet international standards in the human rights arena. The intention of the legislator should not rhyme with political or personal interests but to embrace the digital world without any stringent legislation curtailing freedom of speech.

Uganda being a state party to international conventions and the spirit of its constitution in Article 45, the amendment will be subjected to state reporting mechanism due to the anticipation of grave violations of human rights. Secondly, Uganda being party to the United Nations Commission on Huma Rights created by UNGA Resolution 60/251 it will risk its position if democracy and the rule of law are to prevail. It is high time we complied.

Uganda is subject to the principle of progressive realisation of human rights which has been domesticated under section 13 of the Human Rights (Enforcement) Act, 2019 implying that the position of the amendment which is a against the right to freedom of speech and expression departs from this principle which is not good practice under international Human Rights law. We need not to keep human rights legislation in abeyance.

States, Uganda inclusive have obligations under international law which are to preserve, protect and provide human rights like the one in issue but not to sabotage the same through legislation. It therefore follows that even if the justification of the legislator is that freedom of speech and expression is not a non-stop right, it is a fundamental right under Article 20(1) & (2) of the constitution, which requires the state to observe the said three fold obligations.

Civilised states like Uganda are required as a matter of *erga omnes obligation* to respect all human rights without isolation. This is because legislators are granted powers under Article 79 to make laws for proper governance of the country. The amendment defeats the intent and purpose of this position something that calls for checks and balances to serve the common good.

In opinion, I fortify that freedom of expression and speech is a fundamental human right and it reinforces all other rights allowing society to develop and progress. The ability of the citizenry to express its opinion and speak freely is essentially to bring change in society and thus the computer misuse amendment Act cannot serve to justify the estoppel.

k).**Conclusions.**

The environment of the internet is still developing due to emerging trends world over and it is the vehicle through which states have realised a take-off socially and economically in light of 1st, 2nd and 3rd generation rights in both domestic and international legislation.

It is not good practice for the state to make amendments of any principal legislation where the amendment contravenes constitutional provisions since this results into constitutional

litigation which is un necessary had the legislators practiced what is right.

As such, if liberty means anything at all, it means the right to tell people what they do not want to hear. If the legislators intention in the principal Act and the amendment is to take away freedom of speech and expression then dumb and silent we may be led, like sheep to the slaughter.