

Freedom of Expression on the Internet and the Law in Tanzania

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Abstract

This article seeks to discuss some legal issues raised by the emergence of Internet as a new medium through which the right to freedom of expression is exercised. The legal issues that are discussed include freedom of expression in relation to the right to privacy, defamation and protection of children welfare, and freedom of expression regulation on the Internet from its generality. These are issues that call for a balance between them so as to enhance justice to all in a society. The discussion is based on Tanzania laws and other international laws that guarantee this fundamental right, and the laws that protect other rights which may be affected by the exercise of the former right. At national level, the laws discussed in this article include the Constitution of the United Republic of Tanzania, 1977 (as amended), and the Law of the Child Act, No. 21 of 2009 whereas those at international level include the Universal Declaration of Human Rights, 1948; the International Covenant on Civil and Political Rights, 1966; the African Charter on Human and People's Rights, 1981; the Convention on the Rights of the Child, 1989; the United Nations Human Rights Council Resolution 13; and the United Nations General Assembly Resolution 59.

Keywords: Freedom of expression, Privacy, Defamation, Children Protection

1.0 Introduction

The right to freedom of expression upholds the rights of all to express their views and opinions freely. It being a fundamental right, the United Nations General Assembly, in its first session, adopted a resolution (before any human right declaration or treaty had been adopted) stating that freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nation is consecrated.¹ The exercise of freedom of expression can be through various mediums such as radios, televisions, newspapers and the internet which has emerged as a new medium. New technologies such as the Internet, satellite and digital broadcasting offer unprecedented opportunities to promote freedom of expression and information.²

On the Internet there are different avenues of freedom of expression that allow people to share their thoughts. These avenues include social networks such as Facebook, Instagram, Twitter and LinkedIn, websites and blogs. In recent days, social networks have become mass communication tools and vehicles for mobilization and websites such as Facebook and Twitter are being used by activists and citizens to relay information that is not always accessible through traditional media.³ The Internet has opened up new possibilities for the realisation of the right to freedom of expression due to its unique characteristics which include its speed, worldwide reach and relative anonymity.⁴ Any person with access to Internet can exchange communication instantaneously and such communication can be directed to specific individuals, a group of people or the world at large. With advent of the Internet, the power to communicate on a mass scale no longer rest solely in the hands of elites, with the cost of setting up and operating a newspaper, radio station or television show acting as natural barriers to participation from the wider public.

On the one hand, while the Internet empowers freedom of expression by providing individuals with new means of expression, on the other hand, the free flow of information has raised the call for content regulation, not least to restrict minor's access to potentially harmful information.⁵ However, unlike other communications media, such as televisions and radio, (which are often subject of extensive regulation), historically, the Internet

¹ See United Nations General Assembly Resolution 59 (1) retrieved from [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/59\(1\)&Lang=E&Ares=RESOLUTION](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/59(1)&Lang=E&Ares=RESOLUTION) (as accessed on 10-3-2014).

² See Freedom of Expression, a Study Guide retrieved from http://www.hrea.org/index.php?base_id=147 (as accessed on 10-2-2014).

³ See Free flow of information and social network: a role for democracy and social participation retrieved from <http://www.unesco.org/new/en/communication-and-information/flagship-project-activities/unesco-and-wsis/internet-government/unesco-and-the-igf/6th-ignairobi> (as accessed on 11-2-2014)

⁴ See Background paper: Human rights in cyberspace, (2013), at 5, retrieved from http://www.humanrights.gov.au/sites/default/files/document/publication/human_rights_cyberspace.pdf (as accessed on 7-3-2014). See also, Chawki, M, (2006), *Anonymity in Cyberspace: Finding the balance between Privacy and Security* at 5. See as well, Lessig, L (2000), the Law of the Horse: What CyberLaw might teach, *Harvard Law Review*, Vol. 113 at 505.

⁵ See Jorgensen, R.F, Internet and Freedom of expression, European Master Degree in Human Rights and Democratization, 2000-2001, Raoul Wallenberg Institute, at 2&5 retrieved from <http://www.ifla.org/files/assets/faife/publications/ife03.pdf> (as accessed on 10-2-2014).

has been a relatively unregulated and at times seemingly anarchic medium.¹ The Internet is open in the sense that it can not be administered by any single entity, be it academic, corporate, governmental or non-profit organisation.² The emergence of the Internet has also raised the question of how to define it in terms of public sphere and accordingly, balance the online rights of expression against the restrictions necessary in a democratic society.³

In Tanzania, the number of people with access to Internet has been increasing and the Internet is believed to have experienced an exponential growth in recent years.⁴ The industry has expanded and changed rapidly since the introduction of Converged Licensing Framework (CLF) in 2005 that took advantages in technology, number and types of services provided in the market and growth of Internet usage.⁵ For the past five years, the number of Internet users has been increasing due to the fact that Internet had been used in business transactions and by many government departments. This increase is being facilitated by the reason that there had been a transformation in the use of Internet infrastructure from Satellites which were slow in speed and costly to submarine cables which are fast and less costful. By June 2010, the number of Internet users was estimated to be 4.8 millions out of which 5% accessed internet services from cybercafés, 55% from organizations/institutions and 40% from households.⁶ There is no doubt at the moment the number has already increased bearing in mind that there is advancement of technology where a significant number of people use Internet through mobile phones and iPad, thus, in Tanzania, freedom of expression is also facilitated by this new medium.

The exercise of freedom of expression may in some instances result in the violation of other human rights such as the right to privacy, reputation of others and children rights, and in the online environment, violation of such rights may have serious effects compared to the offline environment. Consequently, the exercise of freedom of expression must be balanced with other rights.⁷ However, the issue arises as to how best to protect freedom of expression and free flow of information without compromising other human rights. Due to this, there are contradicting views as to whether freedom of expression should be regulated on the Internet, and if so, how should the same be regulated. Although in any system of international and national human rights it is recognized that freedom of expression can be restricted, such restrictions should be to a very limited nature and should be made with great care and must be in accordance with the International Covenant on Civil and Political Rights (ICCPR) of which Article 19 is reflected in Article 18 of the Constitution of the United Republic of Tanzania which has been cited above.

2.0 Legal Protection of the Right to Freedom of Expression

The right to freedom of expression is guaranteed under article 18 of *The Constitution of the United Republic of Tanzania, 1977 (as amended)*; and provisions under other international legal instruments including article 19 of *The Universal Declaration of Human Rights (UDHR)* to which Tanzania is a signatory, which has pointed out that freedom of expression can be exercised through any media, thus the Internet, as a new medium, is also included; article 19 *The International Covenant on Civil and Political Rights (ICCPR)* which also supports the view that freedom of expression can be exercised through any media including the Internet-based modes of expression, article 9 of *The African Charter on Human and People's Rights (ACHPR)*; *The United Nations Human Rights Council Resolution 13* which was adopted by the UN Human Rights Council on its twentieth session for promotion, protection and enjoyment of human rights on the Internet.

This resolution requires that the same rights that people have in offline environment must be protected in online environment as well, thus, it appears that the limitations on exercise of freedom of expression may also be applied in online environment. However, as the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has emphasized, due to the unique characteristics of the Internet, regulations or restrictions which may be deemed legitimate and proportionate for traditional media are often not

¹ See Dare, J, (2005), Cyberharassment and Online Defamation: a default form of Regulations? *Transformation journal*, Issue 11, at 7 retrieved from http://www.transformationsjournal.org/journal/issue_11/article_04.shtml (as accessed on 11-2-2014). See also, Lessig, L, (1996), The Zones of Cyberspace, *Stanford Law Review*, Vol. 48 at 1408. See as well, Johnson, D.R & Post, D, (1996), Law and Borders-The rise of Law in Cyberspace, *Stanford Law Review*, Vol. 48 at 1389.

² See Internet and Freedom of expression retrieved from <http://www.ifla.org/files/assets/faife/publications/ife03.pdf> (as accessed on 19-2-2014).

³ See Jorgensen, *op cit.*, at 5.

⁴ See TCRA Report on Internet and Data Services in Tanzania-A supply-Side Survey retrieved from <http://www.tcra.go.tz/images/documents/reports/InternetDataSurveyScd.pdf> at 6 (as accessed on 7-11-2013).

⁵ TCRA Report on Internet and Data Services in Tanzania-A supply-Side Survey retrieved from <http://www.tcra.go.tz/images/documents/reports/InternetDataSurveyScd.pdf> at 6 (as accessed on 7-11-2013).

⁶ See TCRA Report on Internet and Data Services in Tanzania-A supply-Side Survey, *supra* at 4.

⁷ See Dare, J, (2005), Cyberharassment and Online Defamation: a default form of Regulations? *Transformation journal*, Issue 11, at 10 retrieved from http://www.transformationsjournal.org/journal/issue_11/article_04.shtml (as accessed on 11-2-2014). See also, article 19 (3) of the ICCPR and article 30 of the Constitution of the URT.

so with regard to the Internet. Citing as an example in cases of defamation of individual's reputation, the Special Rapporteur has stated that given the ability of the individual concerned to exercise his/her right of reply instantly to restore the harm caused, the types of sanctions that are applied to offline defamation may be unnecessary or disproportionate.¹

3.0 Challenging Legal Issues on Freedom of Expression on the Internet

With the emergence of Internet, several legal issues have arisen. These include the issue of balancing freedom of expression with other rights and the issue of regulating freedom of expression in online environment. Although the right to freedom of expression is essential to a healthy and vibrant society, and is considered fundamental to an individual's moral and intellectual development, it is generally accepted in democratic societies that the exercising of the right to freedom of expression carries with it the responsibility to ensure that co-existing rights are not impinged.

3.1 Freedom of Expression and the Right to Privacy

The right to privacy is guaranteed by article 12 of the UDHR, article 17 of the ICCPR and article 16 of the Constitution of the United Republic of Tanzania. Article 12 of the UDHR provides:

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

Article 17 of the ICCPR is the reiteration of Article 12 of the UDHR and it provides;

- (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- (2) Everyone has the right to the protection of the law against such interference or attacks.

The term correspondence nowadays covers all forms of communication including via the internet, thus the right to private correspondence gives rise to a comprehensive obligation on the part of the State to ensure that e-mails and other forms of online communication are actually delivered to the desired recipient without interference or inspection by State organs or by third parties.²

Article 16 of the Constitution of the URT provides;

- (1) Every person is entitled to respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communications.
- (2) For the purpose of preserving the person's right in accordance with this Article, the State authority shall lay down legal procedures regarding the circumstances, manner and extent to which the right to privacy, security of his person, his property and residence may be encroached upon without prejudice to the provisions of this article.

Privacy can be defined as the presumption that individuals should have an area of autonomous development, interaction and liberty, a “private sphere” with or without interaction with others, free from State intervention and from excessive unsolicited intervention by other uninvited individuals³. The right to privacy entails the ability of individuals to determine who hold information about them and how that information is used.⁴ The principal areas of privacy protection include the right to be free of intrusion upon one's seclusion, right to be free of public disclosure of private facts, right to be free of being placed in a false light and right to prevent misappropriation of one's name and likeness.⁵ In *Hill v. NCAA*¹ the standard for establishing an invasion of

¹ See paragraph 27 of the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, (2011) retrieved from http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf (as accessed on 13-2-2014).

² See paragraph 57 of the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, (2011), retrieved from http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf (as accessed on 13-2-2014).

³ See paragraph 22 of the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, (2013) retrieved from http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegulaSession/Session23/A.HRC.23.40_EN.pdf (as accessed on 12-3-2014).

⁴ *ibid.*

⁵ See Privacy and Free Speech Issues on the Internet retrieved from <http://courses.ischool.berkeley.edu/i206/f97/GroupH/privacy.html> (as accessed on 11-2-2014). See also, Schutz, P & Michael, F, Privacy: What Are We Actually Talking About? A Multidisciplinary Approach at 1, in IFIP. (2011), *Privacy and Identity Management for Life*.

privacy was established. The court explained that three factors must be shown to allege invasion of privacy; firstly, there should be a legally protected privacy interest which include informational privacy and autonomy privacy, secondly, there should be a reasonable expectation of privacy in the circumstances, which is an objective entitlement founded on broadly based and widely accepted community norms and lastly, there should be conduct by the defendant constituting a serious invasion of privacy.

Despite the widespread recognition of the obligation to protect privacy, the specific content of this right was not fully developed by international human rights protection mechanisms at the time of its inclusion in the UDHR and ICCPR. Lack of explicit articulation of the content of this right has contributed to the difficulties in its application and enforcement, and since the right to privacy is a qualified right, its interpretation raises challenges with respect to what constitutes the private sphere and in establishing the notions of what constitutes public interest.² Also, the rapid and massive changes to communications and information technologies have irreversibly affected people's understanding of the boundaries between private and public spheres.³

While the Internet offers great opportunities for individuals to express their views instantaneously, at less cost, anonymously and with wide reach, it has been identified that there is inadequate protection of the right to privacy which is essential for individuals to express themselves freely. The Internet allows individuals to engage in public debate without revealing their real identities, yet, it presents new tools and mechanisms through which both State and private actors can monitor and collect information about individual communications and activities on the Internet. Such practices can constitute a violation of the Internet user's right to privacy and impede the free flow of information and ideas online by undermining people's confidence and security on the Internet.⁴

The Special Rapporteur has expressed his concern on actions taken by States against individuals communicating via the internet with broad justification that it is necessary for protecting national security or to combat terrorism. He has pointed out that while such ends can be legitimate under international human rights law, surveillance often takes place for political rather than security reasons in an arbitrary and covert manner. For example, States have used popular social networking sites such as Facebook to identify and to track the activities of human rights defenders and opposition members, and in some cases have collected usernames and passwords to access private communications of Facebook users.⁵ In Tanzania, in the year 2011 there were reports that officials monitored Internet content and activity and the ruling party targeted the popular news and public forum website Jamii forums. Also, Jamii forums moderators allege that the ruling party supporters also conduct cyberattacks on the site, overloading it with traffic to disrupt service.⁶

It has been noted that the right to privacy can be subjected to restrictions or limitations under certain exceptional circumstances.⁷ This may include State surveillance measures for the purposes of administration of criminal justice, prevention of crime or combating terrorism.⁸ With technological changes, there are increased opportunities for State Surveillance and interventions into individuals' private communications. "However, such interference is permissible only if the criteria for permissible limitations under international human rights law are met. Hence, there must be a law that clearly outlines the conditions whereby individuals' right to privacy can be restricted under exceptional circumstances, and measures encroaching upon this right must be taken on the basis of a specific decision by a State authority expressly empowered by law to do so, usually the judiciary, for the purpose of protecting the rights of others, for example, to secure evidence to prevent the commission of a crime, and must respect the principle of proportionality".⁹

Between the right to privacy and the right to freedom of expression, there are tensions as for example when

¹ 865 P. 2d 633, 641 (Cal. 1994) extracted from Stohs, B, (2004), Privacy, Free Speech & the Garden Grove Cyber Cafe Experiment, *Duke Law & Technology Review*, No 12, at 10 retrieved from <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1116&content=dltr> (as accessed on 10-2-2014).

² See paragraph 21 of the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, (2013), retrieved from http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegulaSession/Session23/A.HRC.23.40_EN.pdf (as accessed on 12-3-2014).

³ *ibid.*

⁴ See paragraph 53 of the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, (2011), retrieved from http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf (as accessed on 13-2-2014).

⁵ See paragraph 54 of the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, (2011), retrieved from http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf (as accessed on 13-2-2014).

⁶ See <http://www.freedomhouse.org/report/freedom-press/2012/tanzania> visited on 11-2-2014.

⁷ See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, (2011), *supra* at paragraph 59.

⁸ *ibid.*

⁹ *ibid.*

information considered to be private is disseminated through the media.¹ In this sense, article 19 (3) of the ICCPR provides for restrictions on freedom of expression to protect the right of others, however as it has been pointed above, the principle of proportionality must be strictly observed to avoid the danger of undermining freedom of expression. Although article 17 of the ICCPR does not contain a limitation clause, it is understood that this provision should be interpreted as containing elements of a permissible limitations test and the right to privacy should be subject to the same permissible limitations test as the right to freedom of movement. The test includes inter alia the following elements:

- (a) any restriction must be provided by law;
- (b) the essence of human rights is not subject to restrictions;
- (c) restrictions must be necessary in a democratic society;
- (d) any discretion exercised when implementing the restrictions must not be unfettered;
- (e) for a restriction to be permissible, it is not enough that it serves one of the enumerated legitimate aims, it must be necessary for reaching the legitimate aims;
- (f) restrictive measures must conform to the principle of proportionality, they must be appropriate to achieve their protective function, they must be the least intrusive instrument amongst those which might achieve the desired result, and they must be proportionate to the interest to be protected.²

The Special Rapporteur has further stated that a number of States are introducing laws or modifying existing laws to increase their power to monitor Internet users' activities and content of communication without providing sufficient guarantees against abuse. Also, several States have established a real-name identification system before users can post comments or upload content online, this can compromise their ability to express themselves anonymously, particularly in countries where human rights are frequently violated.³ While Privacy laws are important in protecting the private affairs of individuals, they should not be misused to deny discussion of matters of public concern. However, there is no doubt that existing legal provisions do not provide sufficient safeguards against privacy invasion on the Internet. Generally, the right to privacy and freedom of expression do interrelate because the right to privacy is often understood as an essential requirement for the realization of the right to freedom of expression.⁴ Thus, undue interference with individuals' privacy can both directly and indirectly limit the free development and exchange of ideas.

3.2 Freedom of Expression and Defamation

Defamation⁵ is defined as an intentional false communication, either published or publicly spoken, that injures another's reputation or good name.⁶ Defamation flows from publication or communication of information and it consists of ingredients which are publication of a statement, such statement makes reference to the plaintiff, a statement is communicated to some person or persons other than the plaintiff himself, a statement reaches the plaintiff and it causes actual or presumed damage to the plaintiff. When defamation occurs in Internet medium it encounters similar ingredients with a slight difference that it occurs when defamatory imputation is published in electronic form.⁷

The exercise of freedom of expression may in some instances result into reputational injury and most defamation claims arise from exercising the right to freedom of expression. In the online environment, the ability of users on social networking websites to blog, comment and message provides plenty opportunities to publish

¹ The crucial issues have revolved around the question of what limitations ought to be imposed upon freedom of expression in order to reconcile that interest with other individual and social interests sought by the good society. See, Heyman, S.J, (1983), Note, Content Regulation and the Dimensions of Free Expression, *Harvard Law Review*, Vol.96 at 1857. See also Wacks, R, (2010), *Privacy-A very short Introduction* at 83, 90& 94.

² See paragraphs 27, 28 &29 of the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, (2013), retrieved from http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegulaSession/Session23/A.HRC.23.40_EN.pdf (as accessed on 12-3-2014). See also, Schutz, P & Michael, F, Privacy: What Are We Actually Talking About? A Multidisciplinary Approach at 5, in IFIP. (2011), *Privacy and Identity Management for Life*.

³See paragraph 55 of the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, (2011), retrieved from http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf (as accessed on 13-2-2014).

⁴ Privacy law and law sustaining a free press are mutually supportive as they are both vital features of the basic system of individual right. See Wacks, R, (2010), *Privacy-A very short Introduction* at 92. See also, Heyman, S.J, (1983), Note, Content Regulation and the Dimensions of Free Expression, *Harvard Law Review*, Vol.96 at 1864.

⁵ Defamation may take a form of libel, being in permanent form or expressed in a mode of communication capable of being comprehended visually, or slander, being in a non-permanent form, expressed in spoken words or some other transitory form such as gestures or non-verbal sounds such as hissing. See, Svantesson, D, B, (2009), the right of reputation in the Internet era, *International Review of Law, Computers & Technology*, Vol. 23, No.3 at 177.

⁶ See Black's Law Dictionary, (6th Edition), 1990.

⁷ See Sharma, V, (2011), *Information Technology Law and Practice*, (3rd Edition) at 418.

false statements that damage the reputation of their targets.¹ Thus, the making of such statements may legally give rise to civil liability. However, it has been pointed out that if the target of defamation is a public figure, he must prove that the defendant acted with malice but if the target is not a public figure, but the statement involved a matter of public concern, the plaintiff must prove that the defendant acted with negligence concerning its falsity.² On the other hand, it has been argued that the only consequence of defamatory speech on the Internet should be the requirement to post a retraction because it is easy to post a retraction on the Internet.³

The possibility of an abusive and defamatory behaviour to occur in online environment is intensified by the unique anonymity nature of computer-mediated communication which tends to have a powerful, disinhibiting effect on behaviour where people allow themselves to behave in ways different from ordinary everyday life.⁴ The anonymity nature of the Internet raises issues in online defamation including how to identify the perpetrator and the degree to which Internet Service Provider should be held accountable for facilitating the defamatory activity.⁵ Furthermore, the immediacy and spontaneity of computer-mediated communication in which messages are often sent in speed and in the heat of the moment lead parties to say things they would not normally commit to writing but also would in fact not say in face to face interaction with the other party.⁶ On the Internet, a defamatory statement can be instantaneously available throughout the world. Also increased interaction on the Internet can lead to an increase in disputes arising from different cultural interpretations of rights and responsibilities particularly where they involve freedom of expression and individual reputation.

Internet provides an ideal platform from which to abuse others with minimal physical risk and inconvenience to oneself and with little call for accountability as it can be seen in the case of **Cullen v. White**⁷ where defamation was conducted online but the plaintiff faced difficulties in enforcing right to his personal reputation. In this case, White was defaming Cullen on the Internet and when Cullen approached the Federal Police seeking their assistance in bringing an end to White's offensive behaviour he was advised that there was little they could do since there was no legislation that dealt specifically with this form of cyberstalking or cyberslandering and, as White had not physically attacked Cullen, the police had no power to apprehend him on criminal charges. The issue was further complicated by the fact that White did not reside in Australia where Cullen lodged his claim and that if he had done so there could have been the possibility for police intervention. Furthermore, there was a challenge in enforcement of the right due to the fact that fundamental differences in the law of defamation between the United States and Australia mean that the Western Australian judgement is unlikely to be recognised in the United States and because the key mechanisms designed to balance the competing interests of freedom of expression and individual reputation, that is the law of defamation is radically different in the United States in comparison to Australia. Due to these challenges, individuals in Cullen's situation are effectively denied any practical form of relief from online defamation. The difficulties Cullen faced in reaching a suitable outcome were to a large extent caused by the fact that White was a resident of the United States where it is unlikely that foreign defamation judgement that offend constitutional rights will be enforced.

In Tanzania, the situation like this may face individuals who are defamed in online environment because there is no legislation that deals with online defamation and by the fact that defamation laws are territorial, thus what might be claimed to be defamatory in Tanzania might not be the same in other States and the issue of enforcing judgement might as well pose difficulties in enforcing one's right to personal reputation.⁸ Therefore, given the level of defamation that may be present in online environment and the difficulties in enforcing the right that arise to users such as Cullen, it could be assumed that critical attention would be focused on the impact of such behaviour on the cyberspace. Traditionally, the law of defamation has been used to resolve disputes involving the competing rights of freedom of expression and protection of reputation. However,

¹ See Viscounty, P, et al, Social Networking and the Law: Virtual Social Communities are creating real legal Issues retrieved from <http://apps.americanbar.org/buslaw/blt/2009/-03-04/viscounty.shtml> (as accessed on 16-2-2014).

² See Fisher, W, (2001), Freedom of Expression on the Internet retrieved from <http://cyber.law.harvard.edu/ilaw/speech/> (as accessed on 10-2-2014).

³ See Privacy and Free Speech Issues on the Internet retrieved from <http://courses.ischool.berkeley.edu/i206/f97/GroupH/privacy.html> (as accessed on 11-2-2014).

⁴ See Dare, J, (2005), Cyberharassment and Online Defamation: a default form of Regulations? *Transformation journal*, Issue 11, at 3 retrieved from http://www.transformationsjournal.org/journal/issue_11/article_04.shtml (as accessed on 11-2-2014).

⁵ See Background paper on Freedom of Expression and Internet Regulation, (2001) at 6, retrieved from <http://www.article19.org/data/files/pdfs/publications/freedom-of-expression-and-internet-regulation.pdf> (as accessed on 7-3-2014).

⁶ See Dare, *loc cit*.

⁷ [2003] WA Supreme Court 153 as extracted from Dare, *loc cit*.

⁸ Although the Reciprocal Enforcement of Foreign Judgments Act provides for the reciprocal enforcement of foreign judgments as between Tanzania mainland and foreign countries, this law can not help victims of online defamation as it is applicable in judgments which result from offline disputes, and applies to a country which may be covered by order given by the President, directing that the judgment from such particular country be registered in Tanzania. See Cap 8 R.E 2002.

resolving such disputes in an online environment presents unique difficulties particularly when right of freedom of expression which are often identified as synonymous with the Internet are challenged. Furthermore, evidence suggests that the increasing internationalization of the Internet is vigorously challenging the appropriateness of traditional laws designed by and for the citizens of individual nations to resolve disputes involving international parties as it seen in the case discussed above.¹ On the other hand, it has been argued that defamation law does not work well to protect reputations rather; it prevents the dialogue and debate necessary to seek the truth. Instead of having defamation law which discourages speech and writing, and suppresses information that would not be found defamatory if it went to court, more speech and more writing is considered to be the answer to the problem as Internet allows the individual to respond in a timely fashion, with minimal expense and without danger of inhibiting robust debate.² However, the right of reply argument does not seem to be suitable solution because it does not in any way prohibit the offending party from continuing their attacks as it is observed that many websites provide mechanisms for users to redress defamatory statements for example by giving users the ability to delete comments while not affirmatively assuming the responsibility of controlling content.³

Determining place of publication and applicable jurisdictional laws in online defamation are other dilemmas. This issue was addressed in the case of *Dow Jones & Company Inc. v. Gutnick*⁴ which concerned an allegedly defamatory article published online. The court applied the principles based on Gutnick's submission which relied on established common law principles which find that publication occurs in the place where it is received and comprehended by a person other than the publisher and the plaintiff. That is, when the material sued for appeared on the appellant's website and was downloaded⁵. The court's position was in contrast to Dow Jones submission which stated that the unique nature of the internet called for a radical departure from this principle, which would recognise publication as taking place at the point of upload. This means, the appeared articles would be deemed to have been published where their servers are located. Furthermore, since the content was lawful at the point of upload in the United States, any attempt to enforce local jurisdiction by an Australian court would act to inhibit the Internet as a forum for transnational discourse. However, the court rejected this submission and found that the reputation is damaged when the defamatory publication is comprehended by the reader, listener or observer.⁶

Defamation is considered to be one of limitations to freedom of expression whereby in some countries criminal defamation laws still exist to protect public figures from injury to their reputations.⁷ These laws limit freedom of expression and are frequently abused in cases where there is no public interest at stake.⁸ International Human Rights institutions have recommended that such laws should be abolished and replaced with civil defamation laws. However, civil defamation laws can also be misused to censor criticisms and debate concerning public issues, thus international human rights bodies have stated that civil defamation laws should observe the principles that public bodies should not be able to bring defamation actions, truth should always be available as a defence, politicians and public officials should have to tolerate a greater degree of criticism, publications regarding matters of public interest which are reasonable in all circumstances should not be considered defamatory and damages awards should take into account alternative remedies such as apologies and corrections⁹. While champions of freedom of expression requires that individuals should exercise the right to freedom of expression without limitations, the ICCPR has pointed out that limitation on exercise to freedom of expression is essential in protecting reputation of others. Although the law of defamation aims at balancing the two often competing rights which are; protection of the reputation of individuals and organizations and protection of freedom of expression, without a careful balancing of rights, defamation laws can damage freedom of expression,¹⁰ and while critics of Internet regulation focus on the importance of free speech in a democratic society and on the potential chilling effect defamation actions may have on the public sphere, they fail to

¹ See Dare, J, Online Defamation: A Case Study in Competing Rights, at 6, retrieved from <http://www.mcc.murdoch.edu.au/cfel/docs/Julie-Dare-FV.pdf> (as accessed on 11-2-2014).

² See Dare, *op cit.*, at 18.

³ See Dare *op cit.*, at 22. See also, Viscounty, P, et al, Social Networking and the Law: Virtual Social Communities are creating real legal Issues retrieved from <http://apps.americanbar.org/buslaw/blt/2009/-03-04/viscounty.shtml> (as accessed on 16-2-2014).

⁴ (2002) HCA 56 as extracted from Dare (2005) *op cit.*, at 7. The decision in this case was the first to determine place of publication and consequently which jurisdiction's laws apply for documents published online.

⁵ *ibid.*

⁶ *ibid.*

⁷ See Freedom of Expression, a Study Guide retrieved from http://www.hrea.org/index.php?base_id=147 (as accessed on 10-2-2014).

⁸ See Freedom of Expression, a Study Guide retrieved from http://www.hrea.org/index.php?base_id=147 (as accessed on 10-2-2014).

⁹ *ibid.*

¹⁰ See Dare, J, Online Defamation: A Case Study in Competing Rights, at 5, retrieved from <http://www.mcc.murdoch.edu.au/cfel/docs/Julie-Dare-FV.pdf> (as accessed on 11-2-2014).

acknowledge that defamatory and abusive behaviour as White engaged in can also be used to effectively stifle free speech.¹

3.3 Freedom of Expression and Children Protection

Children protection has been a concern of both international and national legal framework.² Under both international and national legal instruments a child is defined as a person below the age of eighteen years.³ However, the law of a specific State may provide that majority age is attained earlier. The exercise of freedom of expression in the Internet has pose a threat to children protection due to the fact that in the Internet individuals are free to post whatever material whether obscene or not. Children using internet may download sexual or violent material which is easily accessed, copied or downloaded and communicated. Parents are concerned about their children gaining access to sexually explicit materials; however, the question that arises is as to how the law can restrict children's access without restricting the access of willing adult.⁴

In protecting children from bad information the Special Rapporteur has stated that while upholding the right to freedom of expression, governments have a duty to protect children from information that could undermine their dignity and development, and that they should establish protective mechanisms. Thus, in an attempt to protect children in the online environment, the United States passed several legislations which however were challenged as it will be discussed hereunder. In 1996 the United States Congress passed a law⁵ which criminalized the knowing transmission over the Internet of obscene or indecent messages to any recipient under 18 years of age and prohibited the knowing sending or displaying to a person under 18 any message that in context depicts or describes, in terms patently offensive as measured by a contemporary community standards, sexual or excretory activities or organs. The Act was challenged through the case of American Civil Liberties Union v. Janet Reno, Attorney- General of the United States⁶ (ACLU v. Reno I) where the District Court when entering the verdict observed that communications over the Internet do not invade an individual's home or appear on one's computer screen unbidden. Users seldom encounter content by accident. A document's title or a description of the document will usually appear before the document itself takes the step needed to view it, and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document and that almost all sexually explicit images are preceded by warnings as to the content. It was concluded that this Act is unconstitutional as it will undermine the substantive, speech enhancing benefits that have flowed from the Internet...and that the Constitution denies Congress the power to regulate protected speech on the Internet.⁷ On appeal, the Supreme Court affirmed the district court's decision and accepted its conclusion that the CDA places an unacceptably heavy burden on protected speech, and it held that although the government has an interest in protecting children from potentially harmful materials, the CDA pursues that interest by suppressing a large amount of speech that adults have a constitutional right to send or receive.⁸

Generally, the Act was struck out for unconstitutionality on several grounds *inter alia*, its references to indecent and patently offensive messages were unconstitutionally vague, it failed to exempt from its prohibitions sexually explicit material with scientific, educational or other redeeming social value, it could not be justified as a time, place and manner regulation because it restricted speech on the basis of its content and lastly its supposed objectives could be achieved through regulations less restrictive of speech, that is through the use of technology such as blocking.⁹

In 1998, the US Congress came out with another enactment¹⁰ as a second attempt to regulate the dissemination to minors of indecent material on the Internet. This law obliged commercial Web operators to restrict access to material considered harmful to minors.¹¹ Material harmful to minors was defined as;

¹ See Dare, J, (2005), Cyberharassment and Online Defamation: a default form of Regulations? *Transformation journal*, Issue 11, at 8 retrieved from http://www.transformationsjournal.org/journal/issue_11/article_04.shtml (as accessed on 11-2-2014).

² Internationally, there is the Convention on the Rights of the Child, 1989 whereas at national level, several laws offer children protection including the Law of the Child Act, (2009) and the Law of Marriage Act, 1977.

³ See article 1 of the Convention on the Rights of the Child, 1989 and the section 4 of the Law of the Child Act, (2009).

⁴ See Volokh, E. Freedom of Speech in Cyberspace from the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex retrieved from <http://www2.law.ucla.edu/volokh/listener.ntm> (as accessed on 13-2-2014).

⁵ The law is known as the Communications Decency Act (CDA).

⁶ 929 F Supp 824 (E.D. Pa. 1996), extracted from Sharma, V, (2011), *Information Technology Law and Practice*, (3rd Edition) at 396.

⁷ See Sharma *op cit.*, at 397. See also, Developments in the Law-The Law of Cyberspace (1999) (author not identified), *Harvard Law Review*, Vol. 112 at 1581.

⁸ See Sharma, *op cit.*, at 398.

⁹ See Fisher, W, (2001), Freedom of Expression on the Internet retrieved from <http://cyber.law.harvard.edu/ilaw/speech/> (as accessed on 10-2-2014). See also, Smith, B.L, (2001), the third Industrial Revolution: Policy making for the Internet, *Columbia Science & Technology Law Review*, Vol. 3 at 22.

¹⁰ The Child Online Protection Act (COPA).

¹¹ See Smith, *loc cit.*

“Any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that-

- (a) The average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
- (b) Depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
- (c) Taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.¹

This law was again challenged through the case known as **American Civil Liberties Union v. Janet Reno, Attorney-General of the United States**² (**ACLU v. Reno III**) where plaintiffs sought an injunction to prevent its enforcement and the court found that the Congress had exceeded its constitutional authority. The critical defect of COPA was its reliance upon the criterion of contemporary community standards to determine what kind of speech is permitted on the Internet. The District Court held that COPA violates the Constitution and it imposes a burden on speech that is protected for adults and because the government could not prove that COPA is the least restrictive means available to achieve the goal of restricting the access of minors to “harmful to minors” material.³ On appeal, the Circuit Judge observed:

“This appeal presents a conflict between one of society’s most cherished rights—freedom of expression—and one of the government’s most profound obligations—the protection of minors.”⁴

The Court of Appeal held that because the standard by which COPA tests whether material is harmful to minors is based on identifying contemporary community standards, the inability of Web publishers to restrict access to their Websites based on geographic locale of the site visitor imposes an impermissible burden on constitutionally protected First Amendment speech. Furthermore, COPA violates the First Amendment because there is still no effective way to prevent minors from obtaining prohibited speech without also deterring and burdening access by adults. It was further held that because the material posted on the Web is accessible by all internet users worldwide and because current technology does not permit a Web publisher to restrict access to its site based on geographical locale of each particular user, COPA essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state’s community standard in order to avoid criminal liability.⁵

In Tanzania, no any legislative attempt has been made to protect children in the online environment. The Law of the Child Act⁶ which is responsible for protecting children’s rights does not contain any provision relating to children’s protection in online environment rather; it broadly imposes an obligation to parents to protect children from *inter alia*, exposure to physical and moral hazards.⁷ Generally, courts’ views on protecting children on the Internet have been that government should use less restrictive alternative such as blocking and filtering software that restricts only children than a total ban.

4.0 Conclusion

A clear balance between the right to freedom of expression and other rights such as right to privacy and children’s protection is required in order to ensure that the exercise of the former right does not affect the latter. Although the ICCPR requires States to take positive steps to ensure that rights, including freedom of expression are respected; Tanzania, has no any specific law that has been enacted to safeguard this right despite occurrence of number of incidences which infringe it.⁸ Moreover, the Constitution of United Republic of Tanzania is silent on the medium through which the right to freedom of expression can be exercised. Although the Constitution guarantees the right to freedom of expression, it does not explicitly provide for the freedom on the Internet. The

¹ See Sharma, V, (2011), *Information Technology Law and Practice*, (3rd Edition) at 399.

² 31 F Supp 2d 473 (E.D. Pa. 1999) extracted from Sharma, *loc cit*.

³ See Sharma, V, (2011), *Information Technology Law and Practice*, (3rd Edition) at 400.

⁴ See Sharma *op cit.*, at 401.

⁵ *ibid*.

⁶ No. 21 of 2009.

⁷ See section 9 (3) (a).

⁸ See For example, in 2005 the government banned all media entities from publishing advertisements or announcements coming from a civil society known as HakiElimu claiming that the advertisements which focused on primary and secondary education development programs were disparaging public effort and mocking the image of national education performance and on 2007 the Prime Minister’s office made statement reminding them that their advertisements and publications that are being published via radio, television and other media had been prohibited by government being contrary to the public interest. See NGO Report on the implementation of the International Covenant on Civil and Political Rights, at 37 extracted from <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/TanzanianNGOCoalition96.pdf> (as accessed on 11-2-2014).

draft Constitution of the United Republic of Tanzania also does not take into account this new medium.¹ With changes in technology and society there are constitutional values that need to be redefined so as to cope with the changes.

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