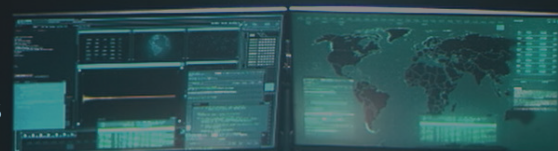

THE PROPOSED COMPUTER MISUSE (AMENDMENT) BILL, 2022: A MAW TO FREEDOM OF EXPRESSION AND PARTICIPATORY DEMOCRACY

A Policy brief by Unwanted Witness



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1. BACKGROUND

The Computer Misuse Act is one of three novel cyber laws that was enacted by Parliament in 2011 to: make provision for the safety and security of electronic transactions and information systems; to prevent unlawful access, abuse or misuse of information systems including computers and to make provisions for securing the conduct of electronic transactions in a trustworthy electronic environment and to provide for other related matters. In short, the Act defines and sanctions prosecution of activities that undermine computer security, affect the integrity, confidentiality and availability of computer systems.

The Act commenced on 15th of April, 2011 under Statutory Instrument No. 35 of 2011 however since then, . The Act has since been used as a tool of repression on political dissidents and activists.

Key notable individuals that have suffered the wrath of the Computer Misuse Act include Dr. Stella Nyanzi a former research fellow at Makerere University who was charged with the offence of Cyber Harassment and Offensive communication contrary to Sections 24(1), (2) (a) and Section 25 respectively of the Computer Misuse Act, 2011. She was convicted and sentenced to prison by the Buganda Road Chief Magistrate but later, this decision was quashed by the High Court in Kampala, because the Chief Magistrate court did not have jurisdiction to entertain the matter which rendered the trial in the lower court a nullity, the court further quashed the decision on ground that the procedure in the lower court contravened Article 28(3)(d) of the Constitution of Republic of Uganda, 1995 (as amended) which guarantees the right of a person charged with a criminal offence to be permitted to appear before court in person.

On June 8, 2015, after being kidnapped by security agencies for a number of days, another Ugandan, Robert Shaka was arraigned before the Buganda Road Chief Magistrate's court and charged with offensive communication under Section 25 of the Computer Misuse Act, 2011.

Police alleged that Robert Shaka frequently used a computer to disturb H.E Yoweri Kaguta Museveni's privacy. The Director of Public Prosecutions (DPP) claimed that Shaka had violated Museveni's privacy by posting statements regarding the president's health condition on Facebook, and his trial is still pending.

Another Ugandan known as Michael Muhima was on May 14, 2021 charged with "offensive communication" for a tweet he posted in November 2020, parodying the police spokesperson, Fred Enanga. Muhima was jailed and denied access to his family and lawyers for five days before being released on bail.

This among others shows how the Computer Misuse Act has been used to unjustifiably curtail freedom of expression online, most especially when it comes to critiquing high ranking government officials.

Associated with this malignant approach, the computer Misuse Act has been used as a targeting tool against Ugandans that exercise their Freedom of Expression and a right to peaceful assembly guaranteed by the Constitution of the Republic of Uganda, 1995 (as amended).

In February 2022, Honourable Nsereko Mohammad, sought leave of parliament to introduce a private Members Computer Misuse (Amendment) Bill 2022, stating that since the passing of the Computer Misuse Act, 2011, the world has continued to experience rapid advancement in computer-generated technology, leading to the adoption of numerous online and social media platforms as a means of communication and interaction.

The proposed Computer Misuse (Amendment) Bill 2022 does not however suggest anything that is not legislated already. For example, the Data Protection and Privacy Act, 2019 exhaustively provides remedies to the ostensible gaps that the amendment intends to fill. Majority of the intended insertions creating new and different offences have an effect of unjustifiably and unnecessarily curtailing guaranteed rights and freedoms such as the right to civic participation, freedom of assembly and association, freedom of speech and expression which includes the freedom of the press and other media all guaranteed by the 1995 Uganda Constitution as amended.

2. ANALYSIS OF THE PROPOSED COMPUTER MISUSE (AMENDMENT) BILL 2022

The Constitution of the Republic of Uganda, 1995 as amended is an agreement amongst Ugandans to depart away from our chequered history characterised by tyranny, oppression, political and constitutional instability and set of standards we accept to protect each other from tyranny, oppression, political and constitutional instability.

The impugned amendments are nothing but a retrogression from the positive score this country has taken to avoid backsliding to our chequered history. In the subsequent paragraphs we demonstrate how retrogressive the impugned amendment is.

2.1. Amendment of Section 2 in the principal Act

The impugned Bill proposes to amend Section 2 of the Principal Act by inserting the word “leader” as defined in the Leadership Code Act, 2002. Section 2 of The Leadership Code Act, 2002 defines a leader as a person holding or acting in any offices specified under the second schedule of the Act.

The second Schedule of the Leadership Code Act, 2002, provides a list of leaders and this includes; Political leaders, like the President, Vice President, Speaker and Deputy Speaker as well as political party leaders. The amendment poses the following troubles;

This proposed amendment is discriminatory because it is only focusing on leaders as defined under the Leadership Code Act, 2002. This implies that other leaders that have no intentions to aspire for leadership as defined in the Leadership Code Act, 2002 are manumitted to abuse the Computer Misuse Act. It hence creates two classes of citizens which should not be the spirit of the law.

2.2. Amendment of Section 12 in the principal Act

The proposed amendment intends to amend Section 12 of the Principal Act by substituting subsection (1) with provisions prohibiting a person without authorization from accessing or intercepting any program, sharing any information about or relating to another person, or another person’s data or information, voice or video recording. The Data Protection and Privacy Act, 2019 sufficiently regulates the collection and sharing of personal information, therefore the amendment is superfluous and likely to warrant criminalising legitimate interception of any programs, sharing of information, voice and video recording of public figures driving on the wrong side of the road or violating the law.

The clauses in the proposed amendment are vague and overbroad, they loop both legitimate and illegitimate actions that are protected freedoms and rights such as the right to access to information, freedom of expression and right to disseminate in-

formation, exercised through citizen journalism. A law must be clear enough to be understood and must also be precise enough that it only applies to activities connected to the law’s purpose.

Articles 50(1) and 27 of the Constitution of the Republic of Uganda 1995, as amended read together with the Data Protection and Privacy Act, 2019 and Sections 3, and 9 of the Human Rights (Enforcement) Act, 2019 provide sufficient civil remedies to any one who complains of violation of his or her human rights including his or her right to privacy. The amendment of this section by insertion of subsection (1) (a), (b) and (c) is redundant and inimical to citizen journalism.

2.3. Amendment by insertion of Section 22A in principle Act

The proposed amendment intends to amend the principle Act, by inserting Section 22A that criminalises the sharing, sending, and transmitting of personal information about or relating to children without the consent of their parents. This is already covered under Section 8 of the Data Protection and Privacy Act, 2019 together with its regulations. Section 8 prohibits the collection and processing of personal information related to children without their parent’s consent.

Section 35 the Act criminalises disclosure of personal information of a data subject including children. This makes Clause 3 of the Bill redundant and therefore should be ignored by the Parliament of Uganda since the existing legal regime sufficiently protects children’s personal data.

Therefore, the proposed amendment does not add anything peculiar to the already existing law and we argue Parliament to disregard it.

2.4 Amendment by insertion of Section 23A

The proposed insertion of Section 23A in the principle intends to legislate against “hate speech” by prohibiting a person from writing, sending or sharing any information through a computer which is likely to ridicule, degrade or demean another group of persons, a tribe, and ethnicity, a religion or gender. Any speech that is likely to create divisions among persons, a tribe, an ethnicity, a religion or gender and any speech that Promotes hostility against a person, group of persons, a tribe, an ethnicity, a reli-

gion or gender. This clause does not precisely define what amounts to hate speech.

Whereas the purpose of the amendment may seem legitimate, it is phrased in a vague and imprecise way and subject to the whims of law enforcers, this has a chilling effect on legitimate speech and expression. We wish to note that laws intended to criminalise speech have been used by government and other tyrant regimes as a tool to suppress the opposition, media representatives, civil society actors, and the general public for legitimate speech and dissent. This has been done through politically motivated prosecutions of journalists, and commentators on the basis of their speech and opinions.

The principal Act is already being used as a tool to clampdown on online speech and expression. In Uganda, politicians like Joseph Kabuleta along with a long list of activists have suffered the pangs of the principal law. The amendment will therefore entrench and consolidate the suppression of digital rights and freedoms.

It must be noted that freedom of expression with its underlying tenets is universally guaranteed in various regional and international instruments to which Uganda is a party; right from the Universal Declaration of Human rights, International convention on Civil and political rights and the Banjul Charter.

Freedom of speech and expression is a cornerstone of democracy. Democracy is based and thrives essentially on free debate and open discussion, every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential. The amendment and its very broad and vague terms intend to unjustifiably limit this fundamental right.

Any attempt to pass a law that unjustifiably restricts the fundamental right to freedom of expression, guaranteed by Article 29 of the Constitution of the Republic of Uganda (as amended) and other international instruments that Uganda has ratified to such as, Article 19 of the Universal Declaration of Human Rights (UDHR 1948) as well as Article 19 of the International Convention on Civil and Political Rights (ICCPR) 1966) is to degenerate into tyranny and oppression.

The rapid growth of technology has decentralised and liberalised speech, and the majority of Ugandans have resorted to using social media to express their views and engage powerful politicians that they would never have a chance to engage had it not been for these platforms.

If this law is passed in whatever form, it will unjustifiably and disproportionately infringe on the enjoyment of the fundamental rights and freedoms highlighted in this brief. We therefore call upon Parliament to reject the proposed amendment.

2.5 Amendment by insertion of Section 24A in the Principal Act

The amendment intends to amend the Principal Act by inserting section 24A to criminalise the sending and sharing unsolicited information.

This provision is not only vague but also too broad; it has the effect of looping in both legitimate and illegitimate expression and sharing of information. For instance commercial advertising which is protected speech and already regulated under the Electronic transaction Act, 2011 is as well looped in this impugned amendment. Section 26 of the electronic transactions Act, 2011 prohibits the sending of unsolicited commercial messages to a consumer unless such unsolicited commercial message is received and with an opt-out option by the consumer at no cost.

This will unjustifiably restrict freedom of speech and expression which includes the right to disseminate information and right to carry on any lawful occupation, trade or business.

The amendment that criminalises sharing of information is inimical to e-commerce that thrives on online advertisement. Whereas the unsolicited information in this context may mean “cyberflashing” which is illegitimate, the amendment does not create a distinction between legitimate and illegitimate unsolicited information. Therefore, this goes against the non derogable right to fair hearing that among others requires penal laws to be clear enough to enable a citizen to distinguish between the prohibited conduct and the permissible one.

2.6 Amendment by insertion of Section 26A in the principal Act

This amendment intends to prohibit sending, sharing or transmitting any “misleading” or “malicious” information about or relating to any person through a computer. The above intended amendment is in substance identical to the offence of criminal libel in the Penal Code Act, Cap.120 laws of Uganda.

The ostensible intent of both Sections is to protect the reputation of individuals. Criminal libel applies both online and offline, a clear example is the case of Haji Achile Twaibu versus Uganda where the accused was charged with libel over facebook posts against a politician, the conviction and the sentence were only overturned on appeal basing on the illegalities of his trial process.

Secondly, the criminal justice system that costs the State a lot of taxpayers money should not be used as a tool to settle individual squabbles who have an option of seeking civil remedies.

2.7 Amendment by insertion of Section 27A in the principal Act

The clause 7 of the amendment bill intends to insert Section 27A in the Principle Act by restricting a person who has been convicted under the Computer Misuse Act from being eligible to hold a public office for a period of 10 years.

Section 27A (2) provides that where a person has been a leader or holds a public office, the person once found guilty is required to vacate his or her office, and dismissed in addition to the prescribed punishment. In effect, the law will affect leaders who for a legitimate cause and in public interest share or disclose information and hold leaders accountable.

Consequently, this law is against the principle of accountability, transparency, equality and civil and participatory democracy that is depicted under the Constitution of the Republic of Uganda, 1995 as amended. Article 21 of the Constitution of the Republic of Uganda guarantees the right to equality and freedom from discrimination.

The Article is to the effect that all persons are equal before and under the law in all spheres of political, economic, social and cultural life, and in every other respect and shall enjoy equal protection of the law.

From the reading of the proposed amendment, it is

discriminatory since it creates two classes of people: leaders as provided for in the Leadership Code Act, 2022 are culpable while as other leaders that do not fall within the category are at liberty to abuse the law.

3. RECOMMENDATIONS

The parliament should disregard the proposed amendment in the computer Misuse Act, and the reasons are explained in the analysis above.

Parliament should further review and repeal Sections 24 and 25 of the principal Act. This is because the Sections are inconsistent with the Constitution of the Republic of Uganda, 1995 as amended. The impugned Sections are inconsistent with Articles 29(1)(a) and 43(2)(c) of the constitution for having an effect of unjustifiably restricting the freedom of speech and expression. Furthermore, the Sections have been used by the government as a tool for prosecuting people with opposing views. The foregoing provisions are not only vague but also broad that citizens are not fairly and precisely notified of what is proscribed conduct and allowed conduct.

The government should strengthen the enforcement and implementation of the Data Protection and Privacy Act. This can be done by establishing a close relationship between the Office of the National Data Protection and the office of the Director of Public Prosecution.

4. CONCLUSION.

The proposed Computer Misuse (Amendment) Bill, 2022 is a nightmare to the freedom of expression and speech, very repressive in a free and democratic state, we therefore ask Parliament to review the amendment with further and serious scrutiny. We further request parliament to consider repealing sections 24 and 25 of the Principal Act.

