

# THE CYBER LAW AND FREEDOM OF EXPRESSION: THE TANZANIAN PERSPECTIVES

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## Abstract

*Freedom of Expression in Tanzania is a constitutional and human rights issue. Various International and regional instruments play a pivotal role in trying to balance the interests between the human rights, on one side, and the need to regulate the society, on the other. This balancing act can vividly be seen through various laws and international instruments, which have been enacted to regulate freedom of expression. Most of the traditional freedom of expression laws in Tanzania are penal in nature, thereby posing a valid question on not only the legitimacy of the laws regulating the freedom of expression but also the validity of making those laws penal.*

*The new Cyber Crime Law in Tanzania is an addition to the list of penal laws regulating freedom of expression. While the supporters of the laws positively dramatize the usefulness of the laws in combating cyber crime, online unethical conduct and violation of intellectual property on line, the critics are challenging the law for being draconian and infringing the freedom of expression.*

*This paper intends to critically assess the opposing views and opinions on: the usefulness or draconian of the new cyber crime law in Tanzania, its making process, criminal inevitability and most important whether the same promote or hinder freedom of expression.*

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## 1.0 Freedom of Expression

Freedom of expression is not only a cornerstone of democracy but also the basis of other rights and freedoms in general. In its very first session in 1946, before any human rights declarations or treaties had been adopted, the United Nations General Assembly (UNGA) adopted resolution stating:

*“Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.”*

The Universal Declaration of Human Rights, 1948 may assist us in giving the more accepted meaning of the freedom of expression. Article 19 of the Universal Declaration of Human Rights says;<sup>2</sup>

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

Not far from that, the constitution of United Republic of Tanzania, 1977 as amended<sup>3</sup> says the following on freedom of expression:

*“Every person*

- (a) has a freedom of opinion and expression of his ideas;*
- (b) has a right to seek, receive and, or disseminate information regardless of national boundaries;*
- (c) has the freedom to communicate and a freedom with protection from interference from his communication; and*
- (d) has a right to be informed at all times of various important events of life and activities of the people and also of issues of importance to the society.”*

The above two provisions from the above two quoted instruments,<sup>4</sup> which are vital to the existence of the freedom of expression, provide that the freedom of expression is all about being free to; collect, receive and disseminate news, ideas, opinion and information beyond the frontiers. It is about freedom to have and not to be interfered in communications and be informed on the important events and news, both international and local, and freedom to be informed on the matter of importance to people and the community at large. Who has the right and final decision to decide which matter is of importance to the people or community? This is a puzzle, which needs to be undone.

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<sup>2</sup> UNGA, Resolution 59(1) of 1946

<sup>3</sup> 14<sup>th</sup> amendment of the Constitution, vide Act of Parliament No 1 of 2005

<sup>4</sup> Universal Declaration of Human Rights 1948 and The Constitution of United Republic of Tanzania, 1977, as amended by Act 1 of 2005.

The right to freedom of expression and opinions; the right to seek, receive and impart information and ideas; can only be restricted in certain circumstances. Some of the permitted limitations are related to protection of other rights and reputations of others or protection of national security, public order, public health or morals. Still such a limitation sounds vague and much wider if not properly used by the authority.

It is in record how the freedom of expression has been at the mercy of the authorities discharging statutory duty with wider discretionary powers<sup>5</sup> as explained by Ndumbaro.<sup>6</sup> Efforts, at international and national, are equally in records as to how much freedom of expression is protected. Johannesburg rules,<sup>7</sup> Camden principles,<sup>8</sup> Article19<sup>9</sup> etc. are good examples to highlight on the said move to protect and promote freedom of expression.

Professor Gerhard Erasmus<sup>10</sup> tries to lay down guidelines for regulating freedom of expression by suggesting that freedom of expression is regulated by; human rights, law and violence. On human rights, his argument is straight forward, that, freedom of expression itself is a human right but is not the only one. There are other rights, which need to be respected. In that respect, we may appreciate the usefulness of Article 30 (1) of the Constitution of United Republic of Tanzania, 1977.

On violence, he is establishing a principle that, when human rights and law end, then violence should be used a litmus test for protecting or not protecting freedom of expression. The argument here is: *“the closer the freedom of expression is to the violence, the lesser the protection it is going to enjoy”*. This, in a simple language, means if the freedom of expression is violence in itself or is very close to the violence, there will be little or no protection it is going to enjoy. On law, he simply underlines the usefulness of law in regulating everything, including freedom of expression.

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<sup>5</sup> Ndumbaro DD ‘*Decision making and the Law: The Use and Abuse of Discretionary Powers.*’ A Paper Presented at the Youth Leadership Training Programme, Dar es Salaam on 24 September 2011. (Unpublished)

<sup>6</sup> Discretionary powers are normally legal or statutory powers which are wide in nature and conferred upon an authority to use the same at will or as may deem fit. If you read between the lines in any statute, you may find the clause such as: “may”, “deem fit”, “in his opinion”.

<sup>7</sup> <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>. Accessed on 5 May 2010

<sup>8</sup> <http://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>. Accessed on 5 May 2010

<sup>9</sup> Ibid

<sup>10</sup> *The Bill of Rights Handbook*. 2nd Ed, Cape Town, Juta & Co. Ltd 1999 297-322

Equally, on the same footing, is the renowned legal and political commentator, Prof. Issa G. Shivji,<sup>11</sup> who seems to allow the laws to regulate freedom of expression with strong proviso that regulating does not mean eroding. Shivji laments that while trying to regulate the freedom of expression, the statutory instruments or the authorities, go a step further and erode it. Therefore, his problem is not absence of the law to regulate freedom of expression but rather the content of the laws, which regulate the freedom of expression.<sup>12</sup>

### 1.1 Constitutional Provisions

Tanzania has experienced four constitutions since 1961 but it was only in 1984, through amendment to the constitution when the freedom of expression was introduced, together with other rights under the bill of rights. The absence of constitution guarantee and protection occasioned a serious violation of human rights by denying the mechanism for enforcement upon breach. After 1984, to be precisely 1988, the enforcement mechanism of human rights is much more legally guaranteed than any other time in Tanzania. Takrima case<sup>13</sup> of 2006 is also a good reference on the cases on enforcement of bill of rights in Tanzania,<sup>14</sup> as in America's Pentagon Papers.<sup>15</sup>

The Constitution of United Republic of Tanzania, 1977, as amended, subjects the constitutional rights, including freedom of expression, to the laws of land and other human rights. Article 30 (1) and (2) of the Constitution of United Republic of Tanzania, 1977, insist on respect of other rights and freedom when one exercise his or her rights provided under the constitution or other instruments. The Limitation provided in the above said provision extends also to matters of public interests. The Constitution also, in sub article two of article thirty, insists on the sovereignty of the parliament in enacting laws, which may infringe freedom and rights, including freedom of expression, provided that those laws are intended to; safeguard rights of freedom and rights of others, public interests, public peace, defense, public safety, public morality, public health, development and other matter which is important for the public benefit.

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<sup>11</sup> Shivji GI (2006)

<sup>12</sup> Ibid

<sup>13</sup> <http://www.commonlii.org/tz/other/TZLRC/report/R11/11.pdf>. Accessed on 8 January 2011

<sup>14</sup> Ibid

<sup>15</sup> <http://www.u-s-history.com/pages/h1871.html>. Accessed on 18 November 2015

Article 30 of the Constitution of United Republic of Tanzania, 1977, lines up factors such as; others rights,<sup>16</sup> defense, public safety, public peace, public morality, public health, authority and independence or authority of the court, confidential information, national interests and enhancement of public benefits as some of the factors which may validly and justifiably makes the freedom of expression not absolute.

## 1.2 International and Regional Legal Instruments

International and regional legal instruments, alternatively called; agreement, convention, covenant, treaty, protocol etc., binds the contracting states to the negotiated terms. When negotiations are completed, the text of a treaty is established as authentic and definitive and is signed by the representatives of states. A state can agree to be bound to a treaty in various ways. The most common are ratification or accession. A new treaty is ratified by those states that have negotiated the instrument. A state that has not participated in the negotiations may, at a later stage, accede to the treaty. The treaty enters into force, or becomes valid, when a pre-determined number of states have ratified or acceded to the treaty.

As early as 1946, at its very first session, in the UN General Assembly adopted Resolution 59(I) which states; “Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.” This has been echoed by other courts and bodies.<sup>17</sup> The European Court of Human Rights has recognized the vital role of freedom of expression as an underpinning of democracy when the court remarked: “Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.”<sup>18</sup>

At international and regional level, there are several instruments, which support and cement the freedom of expression<sup>19</sup>. According to several international instruments

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<sup>16</sup> Which includes: Reputation, Freedom, Privacy and Dignity?

<sup>17</sup> For example, the UN Human Rights Committee said: “The right to freedom of expression is of paramount importance in any democratic society”.

<sup>18</sup> *Handyside v. United Kingdom*, 7 December 1976, Application 5493/72 para 49

<sup>19</sup> African Charter of Peoples and Human Rights (ACPHR), 1981; Camden Principles on Freedom of Expression and Equality, 2009; Convention of the Rights of the Child (CRC), 1989; Convention on the Elimination of All Forms of Discrimination Against Women August (CEDAW), 1979; Convention on the Rights of the Child (CRC), 1989; Declaration of Principles on Freedom of Expression in Africa, 2002; European Convention on Human Rights (ECHR), 1953; International Convention on Civil and Political Rights 1966; International Convention on Civil and Political Rights (ICCPR), 1966; International Convention on the Elimination of All Forms of Racial Discrimination (ICEFRD), 1965; International Covenant on Civil and Political

everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Effective information systems that allow free flow of information are always key to enhance democracy, accountability and respect for human rights.

International and national bodies and courts worldwide have insisted and demonstrated also that the right to freedom of expression is central to the international human rights regime and human dignity. That may be the case because all the greatest man-made calamities that have plagued the world for centuries, were caused by expressions, opinions and at time conscience.<sup>20</sup> It is an instrument to assist in the attainment, preservation or continuance of somebody's power, whether exercised by an individual, an institution or a state. It is the extension of physical power into the realm of the mind and the spirit....<sup>21</sup> Therefore the abuse or misuse of freedom of expression may plunge the country into a man-made calamity.

### 1.3 Constitutional Provisions and Freedom of Expression

Freedom of expression is also guaranteed by Article 18 of the Constitution of the United Republic of Tanzania of 1977. The Constitution provides that everyone has a right to give his or her opinion and receive any information of public interest and pertinent to the welfare of the nation. However, freedom of expression and the right to information in Tanzania are not fully enjoyed because of several reasons such as lack of specific legislation protecting these rights, draconian freedom of expression laws, related legislation and the misuse of power by state officials.

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Rights (ICCPR), 1966; Johannesburg Principles on National Security, Access to Information and Protection of the Source, 1996; Mozambique Constitution, 1990; Singapore Declaration on Human Rights, 1993; United Nations General Assembly Resolution No. 59 (1), 14<sup>th</sup> December 1946; United Nation Special Rapporteur on Freedom of Opinion and Freedom of Expression, 1959; United National General Assembly Resolution (UNGA), No. 217A(111) 1948; Universal Declaration of Human Rights (UDHR), 1948; The Declaration of the Right of the Man and Citizen, 1789; The African Charter on the Right of the Child 1990; American Convention on Human Rights, 1969; Declaration on the Human Rights of Individuals who are not Nationals of the Country in Which They Live 1985; The European Convention for Protection of Human Rights and Fundamental Freedoms, 1950; and Yaounde Declaration, 1981.

<sup>20</sup> The slave trade, slavery, the inquisition, the Holocaust, the Genocide in Cambodia and Rwanda are examples.

<sup>21</sup> Michael Scammell, 'Censorship and its History – A personal View', *Article19 World Report* 1988 5

Despite the legal framework above, access to information in Tanzania is still a critical problem. The right to information among other things is curtailed by existing bureaucratic systems, legal systems, poverty, high level of ignorance and existing governance system. The most affected part of the community is those in the rural set up<sup>22</sup>. The 2012 MISA-Tan report indicate that access to information is still a major challenge in Tanzania<sup>23</sup>.

#### 1.4 Internet Access

Tanzania has witnessed the growth in terms of quantity and quality of some indicators of freedom of expression such as media, associations, political parties, forums, demonstrations, strikes etc. Some of the indicators like media have grown up in number<sup>24</sup> but the law is still the same. There must be a force behind such a growth because the media laws have remained static but the changes in media industry are noticeable.

Freedom of the press in particular, has long been considered crucial to democracy, human rights and development because the news media provide a fundamental informational linkage between the government and the mass publics. For media consumers, freedom of the media is defined as freedom to consume information or entertainment from any source without government restrictions.

Internet Access was mainly an urban centered affair because of the lack of computers, electricity and network connectivity in the rural areas where majority of Tanzanian are located. The trend has changed now with the coming of the mobile telephone companies<sup>25</sup> providing both voice and data services which make internet access possible. With the increase of the use of the mobile transaction, the question of cyber crime is no longer a remote issue.

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<sup>22</sup> LHRC Annual Report 2013.

<sup>23</sup> (MISA-Tan surveyed 8 government institutions and measured the levels of openness and secrecy. Selected institutions and Ministries were the Ministry of Finance; The National Housing Corporation (NHC); the Tanzania Electric Supply Company Ltd (TANESCO); Tanzania Revenue Authority (TRA); Ministry of Works; Tanzania Commission for Aids (TACAIDS). Others were Surface and Marine Transport Regulatory Authority (SUMATRA) and the Ministry of Legal and Constitution Affairs).

<sup>24</sup> MCT (2012), MISATAN (2012), and National Information Services (MAELEZO 2012), 68 newspapers and 644 other publications 28 television stations and 59 radio station registered. See also Shivji G *Let the People Speak, Tanzania Down the Road to Neo Liberalism*. Dakar, CODESRIA 2006.

<sup>25</sup> TTCL, Vodacom, Celtel, Tigo, Sasatel, Halotel. 32 million people use mobile phone in Tanzania; <https://www.google.co.tz/#q=number+of+mobile+phone+subscribers+in+tanzania>, accessed on 15<sup>th</sup> February 2016.

Internet service providers are subject to the Electronic and Postal Communications Act<sup>26</sup>, and its regulations as well as the new Cyber Crime Act, 2015. The courts in Tanzania are yet to test the applicability of the defence such as mere conduit or common carrier which are basically essential for protection of cyber operator / service provider. With the exponential increase of online transactions through mobile phones, the role of the court and applicability of these possible defence will much more evident.

## 2.0 Criminalization of Freedom of Expression

The freedom of expression laws in Tanzania can basically be grouped into three facets; First, the Constitution<sup>27</sup> and other international Instruments on freedom of expression<sup>28</sup> and Acts of Parliament.<sup>29</sup> Second the laws specifically enacted to regulate the media profession such as, the Newspaper Act,<sup>30</sup> Tanzania Broadcasting Services Act,<sup>31</sup> Tanzania Communication Regulatory Act,<sup>32</sup> Electronic and Postal Communications Act<sup>33</sup>, etc. Third, laws made for other purposes but in one way or the other regulate the freedom of expression<sup>34</sup>. The list of other laws made for other purpose but in one way or the other regulates or control freedom of expression is long and may take more time to discuss them<sup>35</sup>.

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<sup>26</sup> Act No. 3 of 2010

<sup>27</sup> The United Republic of Tanzania, 1977 as amended.

<sup>28</sup> Universal Declaration of Human Rights, 1948

<sup>29</sup> International Broadcasting Standards.

<sup>30</sup> Cap 229 of the Laws of Tanzania RE 2002

<sup>31</sup> Cap 306 of the Laws of Tanzania RE 2002

<sup>32</sup> Act 8 of 2003

<sup>33</sup> Act No. 3 of 2010

<sup>34</sup> National Security Act, Prison Act; Prevention of Terrorism Act, etc  
<sup>35</sup> Newspapers Act of 1976; Tanzania Broadcasting Services Act, 6 of 1993 (Cap 306 RE 2002); Films and Stage Plays Act, 1976; The Tanzania Communications Regulatory Authority Act 12 of 2003; Tanzania Revenue Authority Act 11 of 1995; Penal Code, Cap 16; Records and Archives Management Act 3 of 2002; Regional Administration Act 19 of 1997; The Prisons Act 34 of 1967; and Public Leadership Code of Ethics Act 13 of 1995. Others include; Public Leadership Code of Ethics Act 13 of 1995; Tanzania News Agency (Repealing) Act 2000; Local Government (District Authorities) Act, 1982; The Police Force and Auxiliary Forces Act 1 of 1987; The Tanzania Library Services Act 6 of 1975; The Standards Act 3 of 1975; The Privatization Trust Act 7 of 1997; The Tanzania Communications Act 18 of 1993; and The Customs (Management and Tariff) Act 2 of 1952 (Cap 27 RE 2002); The Income Tax Act, 2004; The National Security Act 3 of 1970; The General Loan and Stock Act 21 of 1948 (Cap 255 RE 2002); The Statistics Act 1 of 2002 (Cap 351 R.E 2002); The Petroleum (Exploration and Procurement) Act 27 of 1980 (Cap 328 RE 2002); The Mining Act 5 of 1998 (Cap 123 R.E 2002); The Evidence Act 6 of 1967 (Cap 6 RE 2002); and The Fair Competition Act 4 of 1994 (Cap 285 RE 2002); Cyber Crime Act, 2015; Electronic and Postal Communications Act, No. 3 of 2010.



### 3.0 Cyber Freedom and the wrath of the Laws

There is no doubt that cyber crimes are a threat to the national security and other individual's rights enjoyments because cyber crime is unlawful acts wherein the computer is either a tool<sup>36</sup> or a target<sup>37</sup> or both.

The history of the cyber crime is dated as far back as 1820 though the most notable one was the first spam mail, which happened in 1976, and the first virus was installed in 1982<sup>38</sup>. The history of statutory regulation of cyber transactions has been an up and down phenomenon for many countries. In US, for example, the struggles between the First Amendment supporters, on one hand and Children on-line Protection, on the other hand cannot be ignored<sup>39</sup>. While we all appreciate the wideness and wildness, which the cyber freedom has brought to us, we are mindful also on the need to regulate the same in order to protect other rights and values in the society.

On April 1 2015, the Tanzanian parliament passed a cyber crime law that attempts to address child pornography, cyber bullying, online impersonation, electronic production of racist and xenophobic content, unsolicited messages (i.e. spam), illegal interception of communications, and publication of false information — all in one law. The Cyber Crime Act<sup>40</sup> guarantee freedom of expression through Internet but only within the scope and framework prescribed under the statute. There are restrictions on the accessibility to freedom of expression, which need to be gauged against the international standards.

Notable features of the cyber law in Tanzania is not only the non involvement to stakeholders during the enactment process but also the support which the law received in the parliament from both the ruling party and oppositions members of parliament. The support is based on the arguments that the law guarantee protection against: Child Pornography, Incitement to commit suicide, Racist Materials, invasion of the privacy, illegal access, illegal interception, data interference, system interference, misuse of

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<sup>36</sup> . using a computer to commit real world crime e.g., cyber terrorism, credit card fraud and pornography.

<sup>37</sup> . Using a computer to attack other computer e.g. hacking, virus/work attacks, etc

<sup>38</sup> . Rich Skrenta, the High School Student, developed *EIK Cloner*

<sup>39</sup> . Doug Isenberg, Giga law .....

<sup>40</sup> . Act No. 4 of 2015 of Tanzania. The law applies both in Tanzania mainland and Zanzibar, has 59 sections which among other things, create several computer related offences and amend other four laws, namely; The Electronic and Postal Communications Act; the Penal Code making destruction of any device which contains evidence a crime; The Anti-Money Laundering Act; and Extradition Act by inserting the words cybercrime in offences under the said statutes, making it an offence under the Anti-Money Laundering Act and an extraditable offence. It should be noted that, the Act confers jurisdiction to convict any Tanzanian citizen within or outside the country or a foreigner within or outside the country if this foreigner committed a crime against a person located in Tanzania.

devices, forgery, fraud, offences related to child pornography, identity theft and other most serious crimes on social networks of global concern.

The supporters further argue that, the recently introduced Cyber crime Act of 2015 by the parliament of Tanzania promises to provide security to all citizens from any sort of cyber-attack that may come their way as they are surfing on the Internet. For a developing country like Tanzania this is a big step in trying to make sure justice is served and that all those that are using the internet as a medium to take advantage of people's rights, privacy and that of the state are dealt with accordingly.

A report by the Tanzania Communication Regulatory Authority (TCRA) shows that Internet services in Tanzania commenced from the year 1995 and it has been exponentially growing<sup>41</sup>. This growth shows that Tanzanian lives currently depend on the wind of info- technology, in; healthcare, transport and most especially for communication. It has made life much easier than it was before, in every sense. There are now several websites that can help one get any product or service simply by the click of a button.

E-commerce in Tanzania is growing fast due to the increasing number of Internet users and service providers in the country. The country is at a stage where it is vital that its people feel secure when buying products or booking tickets through the Internet via websites like Kaymu or Travel start<sup>42</sup>.

The law is a sign that Tanzania as a developing country is heading in the right direction, like other European and western countries already has; this is a positive step that the country is taking in catching up with the rest of the world. With the new law, using the Internet will very much be more enjoyable and comfortable and additionally problems associated with Internet scams can be dealt with accordingly and all those who are responsible for misconduct, will be punished as required<sup>43</sup>.

The other side of the argument comes forcefully and vigorously criticizing the laws for overstepping the boundary and being draconian. The law, they argue covers much more than serving the legitimate purposes. The Parliament passed the law and the president

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<sup>41</sup> . There has been a steady growth of internet users from 3.5million people in 2008 to over about 11 million out of the 32 million Tanzanians with access to mobile phones by the end of 2015.

<sup>42</sup> . [www.kyumu.co.tz](http://www.kyumu.co.tz)

<sup>43</sup> . Mr. Richard Maguluko, one of the Tanzanians with online shopping experience, tells us his thoughts on cyber crime, "In the recent years we Tanzanians have been hesitant in using E-commerce sites because there are a lot of conmen out there trying to deceive the citizens and they get away with it many times."

assented it despite criticism from social media practitioners and human rights activists<sup>44</sup>. One of the critiques was the then Deputy Minister of Science and Technology, Honourable January Makamba, MP, who tweeted:

*"I am worried about the power given to our police. Ignorant & low income earners might suffer"*

The worry of the Honourable Deputy Minister is founded on the facts that the law gives police wide ranging ability to search the homes of suspected violators of the law, seize their electronic hardware, and demand their data from online service providers<sup>45</sup>. The worry on powers given to police was vivid during the 2015 Presidential General Election whereby police searched and seized computer, cell phones and other electronic gadgets of opposition party<sup>46</sup> and Human rights organization<sup>47</sup> that was monitoring the election.

EPOCA<sup>48</sup>, though did not catch the attention of the critiques when enacted, deals with Cyber-security, Interception, Encryption and Data Retention, which are key factors in cyber. When law enforcement agent requires the information<sup>49</sup>, the court of law or other judicial body that needed information must be submitted to the relevant authority, thereby compromising the privacy of the consumers of freedom of expression. The situation is compounded by lack of Data Protection legislation<sup>50</sup>.

The state can equally intercept communication of an individual by making an application to the public prosecutor for authorization to intercept or to listen to any communication transmitted or received by any communications. The public prosecutor must consider whether any communications is likely to contain any information, which is relevant for the purpose of any investigation into an offence before authorizing such access.

EPOCA has 44 sections establishing different offences, which criminalize freedom of expression and create a harsh environment for one to enjoy the much-needed freedom of

<sup>44</sup> . <http://www.cipesa.org/2015/04/tanzania-cyber-crime-bill-should-safeguard-citizens-rights-on-the-internet/>

<sup>45</sup> . Aidan Eyakuze and Ben Taylor, both of whom work for the independent East African initiative TWaweza.

<sup>46</sup> . Chama cha Demokrasia na Maendeleo (CHADEMA)

<sup>47</sup> . Legal and Human Rights Centre. (LHRC)

<sup>48</sup> . Electronic and Postal Communications Act, No. 3 of 2010.

<sup>49</sup> . Police, Security services, Regulatory authority, etc

<sup>50</sup> . Electronic and Postal Communication Act regulations on consumer protection state that a licensee may collect and maintain information on individual consumers where it is reasonably required for its and lawfully collected and processed. Processed for identified purposes. Accurate. Processed in accordance with the consumer's other rights. Protected against improper or accidental disclosure. Not transferred to any party except as permitted by any terms and conditions agreed with the consumer as permitted by any approval of the Tanzania Communications Regulatory Authority or as otherwise permitted or required by applicable laws and regulations.

expression<sup>51</sup>. The law has criminalized the transmission of obscene communications<sup>52</sup> but there is a lack of clarity on what is obscene under the law and other statutes. Having uncertain law such as this is like walking in the land mine during the night, with very high probability of casualties.

The other bad side of the law punishes the anyone who uses a cyber network without authorization as it is spelt in section 124 (30 of the Electronic and Postal Communications 2010 Act:

*“124.- (3) Any person who secures unauthorized access to a computer or intentionally causes or knowingly causes loss or damage to the public or any person, destroy or delete or alter any information in the computer resources or diminish its value or utility or affect it injuriously by any means, commits an offence and on conviction shall be liable to a fine not less than five hundred thousand Tanzanian shillings or to imprisonment for a term of not exceeding three months or to both”.*

The challenge is when an access is deemed to be authorized and when is deemed to be not authorize? Further who authorizes the access and in case of refusal of authorization what are the available legal remedy? The discretionary powers vested to the authority to allow of refuse access without assigning any reasons and failure of the law to provide remedial measures is a bottleneck to the enjoyment of freedom of expression.

The Electronic and Postal Communications Act<sup>53</sup>, further criminalize what it calls “false information” in the following manner:

*“s. 132. Any person who furnishes information or makes a statement knowing that such information or statement is false, incorrect or misleading or not believing it to be true, commits an offence and shall be liable on conviction to a fine of three million Tanzanian shillings or to imprisonment for a term of twelve months or to both”.*

Twelve months imprisonment or Three Million Shillings fine (US\$ 1500) or both is such a harsh statement for someone who is alleged to have published false information is an impediment to the freedom of expression. The challenges on what is false information is not answered under the law, thereby making it a fertile ground for abuse of freedom of expression.

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<sup>51</sup> Part VI, sections 116-160 of the Electronic and Postal Communications Act No. 3 of 2010.

<sup>52</sup> S. 118 of the Electronic and Postal Communications Act No. 3 of 2010

<sup>53</sup> . Section 132 of the Electronic and Postal Communications Act, No. 3 of 2010.

It is evident from the above arguments and counter arguments that the cyber law has got both supporters and opposers, each camp having strong arguments to move a mountain. Critical and impartial analysis of the law and its applicability in Tanzania will perhaps, give us the real and uncontaminated position of the law.

#### **4.0 Critical Assessment of Cyber Laws, Freedom of Expression and Intellectual Property in Tanzania.**

I join hands with those who support the Cyber Crime Act on three facets: Child Pornography; Incitement to commit suicide and Racist Materials because these are permissible restrictions under International and Regional Instruments on freedom of expression

I profound differ with them when the said laws seems to accommodate other non-permissible restrictions such as Data Espionage<sup>54</sup> because the said data, which have been restricted to be accessed under section 8 of the Cyber Crime Act, may be a piece of information which is critical for investigative journalism, research or other legitimate use. Restricting it, is restricting freedom of expression and it cannot pass the international standards on freedom of expression.

While the law is getting a credit for prohibiting child pornography, it is criticized for unnecessarily curtailing freedom of expression by prohibiting pornography<sup>55</sup>. It has to be taken into account that pornography is different from child pornography. The former is a free choice of an matured adult and is not prohibited under international standards on freedom of expression, thus section 14 of the Cyber Crime Act, has overstepped the line for trying not only to impose un acceptable restrictions but also by criminalizing freedom of expression.

The talk of the country was on section 20 of the Cyber Crime Act, 2015 which reads:

*20.-(1) A person shall not -*

- (a) Initiate the transmission of unsolicited messages;*
- (b) relay or retransmit unsolicited messages , or*
- (c) falsify header information in unsolicited messages.*

*2) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine of not less than three million shillings or three times the value*

<sup>54</sup> . S. 8 of the Cyber Crime Act, 2015

<sup>55</sup> . section 14 ibid

*of undue advantage received, whichever is greater or to imprisonment for a term of not less than one year or to both.*

*(3) For the purpose of this section, “unsolicited messages” means any electronic message, which is not solicited by the recipient.*

Certainly this is one of the most debated provisions of this law. Initially there was unfounded believe that even a recipient of the unsolicited message is guilty under section 20 above but a close look at it reveals otherwise. The recipient will only be liable if he or she relay or modify the content in a bid to falsify it<sup>56</sup>. There are two angles on which one may analyze the provision of the law above. One, at what point in time a message becomes unsolicited? What if the message is very much needed and critical to my survival but I did not solicit it, should the transmitter be punished for assisting and perhaps serving my life? Obviously, the law brings more questions and criticisms than answers and solutions.

Further, section 20 (2) of the Cyber Crime Act, 2015, leaves much to be desired in terms of punishment for unsolicited messages. The first option is either a fine of Tanzanian Shillings Three Million Only (equivalent of US\$ 1500) or three times the value of undue influence gained whichever is greater. A fine of United Dollars fifteen Hundred is a lot of money for a common Tanzania, even for middle-income earner. Three times the value of undue influence brings more uncertainty. The uncertainty is a fertile ground for abuse and misuse of the law. Critical issues to be taken into consideration is who decides on the three times the value of undue influence? In event the three times the value of undue influence? Is greater the US\$ 1500, then the greater one shall prevail. As if that is not enough, the said provision provides a further option of a minimum of one year behind the bar as alternative to the fine BUT sometimes both, one can pay a fine and still go to prison. A sentence can thus be even 20 years with a fine of six figures in United States Dollars. Obviously, such harsh, subjective and uncertain punishment is a fertile ground for abuse and misuse of law, which brings chilling effects in the society and suffocates freedom of expression.

Publication of false, deceptive, misleading, or inaccurate information, data or facts is one of the offences<sup>57</sup> which not only curtails the freedom of expression but also has been put into a practice than any other provision of the law. Section 16 of the Cyber Crime Act, 2015, is a replica of News Papers Act<sup>58</sup>, which was, in 1992, declared unconstitutional by the Nyalali Commission<sup>59</sup>. Most of the targeted information, data and facts, under this

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<sup>56</sup>. section 20 (1) (a) & (b) *ibid*

<sup>57</sup>. section 16 *ibid*

<sup>58</sup>. Act No. 3 of 1976

<sup>59</sup>. Chaired by former Chief Justice, Francis Nyalali, the commission recommended the repeal, among other laws, the News Papers Act.

provision of the law are from political elections<sup>60</sup>. All the cases arise from section 16 of the cyber law but we can discuss much about the cases because they are sub-judice. This is mousetrap for bloggers, what sup and online media.

Part iv of the law deals with search and seizure. A police officer in charge of the police station or any law enforcement officer may search and seize cell phones, Computer, ipads, notice or any device. These search and seizure powers given to police were criticized even by the Deputy Minister<sup>61</sup> for being not only wide but also a recipe for abuse. The criticisms were more realistic during the Presidential General Elections 2015 where opposition parties and Legal and Human Rights Centre offices were searched and computers, cell phones and other electronic gadgets were seized.

Protection of the source is one of the cardinal principles of media profession. A source is a fountain of freedom of expression, thus if we want to promote freedom of expression, the law should always guarantee the protection of the source. There is less debate on protection of the source in other professions such as doctor-patient; lawyer-client; banker-customer BUT when it comes to the media profession there is more unjustifiable reluctances. This is evident under section 36 of the Cyber Crime Act, 2015 where the laws compels anyone to disclose whatever information is needed by the law enforcement officers. May mean disclosure of the source for the media and intrusion of privacy.

Violation of intellectual property rights through a cyber has been discussed under the Cyber Crime Act<sup>62</sup> whereby a person is not allowed to use a cyber system to violate intellectual property protected under any written law. While is good to legally protect intellectual properties, the same should not violate freedom of expression.

Human rights activists filed a case at the High Court, protesting some sections of the Cybercrime Act, September 2015. The Tanzania Human Rights Defenders Coalition (THRDC), Legal and Human Rights Centre (LHRC) and other organizations filed a petition as a complainant, seeking the amendment of some sections, which are “threats to free and open expression online”. The challenged provisions are; Sections 31,33,34,35 and 37 which give powers to police to search users of online data in the absence of a court order, thus contradicting Article 16 of the constitution. Till now the matter is *sub-judice*.

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<sup>60</sup> . There are four pending cases at Resident Magistrate Court of Dar es salaam, at Kisutu: Republic vs. George Aloyce Kimaryo; Republic vs Yerickp Yohanessy Nyerere; Republic vs Leila Constatine Sinare and 3 others.

<sup>61</sup> . January Makamba, *supra*

<sup>62</sup> . Section 24 of the Cyber Crime Act, 2015

## **5.0 Conclusion and Recommendations**

The Cyber Crime Act, 2015, therefore, can be viewed and discussed in the following facets: Duplicates offences from other laws; Criminalize and drawback freedom of expression, especially online media; applies beyond the media; and violate international standards on freedom of expression. The law further provides a possibility of someone being charged and ultimately punished twice for the same offence under different and other laws the Newspapers Act of 1976. This creates a window shopping of justice.

The process towards the enactment of the law was exclusive instead of being inclusive. Involvement of stakeholders is critical in any meaningful law making process. In so doing, attention should be paid to the need to respect international standards on freedom of expression, allow freedom, which is cornerstone of democracy, to take its course. Internet is a human right, thus any attempt to regulate it should be in total compliance to the international regulations.

The Cyber Crime Act needs to respect the Constitution of United Republic of Tanzania, 1977, as amended and other International Instruments on freedom of expression such as: International Covenant on Civil and Political Rights; African Charter on Human and Peoples Rights; Commission on Human and Peoples Rights; African Court of Human and Peoples Rights, etc.

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