

THE HUMAN RIGHTS ADVOCATE

**The Computer Misuse Amendment
Act, 2022:**

Do Human rights matter?

Ninth Issue
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Human Rights

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THE HUMAN RIGHTS ADVOCATE

The Computer Misuse Amendment Act, 2022:

Do Human rights matter?

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Dr. Adrian Jjuuko
Editor

EDITOR'S NOTE

It is my pleasure to present to you the ninth issue of The Human Rights Advocate. This magazine is a publication of Human Rights Awareness and Promotion Forum (HRAPF) that focuses on how particular laws or bills affect the rights of Ugandans, especially marginalised persons. Each issue is dedicated to a specific law or bill that is analysed by various writers from different viewpoints.

HRAPF is an independent, not-for-profit, non-partisan and non-governmental organisation that aims to raise awareness and defend the rights of marginalised groups in Uganda. HRAPF strives to advocate for a legal regime that respects and promotes the rights of marginalised persons. This is done through legal research, legislative advocacy, legal and policy analysis, research and documentation and strategic litigation. HRAPF also provides access to justice to marginalised groups through legal aid services provision and legal empowerment.

This ninth issue of The Human Rights Advocate focuses on the Computer Misuse (Amendment) Act 2022. The Act amends the Computer Misuse Act which was enacted in 2011 to enhance safety and security in an increasingly digitised environment through prevention of unauthorised access to information or data, prohibition of unlawful sharing of any information relating to a child, prohibition of hate speech, prevention of sending or sharing of malicious or unsolicited information and regulating the use of social media.

This edition explores the implications of the Computer Misuse (Amendment) Act 2022 on human rights and the constitutionality of this legislation. The Computer Misuse Act 2011 previously gained traction when the state used its

provisions to bring charges against Dr. Stella Nyanzi who it alleged had used language with sexual imagery to criticise the government for its failure to live up to its promises to provide girls with sanitary pads on Facebook, an online social platform. In one particular post, Dr. Nyanzi reportedly referred to the President as a 'pair of buttocks.' This attracted a charge of cyber harassment under section 24 of the Act. Her other posts were met with the charge of offensive communication' under section 25 of the same Act.

“ In one particular post, Dr. Nyanzi reportedly referred to the President as a 'pair of buttocks.' This attracted a charge of cyber harassment under section 24 of the Act. Her other posts were met with the charge of offensive communication under section 25 of the same Act. ”

Earlier, section 25 of the Act was used to charge Mr. Robert Shaka who was thought to be the person posting under an alias Facebook account name: Tom Voltaire Okwalinga (TVO) which was used to critique the president and key government officials. The Section was also applied against Mr. Swaibu Nsamba who posted a photoshopped picture of President Museveni in a coffin to show how he would celebrate the President's death. Over the years this law has variously been used to suppress digital rights particularly for key populations and government critics.

On 14th October 2022, the Computer Misuse (Amendment) Act 2022 came into effect after President Yoweri Kaguta Museveni assented to the law. The Amendment, according to its long title sets out to enhance the provisions on unauthorised access to information or data; to prohibit unlawful sharing of any information relating to a child; to prohibit hate speech, the sending or sharing of malicious or unsolicited information and to regulate the use of social media.

The right to freedom of expression is guaranteed by various international and regional instruments, including the Universal Declaration of Human Rights (Article 19), the International Covenant on Civil and Political Rights or ICCPR (Article 19) as well as the African Charter on Human and Peoples' Rights (Article 9). Article 29(1) of the Constitution further protects the right to freedom of expression. Just like all human rights, the right to freedom of expression can be limited. However, international standards require that the limitation must be provided for by law, must be necessary for the protection of a legitimate and overriding interest, and that the restriction must be proportionate to protect the interest.

The Amendment in HRAPF's opinion is a disproportionate fetter to the right to freedom of expression as it greatly undermines the enjoyment of digital rights such as freedom of expression and access to information which are guaranteed by national, regional and international laws. HRAPF's concern with the law is the vagueness of some of its provisions.

Vague provisions are susceptible to wide interpretation by both authorities and those subject to the law and are an invitation to abuse as authorities may seek to apply them in situations that bear no relationship to the original purpose of the law or to the legitimate interest sought to be protected, in order to silence critics, and prosecute minorities. The amendment also grants the executive and administrative authorities excessively broad discretionary powers to limit expression.

It is upon this background that HRAPF has decided to elicit academic reflections and opinions and to publish them in this ninth issue of The Human Rights Advocate. The purpose of this issue is to draw the attention of the public to the continuing need to fight the effects of this law, and similar laws, in order to protect and promote the enjoyment of human rights in Uganda. The magazine features viewpoints from various stakeholders, including academia, human rights lawyers, and lawyers in private practice and civil society actors who promote human rights in general as well

as the rights of vulnerable and stigmatised groups in particular.

The editorial provides an introduction to this issue. It is followed by an overview of the Amendment Act, discusses the contents and context of the Act, which is in turn followed by a comparative law perspective on the Amendment Act, a commentary and critique of the law and various legal analyses of the different provisions based on freedom of expression and the right to privacy.

I hope you find this edition useful, and that the articles herein reinforce awareness of the need for deliberate advocacy against the provisions of the Computer Misuse (Amendment Act) 2022 which will curtail the enjoyment of human rights by all persons in Uganda.

OVERVIEW OF THE COMPUTER MISUSE (AMENDMENT) ACT, 2022

By Adrian Jjuuko and Maurice Kabazzi Lwanga



Dr. Adrian Jjuuko
Editor



Maurice Kabazzi Lwanga
Researcher,
Afya Na Haki

Introduction

The Computer Misuse (Amendment) Bill, 2022 which resulted into the Computer Misuse (Amendment) Act, 2022 was introduced as a private member's bill, by Kampala Central Member of Parliament Hon. Mohammad Nsereko on 19th July 2022.¹ The Bill was referred to the Parliamentary Committee on Information and Communications Technology for scrutiny and collection of views from the public.² The Bill's promoters argued that existing laws "do not specifically address regulation of information sharing on social media" or are "not adequate to deter the vice."³ Much emphasis was put on the issue of protecting children by prohibiting the sharing of any information related to them without parental consent.⁴ This was said to be based on the right to privacy which is protected under Article 27(2) of the Constitution of Uganda, 1995 (as amended) which prohibits, among others; interference with the privacy of correspondence or communications and Article 41 which prohibits the disclosure of information that might infringe on another person's right to privacy.⁵ The mischief it sought to cure was the 'abuse of online and social media platforms through the sharing of unsolicited, false, malicious, hateful and unwarranted information' which has adversely impacted the enjoyment of the right to privacy of individuals. The long title to the resultant Computer Misuse (Amendment) Act, 2022 describes it as 'An Act to amend the Computer Misuse Act, 2011 to enhance the provisions on unauthorised access to information or data; to prohibit unlawful sharing of any information relating to a child; to prohibit hate speech, the sending or sharing of malicious or unsolicited information to regulate the use of social media; and for related matters.' This article gives a non-judgmental overview of how the Act amended the Computer Misuse Act, 2011.

Provisions Of The Computer Misuse Act, 2022

Criminalising unauthorised video or audio recording and sharing

Section 1 of the Amendment Act amends Section 12 of the Computer Misuse Act, 2011 by expanding the reach of section 12(1) to criminalise voice and video recording and sharing information without authorisation⁶ in addition to the original offence of intentionally accessing or intercepting any program or data without authority or permission to do so. It also enhances the maximum penalty for the stated offences from a fine of five million shillings to that of fifteen million Uganda shillings but maintains the option of imprisonment not exceeding ten years, or both.⁷ The chances of this provision becoming ridiculous are very high, since it would be a criminal offence to for example record the commission of a crime, and share it online! It would also essentially make any sharing of any information online to a person who has not expressed consented to the sharing to be a criminal offence. It would also make journalism at its essential level, a criminal offence.

Criminalising unauthorised sharing of information about children

Section 2 of the Amendment Act amends section 23 of the Computer Misuse Act 2011 by inserting a new section - 23A. Section 23 criminalises child pornography while section 23A criminalises sending, sharing or transmitting any information about or that relates to a child through a computer. The only exception is when the person obtains the consent of the child's parent, guardian, or other person having authority to make decisions on behalf of the child; the person is authorised by law; or

¹ CIPESA 'Proposed Changes to Uganda's Computer Misuse Law a Blow to Civil Liberties' 2022 <https://cipesa.org/wp-content/uploads/2022/07/Analysis-of-Uganda-Computer-Misuse-Amendment-Bill-2022.pdf> (accessed 13/03/2023).

² As above.

³ As above.

⁴ This was one of the main objects of the Bill as per the Memorandum. See Computer Misuse (Amendment) Bill, 2011, Memorandum.

⁵ As above.

⁶ Computer Misuse (Amendment) Act, 2022, section 1(a).

⁷ Above, section 1(b).

the sending, sharing or transmitting of the information is in the best interest of the child. The Amendment Act includes all information about a child that is shared without appropriate consent of stated individuals or authorisation by law. Contravening the provision attracts a punishment of imprisonment not exceeding seven years, or a fine fifteen million shillings or both.⁸

Other crimes

Section 3 amends Section 26 of the Computer Misuse Act, 2011 which only criminalised cyber stalking and included other crimes by inserting Sections 26A, 26B, 26C and 26D to the Act. The criminalised acts are the following:

Hate speech

Section 26A prohibits the writing, sending or sharing any information through a computer, which is likely to—ridicule, degrade or demean another person, group of persons, a tribe, an ethnicity, a religion or gender; create divisions among persons, a tribe, an ethnicity, a religion or gender; or promote hostility against a person, group of persons, a tribe, an ethnicity, a religion or gender.⁹ The Act provides the penalty for this as a fine of fifteen million shillings or imprisonment not exceeding seven years, or both.¹⁰

Sharing of unsolicited information

Section 26B provides that ‘a person shall not send to or share with another person unsolicited information through a computer unless the sending or sharing of the unsolicited information is in the public interest.’ The Act defines “unsolicited information” to mean ‘information transmitted to a person using the internet without the person’s consent, but does not include unsolicited commercial communication.’¹¹ Contravention of this provision makes one liable, on conviction, to a fine not exceeding Uganda shillings fifteen million only or imprisonment not exceeding seven years, or both.¹²

Sharing of malicious information

Section 26C provides that a person shall not send, share or transmit malicious information about or that relates to another person through a computer.¹³ Contravention of this provision makes one liable, on conviction, to a fine not exceeding Uganda shillings fifteen million only or imprisonment not exceeding

seven years, or both.¹⁴

Using false or disguised identities to misuse social media

Section 26D provides that ‘[a] person who uses social media to publish, distribute or share information prohibited under the laws of Uganda under a disguised or false identity, commits an offence.’¹⁵ The Act introduces a presumption that information published, distributed or shared on a social media account registered using a telephone contact or registered using an email address is published, distributed or shared by the person or organisation in whose name the telephone contact is registered or in whose name the email address is registered.¹⁶ Social media is defined as ‘a set of technologies, sites, and practices which are used to share opinions, experiences and perspectives, and includes YouTube, WhatsApp, Facebook, Instagram, Twitter, WeChat, TikTok, Sina Weibo, QQ, Telegram, Snapchat, Kuaishou, Qzone, Reddit, Quora, Skype, Microsoft Team and LinkedIn.’¹⁷

A person who contravenes this section is liable, on conviction, to a fine not exceeding ten million Uganda Shillings or imprisonment not exceeding five years, or both.¹⁸

Repealing the territorial jurisdiction provision

Section 4 of the Amendment Act amends section 30 of the Computer Misuse Act by repealing section 30(3) of the Act which provided for territorial jurisdiction if the accused was in Uganda at the material time; or the computer, program or data was in Uganda at the material time. The effect of the amendment is that the Act shall have effect, in relation to any person, whatever his or her nationality or citizenship and whether he or she is within or outside Uganda. This act therefore gives the enforcing authority extraterritorial jurisdiction.

Conclusion

The Computer Misuse (Amendment) Act, 2022 purports to enhance the provisions of the Computer Misuse Act by protecting the right to privacy in an increasingly digital world. In an increasingly digitalised world it is important for any government to put in place measures to ensure that the rights of its citizens are protected. It has broad provisions that may make it susceptible to wide interpretation which may further restrict freedom of expression.

⁸Above, section 2.

⁹Computer Misuse Act, 2011 (as amended), section 26A(1).

¹⁰Above, section 26A(2).

¹¹Above, section 26B(3).

¹²Above, section 26B(2).

¹³Above, section 26C(1).

¹⁴Above, section 26C(2).

¹⁵Above, section 26D(1).

¹⁶Above, section 26D(3).

¹⁷Above, section 26D(5).

¹⁸Above, section 26D(3).

HAHA! ...RULE OF LAW?

YOU MUST BE JOKING! THE LAUGHABLE CASE OF THE COMPUTER MISUSE (AMENDMENT) ACT, 2022

Introduction

The only thing more ridiculous than the Computer Misuse (Amendment) Act of 2022 are the tweets of the President's son, General Kainerugaba Muhoozi. They are some of the most careless and criminally indictable tweets posted on Uganda's social media spaces in the previous year. In May 2022, General Muhoozi was summoned by the Constitutional Court to file a defence to a petition challenging his use of Twitter to express his bid to campaign for presidency contrary to Article 208(2) of the Constitution which forbids serving UPDF personnel from engaging in partisan and political activities.¹ In another tweet, the General caused upheaval in regional relations between Kenya and Uganda when he posted that "It wouldn't take us, my army and me, 2 weeks to capture Nairobi."² Here is a demonstrable case of computer misuse but no sanction could ever be waged against the President's son because in Uganda sadly, laws are a tool for inflicting authoritarian power over the 'power-less.'

The Computer Misuse (Amendment) Bill, 2022 was tabled by Kampala Central Member of Parliament Hon. Muhammad Nsereko in February 2022 and in a span of eight (8) months, it became law following the President's assent to it on 14th October, 2022. The lingering question is what the motivation was, for hastily enacting a law which aims to further curtail people's freedom of expression. It is worth noting that more progressive Bills have decayed on the floor of parliament such as the National Health Insurance Bill which the President has blatantly refused to assent to since 31st March, 2021.³

In the preamble of the Act, the purpose of the law, is stated as; 'to enhance the provisions on unauthorised access to information or data; to prohibit unlawful sharing of any information relating to a child; to prohibit hate speech, the sending or sharing of malicious or unsolicited information and to regulate the use of social media.' In this article, I seek to elucidate how the Computer Misuse (Amendment) Act is redundant and aims only to 'subvert justice, reinforce state control and restrict freedom of expression', a manifestation of what Prof. Oloka Onyango⁴ decried. I will achieve this by dismantling the four justifications outlined in the memorandum of the Amendment and render it a useless piece of legislation.



Arinda Daphine
Akina Mama wa Afrika as a
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“**The ambiguity enabled by this amendment is so massive that it essentially criminalises investigative journalism which exemplifies a scenario where the sharing of information accessed without authorisation can be justified.**”

Enhance the provisions on unauthorised access to information or data

Section 1 of the Amendment Act amends Section 12 of the Computer Misuse Act by criminalising any access or interception of any program or another person's data or information, audio or video recording of another person; or sharing any information about or that relates to another person. The ambiguity enabled by this amendment is so massive that it essentially criminalises investigative journalism which exemplifies a scenario where the sharing of information accessed without authorisation can be justified. Where the public interest in the disclosure of information is greater than the harm contemplated, even information protected by a confidentiality clause can be put into the public domain as was decided in the case of *Charles Mwanguhya Mpagi & Angelo Izama v. The Attorney General*.⁵ If this had been

¹Court summons Muhoozi over presidential bid, The East African, May 10 2022, available online <https://www.theeastafrican.co.ke/tea/news/east-africa/court-summons-muhoozi-3810168>.

²Uganda's Museveni Apologizes to Kenya for Son's Tweets, VOA, October 05, 2022 Article by Halima Athumani available online <https://www.voanews.com/a/uganda-museveni-apologizes-to-kenya-for-son-tweets/6777428.html>.

³Affordable medical care is offing as health Insurance Bill passes, Parliament of the Republic of Uganda, 01 April, 2021, available online

<https://www.parliament.go.ug/news/5054/affordable-medical-care-offing-health-insurance-bill-passes>.

⁴Political Question Doctrine in Uganda: An analysis of the technicalities on the realization of the freedoms of expression, association and Assembly in Uganda, J. Oloka-Onyango, 2017.

⁵Miscellaneous Case No. 751 of 2009.

a progressive and necessary law, a qualifying statement would have been added to the clause exempting cases where it is in the public interest to disclose information accessed without authorisation.

On grounds of ambiguity alone, the Computer Misuse (Amendment) Act should be null and void because, to borrow the words of England's Lord Oliver in *De Vesci vs O' Connell*⁶— it is a major “masterpiece of opacity” and it presents opportunity for arbitrary prosecutions which are inevitable whenever laws are made without regard to the principle that criminal laws must specifically describe what conduct they seek to prohibit and punish.⁷ Rather than enhance the provisions on unauthorised access to information, the section curtails further freedom of expression.

Criminalisation of unlawful sharing of any information relating to a child

It comes as no surprise that children are a scapegoat for manipulative actors who seek to enforce arbitrary law. Who would question a law that seeks to protect a child? This must have been at the back of the minds of government when the amendment was passed into law. The repetition of provisions that were in existence prior to the 2022 Amendment goes to show the redundancy of the Computer Misuse (Amendment) Act. The Children's Act, Cap 59 in section 4(1) (g) expressly states that every child has a right to safety and privacy. Cap 59 is a domestication of the Convention on the Rights of the Child which under Article 16 guarantees the protection of a child from arbitrary or unlawful interference with his or her privacy, family, home or correspondence, and unlawful attacks on his or her honour and reputation.

Furthermore, the Penal Code Act protects children against pornography and this includes: dealing in obscene publications and pornographic materials; trading, distribution, publicly exhibiting, making or possessing obscene writings, drawings, prints, paints, printed matter, pictures, posters, photographs, and cinematography films.

In addition, the Data protection and Privacy Act, 2019 under section 8 provides for the protection of children against collecting and processing of personal data. Uganda acknowledges these laws relating to children as meeting international standards.⁹

One then wonders why there is further need to amend the Computer Misuse Act using the justification of prohibiting the sharing of information relating to children, when the same is already prohibited by existing law? For this reason alone, it is apparent that the protection of children was a deceptive justification for a law whose real aim is far from its stated objectives.

Prohibition of hate speech, the sending or sharing of malicious or unsolicited information

Legislation on hate speech is often a tool for the government to suppress the opposition, media, writers, creatives, civil society actors, and the general public against engaging in legitimate speech and dissent.¹⁰ The provisions in section 26C of the amendment on malicious and unsolicited information stand as a panopticon¹¹ for Uganda's communicators to assume they are always under observation and anything they communicate can be used against them in a criminal indictment. Michel Foucault puts it succinctly because this panopticonic legislation places a Ugandan in a state of conscious visibility where “they are seen, but they do not see; they are an object of information, never a subject in communication.”¹² The Amendment cements a proclivity for self-censorship and fear which ultimately curtails the exercise of freedom of expression yet this is a key tenet for any democratic state.

Regulation of the use of social media

Citizens on social media are now at risk of imprisonment for the most obscure offences generated around electronic communication. Government has made systematic progress in restricting social media. From July 2018 to April 2021 a social media tax was imposed that required Ugandans to pay a daily levy in order to access Over the Top (OTT) social media platforms.¹³ In January 2021 the internet was shut down majorly to

6 [1908] AC 298, at p.310.

7 See generally: Sun T W, 'Equality by Other Means: The Substantive Foundations of the Vagueness Doctrine' 2011, Harvard Civil Rights-Civil Liberties Law Review, 46(1):149-194.

See also generally: Void for Vagueness, Legal Information Institute, available online. https://www.law.cornell.edu/wex/void_for_vagueness.

9 'Implementation of the Optional Protocol to the Convention on the Rights of the Child on sale of children, child prostitution and child pornography', Report of the Government of Uganda to the UN Committee on the Rights of the Child, Ministry of Gender, Labour and Social Development, September 2006.

10 The Inherent Danger of Hate Speech Legislation: A Case Study from Rwanda and Kenya on the Failure of a Preventative Measure, by Andrea Scheffler, 2015.

11 The basic setup of Jeremy Bentham's panopticon is this: there is a central tower occupied by a watchman and surrounded by cells.

The tower shines bright light so that the watchman is able to see everyone in the cells. The people in the cells, however, aren't able to see the watchman. (The Guardian).

12 Michel Foucault's concept of panopticon surveillance and control over entire populations. Michel Foucault, *Discipline and Punish: The birth of the prison* (New York: Pantheon Books, 1977).

13 Millions of Ugandans quit internet services as social media tax takes effect, The Guardian, Available online <https://www.theguardian.com/global-development/2019/feb/27/millions-of-ugandans-quit-internet-after-introduction-of-social-media-tax-free-speech>.



restrict social media use ahead of a presidential election.¹⁴ Facebook remains inaccessible even today except through the use of a VPN that can obscure the location of a Ugandan user.¹⁵ Stella Nyanzi, a vocal critic of Museveni's government who had to seek asylum and now lives in Germany under Political Asylum, was tortured and incarcerated in a Maximum Prison for close to a year for a post she made on Facebook.¹⁶ Many activists and communicators have suffered the brunt of unconstitutional enforcement of the Computer Misuse Act such as Motiv Kasagga.¹⁷

Conclusion

As analysed above, the Amendment is utterly baseless, unnecessary and we now know that it only seeks to subvert justice, reinforce state control and restrict freedom of expression'. The consequences of passing the Computer Misuse (Amendment) Act are dire to the right of freedom of expression and the right to access information. With such a law in force, how can whistle blowers and government critics speak out? How do we expose constitutional villains or hold public servants accountable? How do we shame and expose? How do we instigate conversation or an investigation? The future of freedom of expression and democracy in Uganda is frighteningly bleak. Indeed, rule of law is a joke. What we have here is anarchy by law, HA HA HA! In the words of Zziwa Zinabala, a poet and playwright; "No matter, how much we dream there will be a penalty meted to anyone dissenting in opinions in this country."



*"Indeed, rule of law is a joke.
What we have here is anarchy by law,
HA HA HA!..."*

**How do we expose constitutional villains or hold public servants accountable?
How do we shame and expose?
How do we instigate conversation or an investigation?**

¹⁴ Museveni: Why government shut down social media in Uganda, The East African, January 13, 2021.

¹⁵ Facebook to remain shut as gov't talks with tech giant stall, The Daily Monitor, August 12, 2022.

¹⁶ Stella Nyanzi: Uganda's radical activist, DW, August 03 2022 article by Annabelle Steffes-Halmer

¹⁷ My 3 days at Mbuya Chieftaincy of Military Intelligence (CMI) <https://twitter.com/MotivKasagga/status/1581650668074717186>.

PRIVACY OR FREEDOM OF EXPRESSION:

THE CONUNDRUM THAT THE COMPUTER MISUSE (AMENDMENT) ACT 2022 CREATES FOR THE LGBTQ COMMUNITY IN UGANDA



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Introduction

In September 2022, Parliament of Uganda passed the Computer (Misuse) Amendment Act 2022 into law. The Act was assented to by the president in October 2022. The Act makes amendments to the Computer Misuse Act of 2011, wherein it introduces tough penalties for cyber-crimes.¹ This article examines how the Computer Misuse (Amendment) Act 2022 affects the enjoyment of the right to privacy and freedom of expression among members of the LGBTQ community in Uganda, given the prevailing socio-legal environment pertaining to rights of sexual and gender minorities. The article also interrogates possible solutions to the human rights challenges posed by the Computer Misuse (Amendment) Act 2022 for members of the LGBTQ community.

Implications of the Computer Misuse (Amendment) Act on privacy and freedom of expression for members of the LGBTQ community in Uganda

The right to freedom of expression is provided for under Article 29(1) of the 1995 Constitution, and it includes freedom of press and other media. The right to privacy on the other hand, is provided for under Article 27 of the Constitution, and it includes the right to privacy of one's correspondence or communication. Given the criminalisation of same sex sexual conduct in Uganda,⁴ which fuels the wave of homophobia in the country,⁵ it suffices to say that the Computer Misuse (Amendment) Act 2022, does have serious implications on the enjoyment of the right to freedom of expression and privacy for LGBTQ persons in Uganda, which are examined below.

Background

Parliament enacted the Computer Misuse Act 2011, with a view to making provision for the safety and security of electronic transactions and information systems; preventing unlawful access, abuse or misuse of information systems, including computers, and making provision for securing the conduct of electronic transactions in a trustworthy electronic environment, as indicated in the long title to the Act. Whereas the overall objective of the Act was to promote online safety, it had broad provisions that gave unfettered discretion to law enforcement agencies, and as such, its effect was to instead curtail freedom of expression, especially of those who made clear, their dissenting sentiments, views and opinions.³

In February 2022, a motion was moved by the Member of Parliament for Kampala Central Mohammed Nsereko, to introduce a bill that would amend the Computer Misuse

Act 2011. The legislator indicated that the rationale for this move was the need for a strong law on cyber harassment, in the wake of gross abuse of technology, which has led to deprivation of the right to privacy. He further explained that this occurs through wilful generation, sending and sharing of negative, false, malicious, hateful and unwarranted pictures or videos and insults about people.

The Bill was enacted into law in October 2022, and indicates in its long title, that it is for 'an Act to amend the Computer Misuse Act, 2011 to enhance the provisions on unauthorised access to information or data; to prohibit unlawful sharing of any information relating to a child; to prohibit hate speech, the sending or sharing of malicious or unsolicited information, to regulate the use of social media; and for related matters.'

The Act introduces the offences of: voice or video recording another person, or sharing any information about another person without authorisation; hate speech, unsolicited information, malicious information and misuse of social media.

Implications of the amendment of section 12(1) of the principal act.

Section 12 (1) of the Principal Act was amended to clearly define the kind of information whose privacy is protected. This is by making it an offence for any person to access or intercept any program or another person's data, voice or video record another person, or share any information about another person without authorisation.

This amendment is a welcome development in as far as protection of the right to privacy for LGBTQ persons in Uganda is concerned. This is on account of the fact that it criminalises the publication of videos and pictures of LGBTQ persons, especially transgender women, on both mainstream and social media

platforms, wherein they are often outed to the public.⁶

On the other hand, it is important to note that the amendment of Section 12 (1) of the Computer Misuse Act, while beneficial to the expansion of the scope of privacy rights for LGBTQ persons in Uganda, does pose a grave threat to the right to freedom of expression for all persons, including LGBTQ persons and rights advocates; especially when it comes to documentation and publication of incidents of human rights violations by both state and non-state actors. This evokes the debate on the balance between the right to privacy, and the right to freedom of expression.

The Declaration of Principles on Freedom of Expression and Access to Information in Africa, adopted by the African Commission on Human and Peoples' Rights, highlights the fact that freedom of expression is a fundamental human

1 Parliament of Uganda, "New Cyber Law Spells Out Tough Penalties for Offenders" 9 September 2022 New cyber law spells out tough penalties for offenders | Parliament of Uganda (accessed 27 November 2022).

2 Susan Baluka, "The Computer Misuse Act and the Right to Freedom of Expression and Privacy," *The Human Rights Advocate*, Issue 4 November 2017.

3 Inter Press Service, "To Silence a Poet and a Nation: What Stella Nyanzi's Conviction Means for Uganda," 6 August 2019 To Silence a Poet, and a Nation: What Stella Nyanzi's Conviction Means for Uganda | Inter Press Service (ipsnews.net) (accessed 27 November 2022) Also see: Voice of Africa, "Ugandan Author who Criticised President's Son Denied Passport": 7

February 2022 Ugandan Author Who Criticized President's Son Denied Passport (voanews.com) (accessed 27 November 2022).

4 See Section 145 of the Penal Code Act Cap 120 of the Laws of Uganda.

5 See Human Dignity Trust, "Country Profile: Uganda," Uganda | Human Dignity Trust (accessed 19 December 2022).

6 See Human Rights Awareness and Promotion Forum - Uganda (HRAPF) 2020 and 2021 Uganda Reports of Human Rights Violations Based on Sexual Orientation and Gender Identity, <https://hrapf.org/mdocs-posts/2021-sogie-violations-report/>

right, as well as a cornerstone of democracy.⁷ The Declaration guides that states may only limit exercise of the right to freedom of expression and access to information if the limitation is prescribed by law, serves a legitimate aim, and is a necessary and proportionate means to achieve the stated aim in a democratic society. This three-part test has been reiterated by European Court of Human Rights in *Lingens Vs Austria*.⁸

The European Court of Human Rights has also expounded on how to strike a balance between the right to privacy, especially in relation to publication of personal information such as photographs; and media freedom, as an integral aspect of the right to freedom of expression. This was in the case of *Von Hannover Vs Germany*,⁹ wherein the Court stated that in balancing the right to a private life against freedom of expression, the contribution of the photos or articles to a debate of public interest holds relevance. The Court states that a fundamental distinction must be made between reporting facts, capable of contributing to a debate in a democratic society, for example, facts relating to politicians in the exercise of their functions; and reporting details of the private life of an individual who does not exercise official functions.

Whereas the definition of what amounts to 'public interest' is not without difficulty, there is some guidance provided by the Global Principles on Protection of Freedom of Expression and Privacy published by Article 19,¹⁰ wherein it is defined as that which encompasses matters in which the public has an interest or concern of being informed. This includes, but is not limited to, information about matters that affect the functioning of the state, public officials and public figures, politics, public health and safety, law enforcement and the administration of justice, the protection of human rights, consumer and social interests, the environment, economic issues, the exercise of power, art and culture, or matters that affect general interests or entail major consequences. A public figure is defined as an individual engaged in public life, including leaders of state, elected representatives, public officials, business leaders, people in the public eye who have a platform as a result, including celebrities, as well as individuals engaged in a public interest activity or performing a public function.

In giving further guidance on how to balance the right to freedom of expression and the right to privacy in cases involving the publication of personal information, the Global Principles published by Article 19 guide that regard should be given to all the circumstances of the case, including: the extent to which the publication at issue contributes to a debate of public interest; the degree of notoriety or vulnerability of the person affected; the subject covered by the publication and the extent of the private nature of the information at issue; the prior conduct of the person concerned; content, form, and consequences of the publication, including the sarcastic,

humorous or satirical tone used by the author of the publication and the extent to which the harm suffered as a result of the publication of private information has interfered with an individual's private life so as to undermine his or her personal integrity; the way in which the information was obtained, whether it was with or without consent; the intent of the individual or entity disseminating the information at issue, and in particular whether it was malicious; and the extent to which the individual whose privacy is at issue is a public figure.

Looking at the above principles on how to strike a balance between the right to privacy and freedom of expression, it suffices to say that the amendment of Section 12 (1) of the Computer Misuse Act falls short of the relevant human rights standards that permit an infringement on the right to freedom of expression in a free and democratic society. This is owing to the fact that the privacy protections there are too broad, as they prohibit voice or video recording and publication of information about an individual, without exception, whatsoever, and without clear justification.

Implications of newly introduced Sections: 26B, 26C and 26D on 'unsolicited information,' 'malicious information' and 'misuse of social media'

Other newly introduced provisions of Section 26B and 26C also fail the three-part test that a privacy law must pass before it can be a permissible infringement on the right to freedom of expression. This is because they respectively create the offences of 'unsolicited information' and 'malicious information,' wherein they give a very broad definition of what amounts to 'unsolicited information,' and no definition of what amounts to 'malicious information.' These provisions can well be used against people using various media platforms, including social media, to draw attention to violation of rights of LGBTQ persons, and advocate for their rights; given the pervasiveness of homophobia among Ugandans, who are highly likely to shun any social media messages on LGBTQ rights as unsolicited, and any claims of abuse of those rights by public figures as malicious lies. This risk is heightened by the introduction of Section 26D, which creates the offence of 'misuse of social media,' which criminalises the use of social media to publish any information prohibited by law.

It is however important to also acknowledge the fact that Section 26C, in as far as it creates the offence of 'malicious information,' can also be used by members of the LGBTQ community in Uganda to protect themselves against false accusations of 'recruitment of young people into homosexuality,' which often place their safety and security at risk.¹¹ This once again highlights the conflict of interest that the Computer Misuse (Amendment) Act 2022 presents for members of the LGBTQ community in terms of protection of their right to privacy, and protection of their right to freedom of expression.

⁷ The African Commission on Human and People's Rights, "Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa" October -November 2019

DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION English.fm (achpr.org) (accessed 19 December 2022).

⁸ Application No.9815/82.

⁹ Application No.59320/00.

¹⁰ Article 19, "Global Principles on Protection of the Right to Privacy and Freedom of Expression."

¹¹ HRAFP, n 6 (above).

Implications of newly introduced Section 26A on 'hate speech'

Section 26A provides that a person shall not write, send or share any information through a computer, which is likely to ridicule, degrade or demean another person, group of persons, a tribe, an ethnicity, a religion or gender; create divisions among persons, a tribe, an ethnicity, a religion or gender; or promote hostility against a person, group of persons, a tribe, an ethnicity, a religion or gender. This provision is highly welcome as a shield against the homophobic attacks that members of the LGBTQ community are subjected to on various media platforms, including social media.¹²

While there is no singular definition of hate speech, it can be defined as speech that attacks or disparages a group or a person for characteristics purportedly typical of that group.¹³ It is used as an umbrella term that covers a great deal of concepts relating to incitement.¹⁴ Within the international human rights framework, Article 20 (2) of the International Covenant on Civil and Political Rights (ICCPR) lays a foundation for national legislation on hate speech. This is in as far it stipulates that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

In light of the above, it is evident that Section 26A is in conformity with the human rights standards on the prohibition of hate speech, in as far as it criminalises promotion of hostility against a group of persons, including LGBTQ persons, who are often subjected to hate speech in the form of homophobic media reports and social media posts that encourage violent attacks against them by members of the public.¹⁵

Conclusion and way forward

From the above, it is evident that the Computer Misuse (Amendment) Act 2022 creates a conundrum, wherein it offers protections for the privacy rights of LGBTQ persons, on one hand, and threatens their right to freedom of expression on the other. It is therefore imperative that members of the LGBTQ rights movement engage with the recently filed petition, challenging the constitutionality of the Computer Misuse (Amendment) Act 2022,¹⁶ to ascertain how they can complement the efforts of the petitioners in trying to promote the right to freedom of expression, either through advocacy efforts to support the case, or through participation as friends of court.



¹² As above.

¹³ Andrea Scheffler, "The Inherent Danger of Hate Speech Legislation.

A Case Study from Rwanda and Kenya on the Failure of Preventative Measure" 2015 12462.pdf (fes.de) (accessed 19 December 2022).

¹⁴ As above.

¹⁵ HRAPF, n 6 above.

¹⁶ Uganda Radio Network, "Nine CSOs, Five Others Petition Court to Nullify Computer Misuse Law." 17 November 2022.



WHAT IF THE COMPUTER MISUSE ACT 2022 ACTUALLY PROTECTED THOSE AT THE MARGINS OF SOCIETY?

Ruth Muganzi
Project Administrator
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Over the last few years, LGBTQ+ persons individual leaders have seen an influx of online hate speech, false information publishing and defamatory remarks shared through known print media and social media. The case of the self-styled ex-gays¹ caught the attention of both policy makers and citizens, backed by uncensored platforms owned by church groups peddling unverified and unsubstantiated tales of recruitment.

I will state this early. As the LGBTQ+ community we have a distinctive understanding of the difference between consensual same sex relationships among adults which we believe deserve the inherent right to privacy, and acts of child abuse or paedophilia which are fronted under the current debate on sexual minority organising. We agree, the latter has no place in our own safe spaces and should be gravely punished even where the perpetrator self-identifies as a LGBTQ+ person. This is not negotiable and the distinction must be made.

The Computer Misuse Act, 2011 was brought forward with the view that it would enhance safety, privacy² and security in this increasingly digitised world through among other provisions, limiting abuse of information systems and social media. However, this law has largely been used to suppress freedom of expression and the persecution of state critics, robbing us citizens of the ability to question the powers that be. The 2022 amendments presented to parliament in July and adopted in October 2022 present hopeful provisions in relation to hate speech and disinformation which if implemented beyond tokenism politics could save lives of gender and sexual minorities who suffer undue hate and abuse based on false and malicious allegations.

The Computer Misuse (Amendment) Act introduced provisions which prohibit the sending or sharing of information that promotes hate speech and prohibit the sending or sharing of false, malicious as well as unsolicited information. Section 26A makes a clear standing on hate speech.

The section reads: A person shall not write, send or share any information through a computer, which is likely to:-

- (a) ridicule, degrade or demean another person, group of persons, a tribe, an ethnicity, a religion or gender;
- (b) create divisions among persons, a tribe, an ethnicity, a religion or gender;
- (c) promote hostility against a person, group of persons, a tribe, an ethnicity, a religion or gender.

This hate speech provision further makes clear the consequences of this offence under section (2) *to the effect that: 'A person who contravenes subsection (1) commits an offence and is liable, on conviction, to a fine not exceeding seven hundred fifty currency points or imprisonment not exceeding seven years, or both.'*

The fear and intimidation resulting from hate speech prevent LGBTQ persons in Uganda from participating fully in society. This provision on the face of it protects members of the community from harassment and intimidation. The section provides a list of prohibited grounds including tribe, ethnicity, religion and gender. These grounds are not an exhaustive list for victims of hate speech. Courts all over the world have often interpreted such sections to include other grounds including gender identity and sexual orientation. The right to equality before the law protected under Article 21 of the Constitution ensures that the law covers all groups of persons and in my considered view, sexual and gender minorities are undoubtedly included. It is therefore important for the law to recognise that homophobic and transphobic speech is as serious as racial, xenophobic and tribal speech.

"THIS PROVISION ON THE FACE OF IT PROTECTS MEMBERS OF THE COMMUNITY FROM HARASSMENT AND INTIMIDATION"



On another note, the amended law tackles disinformation, a vice that has taken over LGBTQ+ public discourse and undermined activists' participation or response to the same. The new provision of section 26C criminalises malicious information. The section reads:

- (1) A person shall not send, share or transmit any misleading or malicious information about or relating to any person through a computer.
- (2) A person who contravenes subsection (1) commits an offence and is liable, on conviction, to a fine not exceeding seven hundred fifty currency points or imprisonment not exceeding seven years, or both.

¹ B Mwesige, 'Of the Charlatans, Opportunists and Grifters in the ex-gay movement'(2022) <https://www.kuchutimes.com/2022/09/of-the-charlatans-opportunists-and-grifters-in-the-ex-gay-movement/> (accessed 2 November 2022).

² Minority Report On The Report Of The Committee Of Information Communication Technology & National Guidance On The Computer Misuse (Amendment) Bill, 2022 <https://www.parliament.go.ug/cmis/browser?id=46136189-12a7-4cd4-a3dc-e38990862e12%3B1.0> (accessed 2 November 2022).

This section does not define what amounts to malicious information, however there is a lot of misleading and malicious information currently spread against LGBTQ+ persons. The law clearly provides for equal treatment of all persons. There is need to ensure that the law protects all persons from the sharing and spread of misleading or malicious information irrespective of the victim. The take-away is that if its provisions are actually implemented without discrimination or bias, the Computer Misuse (Amendment) Act will go a long way in reducing the current hate speech and malicious information directed at LGBTQ+ persons, advocacy organisations and community leadership in Uganda. By extension, these provisions would support protection of our achievements in many areas including mental health care and responses to HIV/AIDS among the LGBTQ+ community.



Section 26B of the Computer Misuse (Amendment) Act prohibits the sending or sharing of unsolicited information through a computer. Unfortunately, no definition of the terms 'unsolicited' and 'solicited' information are provided here. This provision may affect LGBTQ+ activists that are utilising the rapid reach of computers and technology to advocate for human rights promotion, protection and inclusion. The section presents uncertainties since all information shared through websites and social media handles can be categorised as 'unsolicited'. This can easily be misinterpreted and abused by the state and its agencies to curtail sharing and dissemination of pro-LGBTQ+ rights information. There is

need for the law to provide clear definitions of 'unsolicited information'. The amendment on criminalising unsolicited information will likely bring about violations of freedom of expression and access to information as provided for under various international and regional human rights instruments including article 19(2) of the International Covenant on Civil and Political Rights which states that:

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 amendment to section 12(1) of the principal Act on unauthorised access is also problematic. The section reads:

A person who, without authorization

*...
(b) voice or video records another person; or
(c) shares any information about or that relates to another person, commits an offence and is liable, on conviction, to a fine not exceeding seven hundred fifty currency points or imprisonment not exceeding ten years, or both.*

The criminalisation of unauthorised access presents the challenge to documentation of LGBTQ+ targeted violations as well as the process of holding perpetrators accountable in these times where there are various reported cases of blatant abuse of power, state backed homophobia and human rights erasure. There is need for the law to ensure that it pre gender minorities.

Finally, there is need to introduce a variety of measures to tackle "hate speech" beyond the law particularly against LGBTQ+ people and to challenge prejudice and intolerance. There is need to include comprehensive positive policy measures and ensure the legal framework for limiting freedom of expression meets the required regional and international standards. Steps need to be taken to ensure society does not fall victim to media scandals, sensationalisation³ and misinformation, and to try and understand the challenging context within which Uganda's LGBTQ+ community seeks to use computers with acceptance, love, respect and dignity for all. It is also important to note that while enacting such laws, prohibitions that unnecessarily censor contentious viewpoints are often counter-productive to the aim of promoting equality for LGBTQ+ people and fail to address the underlying social roots of discrimination.

³ ERA - LGBTI Equal Rights Association, 'Era Condemns The Hate Speech And Discrimination Against LGBTI+ People In Albania', <https://www.lgbti-era.org/news/era-condemns-hate-speech-and-discrimination-against-lgbti-people-albania>.

NAVIGATING THE 'PETTY OFFENCE' OF MISUSING SOCIAL MEDIA: PROTECTING DIGITAL RIGHTS OF MARGINALISED PERSONS



Flavia Zalwango

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Misuse of social media should largely be a petty offence. A petty offence refers to a minor crime punishable by way of paying a fine or through a short imprisonment sentence. Although section 26D of the now amended Computer Misuse Act, 2022 provides for the punishments of imprisonment of up to 5 years and a fine of up to ten million Uganda Shillings or imprisonment not exceeding five years, or both punishments, the very nature of the offence still qualifies it as a petty offence. The conduct punished is using a false or disguised identity to publish, distribute or share information prohibited under the laws of Uganda.

Petty offences discriminate against people on the basis that they are poor, are vulnerable, are part of a key population, or on account of their gender, age or disability, and this law does so because the most likely victims of this law are likely to be those who may not have the capacity or clout to openly use social media because of their marginalised/vulnerable status. This article makes the argument that by criminalising the misuse of social media, the Computer Misuse (Amendment) Act extends into the realm of 'petty offences' which in Uganda's context, and provides a basis for more violations of the human rights of vulnera-

ble populations.

Laws that create petty offences are inconsistent with the principles of equality before the law and non-discrimination on the basis that they either target, or have a disproportionate impact on, the poor, vulnerable persons, key populations or on the basis of gender.¹ Groups such as sex workers, street vendors or hawkers, public service vehicle touts, street families, LGBT community members, persons who use and inject drugs, human rights defenders, are regular victims of petty offence laws which often see them placed under surveillance, and subjected to harassment, threats, profiling, discrimination, blackmail, and intimidation.

Specifically for LGBT persons, the section does not cater to the realities of individuals whose gender-identity does not conform with the he/she binary. One has to wonder whether the law will be used to criminalise pluralistic identities of LGBT Ugandans? Vulnerable groups such as transgender, gender non-conforming persons or persons whose gender expression does not conform with their assigned gender at birth risk being arrested and charged under this law thus violating their right to equality before the law and freedom from discrimination. Section 26D(4) is also problematic as its creation of a presumption that a person whose phone number or email is used to register or create a social media account is the person who posted or published undermines the sanctity of the presumption of innocence that is protected under Article 28 of Uganda's Constitution. As was recently observed by Justice Egonda-Ntende in the matter of *Francis Tumwesige v Attorney General*,²

"The presumption of innocence imposes upon the state or the prosecution the burden of proving a criminal case against the accused beyond reasonable doubt and this burden does not shift. Neither is it derogable."

It is clear that if an accused person fails to discharge the burden now imposed upon them by section 26 D (4) of the Computer Misuse (Amendment) Act, they would be found guilty of an offence under section 26 D (1) of the Act.

In that case the Constitutional Court found that section 168(1)(c) of the Penal Code Act, which created the petty and colonial offence of being "rogue and vagabond" failed constitutional muster, as it reversed the burden of proof by instituting a presumption of guilt on the accused person, contrary to the presumption of innocence protected under article 28(3)(a) of the Constitution. It is on the same basis that I argue that section 26D(4) of the Computer Misuse (Amendment) Act on misuse of social media fails to pass constitutional muster. It removes the presumption of innocence and would adversely affect a large section of socially and economically marginalised and criminalised Ugandans who need the anonymity of the internet in order to speak out.

Finally, the offence of misuse of social media is vague. The law as currently phrased goes against the principle of legal certainty, which requires that laws must be definite, clear and sufficiently precise to allow a person to foresee to a reasonable degree in the circumstances, the consequences of which a given action may entail. What exactly is 'information prohibited under the laws of Uganda'? In the *Francis Tumwesige* decision, it was made clear that it is a constitutional imperative that a criminal offence is defined and what this means is that it must be specifically defined so that it should be clear to all what its elements are. The said elements or ingredients should not be ambiguous or vague or too broad as to defy specific definition.

Given its gross constitutional violations, it is clear that section 26D of the Computer Misuse (Amendment) Act, 2022 which criminalises the misuse of social media is unconstitutional. The section has far reaching implications for minorities as it criminalises status and identity. Petty offences such as logging into a Social media account with false names should not be criminalised.

¹ Principles on the Decriminalisation of Petty Offences in Africa https://codpouganda.org/wp-content/uploads/2021/04/principles_on_the_decriminalisation_of_petty_offences_efpa-copy-1.pdf.

² Francis Tumwesige v Attorney General, Constitutional petition no. 36 of 2018 <https://media.ulii.org/files/judgments/ugcc/2022/5/2022-ugcc-5.pdf>.





THE COMPUTER MISUSE (AMENDMENT) ACT (2022):

ONE STEP TOWARDS PRIVACY & A SLEDGEHAMMER TO (UN) SOCIAL MEDIA

Fatumah Ramathan-Nabulya
(A feminist lawyer and social justice advocate)

On Thursday 13th October 2022, Uganda's President Yoweri Museveni signed into law the Computer Misuse (Amendment) Bill, 2022. The question remains whether the Amendments are a sledgehammer to social media and freedom of expression.

The Bill was tabled by the Kampala Central MP, Mohammed Nsereko, seeking to regulate computer use and social media expression. The Bill's mover approached the amendment from a moralistic point of view, often citing vulnerable groups such as women and children, who are often violated in online spaces. The recent technological advancements were also cited as justifications for the Amendment. It is important to note however that the Act does not address the challenges which the mover of the Bill points out. For instance, the Act does not address online gender-based violence, harassment, cyberbullying and discrimination.

The Amendment Act in section 26B deals with the sharing of information about minors without the parents' or guardians' consent. Although one may concede that children's privacy ought to be prioritised, section 8 of the Data Protection and Privacy Act, 2019 already bans the sharing of minors' data without the consent of their parents. It is thus questionable whether there needed to be a regurgitation of already existing law, or rather, an improvement in its enforcement. In addition, the Act fails to address the challenges that children face in the digital space including adult exploitation, lack of parental control and cyberbullying.

Section 26A bans all forms of hate speech based on tribe, ethnicity, religion, gender, or otherwise. Unfortunately, hate speech is defined vaguely and broadly in the legislation. This leaves it susceptible to misuse and as a tool for witch hunts against political opponents or other marginalised groups. Due to the vague nature of the provision, the enforcing authorities could use the law to silence critics, political opponents and marginalised groups thus penalising expression that has neither the intent nor the realistic possibility of inciting hatred.

Section 26B of the amendment Act prohibits the sending and sharing of unsolicited information. This provision does not give due consideration to commercial and innocent unsolicited information in the form of advertisements. This in turn affects the freedom of expression and access to information. Unsolicited information has been defined as information that is sent without the person's consent. Given the broad range and sources of information on the internet, it may be impossible to get personal consent prior to sending out information. The law should have considered whether the sending of such information is for public good despite prior personal consent not being obtained.

Section 26C of the amendment Act prohibits the publication of malicious information. The clause cures no mischief since Section 25 of the Data Protection and Privacy Act already provides for the same. Moreover, freedom of expression is the cornerstone of democracy. This section seeks to restrict or even prohibit

freedom of expression enshrined in Art. 29(1) of the constitution.

Additionally, tortious and defamatory action are already available as an avenue for a civil remedy in cases involving malicious information.

In another restrictive move, under section 26D, the amendment criminalises the so-called "misuse of social media" to publish, distribute or share information prohibited under the laws of Uganda under a disguised or false identity. This provision could be used to target individuals who use anonymous identities on social media to criticise bad governance and injustice without fear of persecution.

In conclusion, while it appears to be a progressive standard for human rights protections, the Computer Misuse (Amendment) Act, 2022 is in fact an opportunity for further restriction of free speech and free expression rights in Uganda. It regurgitates already existing legal protections under the Data Protection and Privacy Act and fails to adequately define hate speech, leaving the scope of this criminal conduct open to manipulation for oppressive ends and censorship. It also effectively restricts social media use under anonymity, which can be an avenue to silence government critics.





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ON COLLISION COURSE WITH THE ACCESS TO INFORMATION ACT: HOW THE AMENDED COMPUTER MISUSE LAW AFFECTS FREEDOM OF INFORMATION

Tools such as social media undoubtedly are altering the way in which information is accessed¹ and activism is carried out.² These tools facilitate networking, making the mobilisation of people for social or political causes much easier.³ The right to access information is important for everyone. Freedom of information is the right to disseminate information and ideas, to seek information and ideas, to receive information and ideas and to impart information and ideas.⁴ Article 9 of the African Charter on Human and People's Rights provides that people have the right to express and disseminate opinions within the law, which is a cornerstone of democracy and a means of ensuring respect for all human rights and freedoms.⁵ Unfortunately, the full effect of the article is watered down by the computer misuse amendment law. This comes at the expense of the law on access to information.⁶ The aim of this essay is to highlight areas of the Computer Misuse (Amendment) 2022 which could be abused in curtailing freedom of information.

There is concern that accessing and publishing government information could be denied or even punished for being malicious and unsolicited. Principle 1 of the Declaration of Principles on Freedom of Expression in Africa, declares that the right to impart and receive information through any form of communication is a fundamental and inalienable human right and an indispensable component of democracy.⁷ The principle also states that privacy laws should not inhibit the dissemination of information in public interest. Under Article 41(1) of Uganda's Constitution, 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 privacy of other person.

In the context of computer misuse, where there is no definitional context for malicious or unsolicited information, the risk remains that human rights defenders can also be persecuted and prosecuted for making information available to the public. In this cluster there are investigative journalists, whistle blowers, human rights monitors and defenders among others, who play a significant role in disseminating information about injustices and human rights violations to the citizens through the media. The amendment to Uganda's Computer Misuse legislation raises eye-brows on what the parameters are for determining what is malicious, unsolicited and/or misuse of social media. These restrictive provisions are likely to be abused with the effect of limiting access to information for the public and freedom of information.

It is a given that social media and the internet are increasingly becoming sources of information for citizens. In a recent trend, social media is referred to as an arena for digital democracy. The internet has raised the possibility that better access to information can increase civic knowledge and participation of citizens, thereby increasing their recognition and helping them to make better decisions.

The right to information is protected as part of the right to freedom of expression under the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil Political Rights (ICCPR).⁸ In both documents, every person has a right to seek and receive information under the general rubric of the right to freedom of expression. By and large, the restrictions introduced by the Computer Misuse (Amendment) Act have negative implications on access to information which reduces civic advocacy.

1 Solomon Rukundo 'My President is a Pair of Buttocks: the limits of online freedom of expression in Uganda' (2018) *International Journal of Law and Information Technology*, 2018, 26, 252-271.

2 R Kakungulu-Mayambala & S Rukundo 'Digital activism and free expression in Uganda' (2019) 19 *African Human Rights Law Journal* 167-192 <http://dx.doi.org/10.17159/1996-2096/2019/v19n1a9> (accessed 11 November 2022).

3 DK Kalinaki 'How social media [are] transforming Uganda's political and social landscape' *African Centre for Media Excellence* 20 July 2016.

<https://acme-ug.org/2016/07/20/how-social-media-are-transforming-ugandas-political-and-social-land-scape/> (accessed 5 December 2022).

4 Crispin Kaheru's speech, Commissioner (UHRC) Launch of a media advocacy documentary and pictorial exhibition of Human Rights' Network for Journalists at Hotel Africana (2022).

5 *Law Offices of Ghazi Sulemain v Sudan II* (20033) AHRLR (ACHPR 2003).

6 *Access to Information Act* <http://judiciary.go.ug/files/downloads/access%20to%20informationinformation%20Act2005.pdf>.

7 *African Affairs Committee Freedom of Expression Subcommittee, The Rights to Freedom of Expression on the Internet as it Applies to Social Media in Africa* (1 March, New York City).

8 *International Covenant on Civil and Political Rights*.

Accessing information from government is like squeezing water out of a stone

Can the constitutional right of access to information be reality?

Printed in the UHRC Magazine 2002

Does freedom of information even matter? The Supreme Court of Sri Lanka noted that a right to freedom of information, while not necessarily included within the guarantee of freedom of speech, for that “would be to equate reading to writing, and listening to speaking”, may well be part of the guarantee of freedom of thought and opinion.⁹ The sharing of unsolicited information is embedded in the right to information because in accessing it (information) the digital user can disseminate such information. This right has been heralded for promoting transparency and accountability which are key in achieving a corruption free and democratic society.

Freedom of expression is provided for in Chapter four of the 1995 Constitution of Uganda. However, in terms of sharing and disseminating information, focus is usually placed on the right to access information from the government. Even with the enactment of the Access to Information Act there has not been as much activism among civil society around the right, and the enacted law is seemingly very limitative,¹⁰ Ngabirano argues that the country can only escape rising tides of corruption in the public sector and overcome fears of mismanagement of the recently discovered oil if citizens are able to access information and hold government accountable.¹¹

According to the World Justice Report of 2021,¹² which scrutinises aspects on open government and accountability, Uganda's performance on rule of law is still faltering. It is clear that criminalising misuse of social media without a definitional context and failing to specify what amounts to malicious and/or unsolicited information will endanger freedom of information in this country.

At the time of writing, the computer misuse legislation does not exclude information which pertains to national security, does not exclude court proceedings or define situations where information cannot be availed in the public interest. Computer misuse legislation places emphasis on the restrictions of using a computer rather than creating exceptions for freedom of information. The offences of unsolicited sharing of information and malicious information set out under the law may be susceptible to human rights violations which include



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denying public access to records, such as evidence and vigilante evidence, which are necessary for purposes of prosecuting court proceedings.

In the area of administration of justice, freedom of information aids dispensation of access to justice. A citizen and litigant is given a right of access to information in the possession of the state or any of its organs. This right is restricted only in cases where release of the information is likely to prejudice the security of the state. When information is accessible in the conduct of proceedings before a court or tribunal, it can facilitate timely hearing of the case. Unfortunately, administration of justice will be limited when public records are denied under the pretext of malicious and unsolicited information.

For the courts to uphold freedom of information there is need to regard the wisdom of statutes but neither can they sanction as being merely unwise that which the Constitution forbids.¹³ The judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away freedom of information through the Computer Misuse (Amendment) Act 2022, the safeguards of the constitution should be examined with special diligence. As has

9 *Fernando v. Sri Lanka Broadcasting Corporation and Others*, 30 May 1996, SC Application No. 81/95, p. 16.

10 Dan Ngabirano 'The Uganda freedom of information campaign: stuck in the mud?' 2013 *Access to Information in Africa Law, Culture and Practice Series*, Volume: 27, 191-214. <https://brill.com/display/book/edcoll/9789004251892/9789004251892-s011.xml>.

11 As above.

12 Rule of law index 2021 <https://worldjusticeproject.org/sites/default/files/documents/WJP-INDEX-2021.pdf>.

13 *Major General David Tinnyefuza v Attorney General (Constitutional Petition No. 1 of 1996)* [1997] UGCC 2.

been affirmed in key judicial decisions: “The provisions of the Constitution are not time-worn adages or hollow shibboleths.”¹⁴

Guidance needs to be taken that “malicious and unsolicited information” are not grounds for limiting access to information. If the state objects to release of information it must show that the release of the information is likely to prejudice the security of the state. This can only be established by evidence to show that the security of the state would suffer. The Constitutional court in the case of *Major General David Tinyefuza v Attorney General*¹⁵ observed that the mischief in such contexts is in the release of information to the citizen, probably with the consequence that such information may be made public prejudicing the security of the state. However, the Court also observed that if the release is in a limited context, i.e. if it is denied to the public and the press but made available to the court and parties to a court litigation for the determination of issues between the state and such party, then, prejudice to the security of the state is averted.¹⁶ The Court further noted that:

*“Section 121 of the Evidence Act gives unquestioned power to the head of Department to give or withhold permission as he thinks fit to a person who desires to produce such a document. They are the sole judge of this matter. They do not have to give a reason or be accountable to anybody for the exercise of this power. If applied together with Article 41 of the Constitution, it would override a citizen's right of access to information in government hands which is a fundamental right enshrined in Chapter 4 of the Constitution. The head of Department could deny a citizen the right of access to information which is not exempted by Article 41 of the constitution; for affairs of state as a term of art is much wider than security of the state or sovereignty or interference with right to privacy.”*¹⁷

Therefore, introducing malicious information and unsolicited information under the Computer Misuse Act, 2022 widens the options to deny access to information from the public. Denying access to information for being “malicious and unsolicited” is the type of menace, that Article 41 of the constitution would seek to remedy. The right of access to information must include the right to use such information in a court of law in support of a citizen's case.

The Computer Misuse Amendment law does not place any limitations on which kind of information would be malicious or unsolicited in the context of prosecuting court proceedings. The Data Protection and Privacy Act permits sharing of information when public duty demand it from the data collectors. However, the amended computer misuse legislation does not address the confidentiality of personal records/transactions which limit freedom of information where such information

may not be availed to the public by investigative officers. Thus, there is a need to secure freedom of information in the context of court proceedings and public interest because that information ensures accountability and public scrutiny and timely dispensation of justice. For example, Human Rights Centre Uganda reported that several CSOs who were keen to get information on controversial issues such as corruption were aware of the Access to Information Act 2005 but were concerned that it has not been implemented or enforced. This state of affairs hampers their ability to hold Government accountable on its obligations under the Constitution and several other international and regional instruments to promote the right to freedom of expression and access to information.¹⁸

States' obligation to give effect to the right to freedom of information, including through legislation, is increasingly being recognised.¹⁹ Courts have also found in certain contexts, that states were in breach of their human rights obligations when they failed to justify their denial of access to information.²⁰

In final analysis, the Computer Misuse (Amendment) Act, 2022 is rather restrictive on freedom of information and is on a collision course with the Access to Information Act. There is some light from the decision of *Tinyefuza v Attorney General* which clarified that a citizen shall have a right of access to information in state hands. This decision determined that it is no longer for the Head of Department of a state agency to decide as they think fit. That unfettered discretion, has been overturned by Article 41 of the Constitution and now, it is for the court to determine whether a matter falls within the exceptions under Article 41 or not.

It is important to note that the right of access to information is one of the latest generation of rights. In the Supreme Court of Uganda in *Charles Onyango Obbo & Another v Attorney General*²¹ the Supreme Court defined freedom of expression as ‘freedom to hold opinions and to receive and impart ideas and information without interference....’ With the advent of the computer misuse amendment law, commentators have noted that new technologies do not warrant a narrower application of the freedom of expression²² and freedom of information. Article 41 of the Constitution overrides section 24B and 26C of the Computer Misuse (Amendment) Act 2022 which sections could unreasonably be used to deny vital information to the citizens by government and or its officers.

14 Per Warren C.J, 1 n Troop vs Dulles 356 US 86, 2L Ed 630, 785 ct 590 (1958), cited and heavily referenced for the decision in Tinyefuza (note 13) above.

15 Constitutional Petition 1 of 1996, [1997] UGCC 2.

16 Tinyefuza, n 13 above, 12-13.

17 Tinyefuza, n 13 above, 12.

18 Human Rights Centre Uganda report (2013).

9 Mendel, T. ‘Freedom of Information as an Internationally Protected Human Right.’ Article 19 (n.d.) Available at: <https://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf>.

20 As above.

21 Obbo and another v Attorney General [2004] EA 265.

22 Li X, ‘Hactivism and the First Amendment: Drawing the Line between Cyber Protests and Crime’ (2003) 27 Harv JL & Tech 301-330.



WHAT UGANDA CAN LEARN FROM RECENT DEVELOPMENTS ON HATE SPEECH IN OTHER JURISDICTIONS

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Uganda recently passed the Computer Misuse (Amendment) Act, 2022. The Act prohibits among other things, hate speech which it defines as writing, sending or sharing any information through a computer, which is likely to create divisions among persons, or promote hostility against a person, a group of persons, a tribe, an ethnicity, a religion or gender. The Act punishes this with a fine of fifteen million shillings or imprisonment not exceeding seven years, or both.

Whereas, some free speech advocates prefer an open marketplace of ideas, where no expression is restricted, since they consider the best response to harmful speech to be through debate that lets different ideas freely challenge it,¹ many almost all agree that there is some speech that has to be restricted. At the international level, Article 19 of the Universal Declaration of Human Rights provides for the right to freedom of expression. Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) stipulates that the right to freedom of expression applies regardless of frontiers and through any media of one's choice. General Comment No. 34 of the UN Human Rights Committee further explains that article 19(2) includes internet-based modes of communication. At the regional level, article 9 of the African Charter on Human and Peoples' Rights provides for the right to freedom of expression. The African Commission on Human and Peoples' Rights also adopted the Declaration of Principles on Freedom of Expression and Access to Information in Africa, which recognises the role of new digital technologies in the realisation of the rights to freedom of international human rights law and standards.

However, all these rights can be limited. For example, Article 19(3) of the ICCPR provides that the enjoyment of freedom of expression 'carries with it special duties and responsibilities' and as such it may be subject to certain restrictions, 'but these shall only be such as are provided by law and are necessary for 'respect of the rights or reputations of others, and for the protection of national security or of public order (ordre public), or of public health or morals.

Restriction of hate speech is one of those accepted restrictions to the right to freedom of expression. However, the UN warns against restricting legitimate speech in the name of restricting hate speech. Only speech that becomes incitement to discrimination etc should be restricted. Any restrictions must be an exception and seek to prevent harm and ensure equality or the public participation of all.

Many countries have laws that censor or limit certain types of expression, including speech that incites violence and hatred. Recently, freedom of expression has been under attack from a variety of new and challenging sources including social media, the use of algorithms to shape perceptions, disinformation campaigns, Artificial Intelligence among others.² This has resulted in actions from governments seeking to regulate growing cybercrimes and a flood of misinformation, often amid controversy as to the detriment these actions present for freedom of expression and legitimate dissent.³ Different approaches to what is acceptable speech can be seen around the world. Some countries show a greater acceptance than others for prohibiting certain forms of speech and even the expression of certain opinions. For instance, some

¹ See for instance: MH Kramer, Freedom of Expression as Self-Restraint, 2021; LC Bollinger, The Tolerant Society: Free Speech and Extremist Speech in America, 1986.

² See: Foster, S 2020, 'Do we want free speech or not? Modern Challenges to Free Speech' Coventry Law Journal, vol. 24, no. 2, pp. 70-81; OSCE.

'Artificial Intelligence and Freedom of Expression', 2020. https://www.osce.org/files/f/documents/9/f/456319_0.pdf.

See also: Justicia, 'Conference: The state of free speech-challenges and solutions for a digital age.' Watch at: <https://www.youtube.com/watch?v=XQnNY0hR9fg&t=5s>.

³ Foster, above. See also: At a glance: Does the EU Digital Services Act protect freedom of expression?

Article 19, February 11 2021. <https://www.article19.org/resources/does-the-digital-services-act-protect-freedom-of-expression/>.



Different approaches to what is acceptable speech can be seen around the world. Some countries show a greater acceptance than others for prohibiting certain forms of speech and even the expression of certain opinions. For instance, some European countries have passed laws in accordance with a European Union Council decision to make it a punishable offence not only to incite hatred, but also to publicly deny crimes of genocide (e.g., the Holocaust) or war crimes

European countries have passed laws in accordance with a European Union Council decision to make it a punishable offence not only to incite hatred, but also to publicly deny crimes of genocide (e.g., the Holocaust) or war crimes.⁴

Different jurisdictions have advanced propositions or literature about hate speech legislation. Hate speech-type legislation proceeds on the theoretical proposition that legislation restricting free speech is necessary to protect certain vulnerable groups from harmful speech. Unfortunately, the purported protection has not been rendered. Hate speech as a phenomenon can be understood by /as any form of negative speech (ranging from offensive to direct incitement to violence) that is targeted against protected characteristics such as sexual orientation, race or disability. Hate speech legislation is seen as an efficient and appropriate means to prevent harm emanating from speech particularly in the digital space.⁵ It is however important to note that hate speech legislation provides a tool for the government to suppress the opposition, media representatives, civil society actors, and the general public for legitimate speech and dissent.⁶ This article looks at how a few countries around the world have addressed hate speech in their legislation and some of the good practices that Uganda could learn from. These country examples have been randomly selected and are presented in no particular order.

Estonia

Article 12 of the Constitution of Estonia prohibits fuelling hatred and discrimination on the basis of ethnicity, race, religion, or political views. Hate speech although criminalised under section 151 of Estonia's Penal Code Act, is hard to prove as the impugned speech must be one that calls for violence or discrimination on the basis of nationality, race, colour, sex, language, origin, religion, sexual orientation, political opinion, or financial or social status, and directly endangers a person's life, health or property.⁷ The requirement for direct danger makes it extremely difficult to prosecute someone under hate speech and this had led to the European Union starting infringement proceedings against Estonia because it had not adopted laws against hate speech.⁸ In December, 2020 the Estonian Parliament voted to reject a bill submitted by the Reform Party to criminalise hate speech.⁹ Furthermore, in April, 2022, Estonia's Parliament passed legislation banning the public display of symbols of hate and aggression around Russia's war on Ukraine, but paragraphs concerning hate speech itself were not accepted.¹⁰

The difference between Uganda and Estonia's law is that the threshold for Uganda to punish someone for hate speech is so low as there is no requirement for a direct and resulting endangerment to one's life or health or property, but rather any likelihood create divisions or promote hostility against a person or group of persons is enough.

Algeria

Additional law No. 20-05 on the Prevention from and Combating of Discrimination and Hate Speech, adopted in April 2020, prohibits and criminalises bigotry and hate speech. Under the said law, hate speech is defined as any kind of expression that spreads, incites, encourages or justifies racial hatred, and other forms of hatred such as humiliation, hostility or violence against a person or group on the basis of race, religion, ethnic group/ origin, national origin, sex, health status, disability, geographical affiliation or gender identity.

It contains a ban against anyone that produces, maintains or supervises a dedicated website or electronic account for the purpose of endorsing any initiative, concept, news or sketches or pictures that may incite bigotry and hate in society which can result in a sentence of 5 to 10 years in prison and a penalty of 5,000,000 to 10,000,000 Dinars.

⁴ See European Parliament, 'Holocaust denial in criminal law: Legal frameworks in selected EU Member States,' 26th January 2022.

[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2021\)698043](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)698043).

⁵ A Scheffler, 'The inherent danger of hate speech legislation: a case study from Rwanda and Kenya on the failure of a preventative measure' (2015)

<https://library.fes.de/pdf-files/bueros/africa-media/12462.pdf> (accessed 20 February 2023).

⁶ As above.

⁷ Penal Code of the Republic of Estonia (2004).

⁸ Hellen Wright, 'European Commission launches infringement proceedings against Estonia,' 30th October 2020.

<https://news.err.ee/1153405/european-commission-launches-infringement-proceedings-against-estonia>.

⁹ Hellen Wright, 'Reform's 'hate speech' draft bill voted out of Riigikogu,' <https://news.err.ee/1210267/reform-s-hate-speech-draft-bill-voted-out-of-riigikogu>.

¹⁰ Institute of Central Europe, 'The Baltic states oppose the symbols of aggression', 17th May 2022.

<https://ies.lublin.pl/en/comments/may-9-the-baltic-states-oppose-the-symbols-of-aggression/>.

Additionally, the Algerian law is broad and covers more grounds for discrimination such as, health status, disability, geographical affiliation or gender identity compared to Uganda's Computer Misuse (Amendment) Act. Considering the reality of online hate speech against gender minorities in Uganda, such an expanded protection would have been a much welcome addition to Ugandan law. In addition, the Algerian Penal law extends liability to the person who supervises the website or electronic account that may have concepts or pictures that may incite bigotry and hate. This ensures that in Algeria websites can be held accountable for propagating hate speech. On the other hand, Uganda's Computer Misuse (Amendment) Act, 2022 only extends culpability to the person who sends or writes the prohibited information and the one who manages the social media account where such information has been posted or shared. This is a narrow basis for liability and leaves the social media application intermediaries or websites themselves without responsibility. There is a need to regulate and hold internet intermediaries accountable for the spread of hate speech. Leaving these internet intermediaries to self-regulate further fails to address the challenges of curbing hate speech.

Canada

Canada's hate speech laws are primarily in the federal Criminal Code, which prohibits inciting or wilfully promoting hatred against 'identifiable groups' particularly in section 319(1) -public incitement of hatred, section 319(2) - wilful promotion of hatred, and Section 319(2.1) - wilful promotion of antisemitism. In the case of *R v Keegstra* [1990] 3 SCR, 697, the Supreme Court found that the offence of publicly inciting hatred makes exceptions for cases of statements of truth, subjects of public debate and religious doctrine.

Restrictions are also found in some of Canada's provincial human rights laws.¹¹ Previously, Section 13 of the Canadian Human Rights Act prohibited the communication of hate messages via federally regulated telecommunications, including the internet. This was repealed in 2013 by Parliament.

However, restrictions that overly prohibit speech have also been found to be unconstitutional. In the case of *Saskatchewan (Human Rights Commission) v. Whatcott* [2013] 1 SCR 467,¹² the Supreme Court of Canada examined the

constitutionality of section 14(1) (b) of the Saskatchewan Human Rights Code, which is similar to former section 13 of the CHRA in that it prohibits "any representation" (i.e., messages or other publications) that "exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground." The Court emphasized how, due to its "tendency to silence the voice of its target group," hate speech legislation can "distort or limit the robust and free exchange of ideas" and is therefore detrimental to the values underlying freedom of speech.¹³ The Court held that the portion of section 14(1)(b) of the Saskatchewan Human Rights Code pertaining to speech that is belittling or affronts the dignity of a person was unconstitutional and struck it from the legislation.

In comparison, Uganda's Computer Misuse (Amendment) Act, 2022, Section 4(23A) does not provide for exceptions for statements of truth or statements that a person makes with an honest belief of their truthfulness. The Ugandan Parliament should have picked a leaf from Canada and incorporated provisions in the Act that provide for the defence of truth as an avenue of balancing the complexities of free speech rights.

France

France's 1881 Law on the Freedom of the Press, in articles 24 penalizes anyone who publicly incites discrimination, hatred, or violence against a person or group of persons based on grounds such as origin, membership or non-membership in a particular ethnic group, nation, race, or religion, sex, Sexual orientation, Gender identity or disability.

The Avia Law (Law of June 24, 2020), was aimed at combating hateful content on the internet and it mandated the rapid removal of online hate speech and other illegal content. Failure to comply was punishable by one year of imprisonment and fine. However on 18th June, 2020, the French Constitutional Council rejected most of the law on the basis that it presented a disproportionate threat to freedom of speech.¹⁴

The developments in France demonstrate the complexity surrounding the criminalisation of hate speech in open and democratic societies and they seem to require even much more consideration for freedom of speech. These considerations seem to have been largely ignored during Uganda's legislative process in the enactment of the Computer Misuse (Amendment) Act.

¹¹ Julian Walker, Legal and Social Affairs Division, 'Hate Speech and Freedom of Expression: Legal Boundaries in Canada Background Paper'.

https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201825E#txt11.

¹² Saskatchewan (Human Rights Commission) V Whatcott, 2013 SCC 11, [2013] 1 S.C.R 467

¹³ As above.

¹⁴ Décision n° 2020-801 DC du 18 juin 2020.

Germany

In Germany, section 130 of the Criminal Code (Strafgesetzbuch – StGB) makes incitement to hatred a punishable offence that can lead to up to 5 year's imprisonment. Section 130 makes it a crime to publicly incite hatred against parts of the population or to call for violent or arbitrary measures against them or to insult, maliciously slur or defame them in a manner violating their human dignity. On June 30th 2017, Germany approved a bill criminalising hate speech on social media sites. The Network Enforcement Act (Netzwerkdurchsetzungsgesetz, or NetzDG), adopted in 2017 was designed to combat online hate speech, fake news, and misinformation by placing responsibility for content moderation on social media companies. In addition, the law states that social networking sites may be fined up to USD\$ 56 million if they persistently fail to remove illegal content within a week, including defamatory fake news.

Germany's law gives room for social networking sites to remove any illegal content on the site within one week and the punishment only comes after the sites have persistently failed to remove the said content from their media sites after that one week. For Uganda, the Computer Misuse (Amendment) Act, 2022, places the burden on the authors and distributors of the information and fails to hold internet intermediaries responsible. Uganda should have learnt from Germany and hold social media sites accountable for failing to flag and remove content that may be considered hate speech.

India

In India the right to freedom of expression and speech is protected by Article 19(1) of the Constitution of India, but Article 19(2) provides for reasonable restrictions imposed on freedom of speech and expression in the interest of 'the sovereignty and integrity of India, the security of the state, friendly relations with foreign states and public order'. The law allows a citizen to seek the punishment of anyone who shows another citizen disrespect on grounds of religion, race, place of birth, residence, language, sexual orientation, gender identity or community or any other ground whatsoever.

India's legal regime does not have a statute concerning hate speech nor does it have a definition for it.¹⁵ If a person has to be criminally charged for such an act, there are various provisions under the Indian Penal Code. While the term 'hate speech' does not feature anywhere within the law,¹⁶ its differ-

ent forms are identified across various laws which regulate speech in India.¹⁷

The Supreme Court of India passed a judgment in *Patricia Mukhim v. State of Meghalaya*¹⁸ in which a journalist in the North Eastern state of Meghalaya, had been convicted of promoting enmity between groups on grounds of religion and race as well as promoting hatred or ill-will for writing Facebook post criticising the 'apathy' of the State government functionaries in not taking any action in relation to an incident where certain persons attacked "non-tribals". The Supreme Court quashed the conviction holding that the Facebook post was an attempt to "highlight the discrimination against "non-tribals" in the State of Meghalaya" and in fact "pleads for equality of "non-tribals" in the State of Meghalaya". There was no discernible intent to promote hatred of any community. The Court noted that 'disapprobation of governmental inaction cannot be branded as an attempt to promote hatred between different communities.'¹⁹ This decision has enabled the State to prevent hateful speech, without specifically criminalising hate speech.

Uganda's Computer Misuse (Amendment) Act, 2022 contains ambiguous restrictions on the freedom of speech which can be weaponised to further oppress minorities, suppress dissent online and silence healthy criticism. The foregoing jurisprudence from the Supreme Court of India is a progressive example which Ugandan courts can draw upon to protect free speech rights under the current law.

Japan

Japan did not have nationally enforced hate speech laws until 2016. Prior to this, Japanese law covered threats and slander but did not apply to hate speech against groups of people. On 7th October, 2013 in a rare ruling on racial discrimination against Koreans, a Japanese court ordered an anti-Korean group, Zaitokukai, to stop "hate speech" protests against a Korean school in Kyoto and pay the school 12.26 Million yen (\$ 126,400) in compensation for protests which took place in 2009 & 2010. In May 2016, Japan's Diet passed the Hate Speech Elimination Act. However, the Act did not explicitly ban hate speech and set no penalty for committing it.²⁰ It instead mandates the government to take further action to eliminate hate speech. Some local governments like Osaka and Kawasaki city have passed ordinances to this end.²¹ Under the Kawasaki ordinance, the city can issue warnings to violators and cease and desist orders to those found to be repeat offenders.

¹⁵ <https://cjp.org.in/an-indian-law-on-hate-speech-the-contradictions-and-lack-of-conversation/>.

¹⁶ A Yadav, 'Countering hate speech in India: looking for answers beyond the law' Winter Issue 2018 ILI Law Review Vol. II <https://ili.ac.in/pdf/csi.pdf>.

¹⁷ Indian Penal Code under Sections 153A, 153B, 295A, 298, 505(1) and 505(2);

See also The Representation of People Act, Information Technology Act, Unlawful Activities (Prevention) Act, 1967.

¹⁸ Supreme Court of India, Patricia Mukhim v. State of Meghalaya, Judgment, 25 March 2021,

Criminal Appeal No. 141/2021, 2021 SCC Online SC 258 (<https://www.legal-tools.org/doc/sbc4ep/>).

¹⁹ Navigating the Meaning of Hate Speech and Seditious Policy Brief Series No. 138 (2022).

<https://www.toaep.org/pbs-pdf/138-lokur-damojipurapu/> (accessed 15 December 2022).

²⁰ The Future of Free Speech, Japan. <https://futurefreespeech.org/japan/>. 15th November 2023.

²¹ As above.

However, these are limited to a period of six months in order to avoid infringement on free speech rights if they do not adhere to the orders, the city can disclose their names and addresses and file criminal complaints against them.²²

Japan's cautious approach to criminalising hate speech is apparent in its conservative legislation which seems to offer more consideration for free speech rights protections. The law more aggressively criminalises speech where it amounts to threats and slander which are intended to occasion violence and hatred. It appears that these criteria act as a guard rail against hate speech allegations which might harm free speech rights. In the case of Uganda's Computer Misuse (Amendment) Act, 2022, no such guard rails exist for the definition of hate speech. Moreover, by comparison to Japanese law which deploys administrative measures, the penalty attending the ambiguity of culpability for hate speech under Ugandan law is seven years' imprisonment or a fine of fifteen million Ugandan shillings (approximately 4,000 US Dollars) or both. Thus, Uganda's law while well meaning, could very well turn out to be a restriction of open debate and criticism.

Conclusion

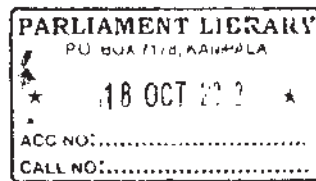
Hate speech and hate crimes have become an increasing concern in recent years. The extent to which states permit, prohibit, or sanction "hate speech" varies across countries. However, the selected countries from different parts of the world show a need to draw a balance between protecting against hate speech and the right to freedom of expression. Uganda should borrow a leaf from these jurisdictions and ensure that freedom of speech which is the cornerstone of democracy is upheld in the country. For instance, Uganda should apply a variety of legal means to respond to hate speech, including civil, administrative and other measures. Criminal law penalties should be limited to the most severe forms of hate speech. Uganda should have reasonable limits on freedom of expression in order to deal with hate, but also ensure that the limits are minimal and balanced with other measures that protect free expression.

²² As above.



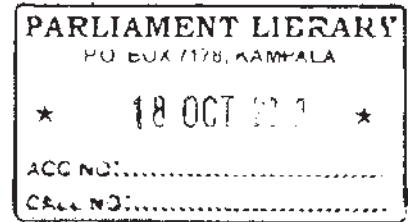
THE REPUBLIC OF UGANDA

THE COMPUTER MISUSE (AMENDMENT)
ACT, 2022





THE REPUBLIC OF UGANDA



I SIGNIFY my assent to the bill.

Yoweri Museveni
.....
President

Date of assent: 14/10/2022

Act *Computer Misuse (Amendment) Act* **2022**

THE COMPUTER MISUSE (AMENDMENT) ACT, 2022

ARRANGEMENT OF SECTIONS

Section

1. Amendment of Computer Misuse Act, 2011
2. Insertion of section 23A in principal Act
3. Insertion of sections 26A, 26B, 26C and 26D in principal Act
4. Amendment of section 30 of principal Act



THE REPUBLIC OF UGANDA

THE COMPUTER MISUSE (AMENDMENT) ACT, 2022

An Act to amend the Computer Misuse Act, 2011 to enhance the provisions on unauthorised access to information or data; to prohibit unlawful sharing of any information relating to a child; to prohibit hate speech, the sending or sharing of malicious or unsolicited information; to regulate the use of social media; and for related matters.

DATE OF ASSENT:

Date of Commencement:

BE IT ENACTED by Parliament as follows:

1. Amendment of Computer Misuse Act, 2011

The Computer Misuse Act, 2011, in this Act referred to as the principal Act, is amended in section 12—

(a) by substituting for subsection (1), the following—

“(1) A person who, without authorisation—

(a) accesses or intercepts any program or another person’s data or information;

Act *Computer Misuse (Amendment) Act* **2022**

- (b) voice or video records another person; or
 - (c) shares any information about or that relates to another person,
- commits an offence.”; and

- (b) by substituting for subsection (7), the following

“(7) A person who commits an offence under this section is liable, on conviction, to a fine not exceeding seven hundred and fifty currency points or imprisonment not exceeding ten years, or both.”

2. Insertion of section 23A in principal Act

The principal Act is amended by inserting immediately after section 23, the following-

“23A. Unauthorised sharing of information about children

(1) A person shall not send, share or transmit any information about or that relates to a child through a computer unless—

- (a) the person obtains the consent of the child’s parent, guardian, or other person having authority to make decisions on behalf of the child;
- (b) the person is authorised by law; or
- (c) the sending, sharing or transmitting of the information is in the best interest of the child.

(2) A person who contravenes subsection (1) commits an offence and is liable, on conviction, to a fine not exceeding seven hundred and fifty currency points or imprisonment not exceeding seven years, or both.”

3. Insertion of sections 26A, 26B, 26C and 26D in principal Act

The principal Act is amended by inserting immediately after section 26, the following

“26A. Hate speech

(1) A person shall not write, send or share any information through a computer, which is likely to—

- (a) ridicule, degrade or demean another person, group of persons, a tribe, an ethnicity, a religion or gender;
- (b) create divisions among persons, a tribe, an ethnicity, a religion or gender; or
- (c) promote hostility against a person, group of persons, a tribe, an ethnicity, a religion or gender.

(2) A person who contravenes subsection (1) commits an offence and is liable, on conviction, to a fine not exceeding seven hundred and fifty currency points or imprisonment not exceeding seven years, or both.

26B. Unsolicited information

(1) A person shall not send to or share with another person unsolicited information through a computer unless the sending or sharing of the unsolicited information is in the public interest.

(2) A person who contravenes subsection (1) commits an offence and is liable, on conviction, to a fine not exceeding seven hundred and fifty currency points or imprisonment not exceeding seven years, or both.

(3) For the purposes of this section, “unsolicited information” means information transmitted to a person using the internet without the person’s consent, but does not include unsolicited commercial communication.

26C. Malicious information

(1) A person shall not send, share or transmit malicious information about or that relates to another person through a computer.

(2) A person who contravenes subsection (1) commits an offence and is liable, on conviction, to a fine not exceeding seven hundred and fifty currency points or imprisonment not exceeding seven years, or both.

26D. Misuse of social media

(1) A person who uses social media to publish, distribute or share information prohibited under the laws of Uganda under a disguised or false identity, commits an offence.

(2) Where the information under subsection (1) is published, shared or distributed on a social media account of an organisation, the person who manages the social media account of the organisation shall be held personally liable for the commission of the offence.

(3) A person who contravenes subsection (1) is liable, on conviction, to a fine not exceeding five hundred currency points or imprisonment not exceeding five years, or both.

(4) For the purposes of prosecution under this section, it shall be presumed, until the contrary is proved, that the information published, distributed or shared on a social media account which is—

- (a) verified by a social media operator, has been published, distributed or shared by a legal or natural person;

Act *Computer Misuse (Amendment) Act* **2022**

- (b) registered using a telephone contact, is published, distributed or shared by the person or organisation in whose name the telephone contact is registered; or
- (c) registered using an email address which has been used or submitted as data by any data collecting entity, is published, distributed or shared by the person or organisation in whose name the email address is registered.

(5) For the purposes of this section, “social media” means a set of technologies, sites, and practices which are used to share opinions, experiences and perspectives, and includes YouTube, WhatsApp, Facebook, Instagram, Twitter, WeChat, Tik Tok, Sina Weibo, QQ, Telegram, Snapchat, Kuaishou, Qzone, Reddit, Quora, Skype, Microsoft Team and LinkedIn.”

4. Amendment of section 30 of principal Act

The principal Act is amended in section 30 by repealing subsection (3).