INPUT OF THE EACJ IN DEVELOPING THE JURISPRUDENCE ON FREEDOM OF THE PRESS IN EAST AFRICA

ANALYSIS OF *MCT, LHRC, THRDC v. A.G OF TANZANIA* ON THE MEDIA SERVICES ACT, 2016

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Abstract

The Parliament of the United Republic of Tanzania enacted the Media Services Act on 5 November 2016 and the President assented to it two weeks later. The Act was enacted largely for the purposes of promoting professionalism in the media industry, regulating media services in the country, establishing the Journalist Accreditation Board and establishing the Media Services Council. Media stakeholders and Civil Society Organisations criticized the Act, arguing that it was meant to muzzle media freedom in the country contrary to the prevailing human rights standards. In January 2017 these organisations filed a case at the East African Court of Justice (EACJ) challenging the said law. After hearing both parties, i.e., the Applicants and the State Attorneys who represented the Attorney General of Tanzania, on 28 March 2019 the First Instance Division of the EACJ made a judgement to the effect that the

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Tanzania Media Services Act unjustifiably infringe the freedom of expression which is one of the human rights standards Partner States to the East African Community are required to respect and protect. This article provides critical analysis of the decision.

Key words: *Freedom of expression, press freedom, criminal defamation, sedition, proportionality test.*

1. INTRODUCTION

Efforts to have laws on access to information and media services in Tanzania started over a decade ago. After a long debate, both outside Parliament and within it, the Tanzanian Parliament passed into law the Access to Information Act[1] on September 7, 2016 and the Media Services Act[2] on November 5, 2016. Before these laws were passed the concern of media stakeholders and Civil Society Organisation (CSOs) had always been that the law enacted should actually reflect the rights guaranteed in the Constitution of the United Republic of Tanzania, especially by entrenching media freedom and access to information. No sooner had these laws started operating than critics started arguing that the Acts would negatively impact on press freedom and that they were passed hastily, without proper discussion and taking into account the broader interest of safeguarding media freedom and access to information in the country.[3] For instance, one of the key points of

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[1] Act No. 6 of 2016.
[2] Act No. 12 of 2016.
[3] See, Freedom House, "Tanzania Freedom of the Press 2016", available at https://freedomhouse.org/report/freedom-press/2016/tanzania (accessed 6 April 2019).

contention is the power given to the government to shutter media businesses that violate the conditions of their permits.

In January 2017 a case was filed in the East African Court of Justice by the Media Council of Tanzania (MCT), the Legal and Human Rights Centre (LHRC) and the Tanzania Human Rights Defenders Coalition against the Attorney General of Tanzania challenging the provisions of the Media Services Act, 2016. Before we could proceed to examine the Court's decision let us review, albeit briefly, the history of the enactment of the Media Services Act to shade light on the protracted process involved before the law was enacted.

2. ENACTMENT OF THE MEDIA SERVICES ACT

Since 2006 the requirement for law governing media was argued by Members of Parliament (MPs) who saw the need to protect journalists when performing their professional duties. An examination of MPs discussions in Parliament also revealed some who suggested that the Government enact a law with rigid sanctions against journalists and media owners who unreasonably misuse their power by attacking public figures.[4] In October 2006, the Government published on its website a draft Freedom of Information Bill and called for opinions from stakeholders. The draft bill was intended to include almost everything related to media services and access to information. It provided access to information on the one hand, and carried provisions restricting access to such information, on the other.

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[4] Zeise, A., "Media and the State: An Overview of the Media Legislation in Tanzania", FES Working Paper, August, 2010, at p. 4, available at http://www.fes-tanzania.org/files/fes/pdf/Media%20and%20the%20State%20-%20Annika%20Zeise.pdf (accessed 8 April 2019).

Journalists and other media practitioners in a day workshop that was held in Dar es Salaam on 13 December 2006 rejected the draft bill. The reason for rejecting the bill was to allow time for undertaking public consultation, which was granted by the Government. As a result, the civil society formed a Coalition[5] on the Right to Information (CORI), led by the MCT. The process of drafting the bill was completed in February 2007, in which CORI recommended two separated bills (the Freedom of Information Bill and the Media Services Bill).[6] Thereafter, the process collapsed, with the Government remaining silent, despite numerous requests to have new bills prepared and tabled in the Parliament.

In the 19th session of the National Assembly under the fourth phase government there was speculation from the Media that the Government was expected to table the two bills (Access to Information and Media Services bills) in Parliament, without informing the media and CSOs stakeholders.[7] These rumors turned out to be true as the Government rushed the two bills to the Parliament in March 2015. The two bills were among twenty one

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[5] Coalition members include MISA -Tanzania, the Tanganyika Law Society (TLS), the Legal and Human Rights Centre (LHRC), the Media Owners Association of Tanzania (MOAT), the Tanzania Media Women's Association (TAMWA), the Tanzania Gender Networking programme (TGNP), the Tanzania Legal Education Trust (TANLET), and the National Organisation for Legal Assistance (NOLA) and the Commonwealth Human Rights Initiatives (CHRI).

[6] See, Human Rights Initiative, "The Stakeholders Reject the Draft Freedom of Information Bill", available at http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/tanzania/stakeholders_reject_draft_foi_bill.pdf (accessed on 5 April 2019).

[7] See the headings in various newspapers: Kiberege, J., "Much awaited Media Bill to be tabled next year", *The East African*, 21 March 2015; Khamis, M., "Puzzle over Media Services Bill", *The Citizen*, 21 March 2015; Mgeni, H., "Opposition: We want Media Services Bill now", *Tanzania Today*, 21 March 2015, all paper articles available at http://www.tanzaniatoday.co.tz/news/media-services-bill-to-be-tabled-in-parliament (accessed 27 March, 2019).

(21) bills that the Government wanted the 19th Session of Parliament to approve, and ensure President Jakaya Kikwete signs them into laws before the end of his term in office, following the general elections in October, 2015.

On the 1st of April 2015, the two bills were presented for the first reading—*The Access to Information Bill, 2015* and *The Media Services Bill, 2015.* Among other things, The Media Services Bill required journalists to be licensed or accredited. This issue has already been decided by some regional human rights courts to be against human rights standards.[8] Secondly, it established a statutory Media Services Council to replace the self-regulatory body, the Media Council of Tanzania (MCT) and; thirdly, it introduced severe sanctions for a number of media-specific offences and allowed for the banning of newspapers.

In another development, seven bills were scheduled for debate in the last session of the 10th Parliament between May and July 2015 before the general elections were held. While Access to Information Bill, 2015 was on the order paper for the second reading, the Media Services Bill was not listed. Media and CSOs representatives and officials of the Ministry for information, Youth Culture and Sports (MIYCS), and the Ministry of Constitutional and Legal Affairs (MoCLA) met with members of two Parliamentary Standing Committees (Community Development and some members of the Constitutional, Legal Affairs and Governance) on 22nd of June 2015 in Dodoma. Civil society stakeholders raised their concern for not participating in the bill making process. On the one hand, while the Government was defending the bill, the opposition was opposing it. The then Minister for the MIYCS, Dr.

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[8] See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*; Inter American Court of Human Rights Advisory Opinion OC-5/85 of November 13, 1985.

Fenella Mukangara stressed that both bills were meant to set a basis for recognizing rights, duties and responsibilities of journalists as professionals. Meanwhile, the Shadow Minister, Mr. Joseph Mbilinyi argued that the bills, if passed, had a potential to "butcher" media freedom in Tanzania."[9] In the end, the committee chairperson agreed to advise the Speaker of the National Assembly that the committee could not submit a bill which does not include contributions from stakeholders".[10] Both bills were finally withdrawn. The then Minister for State in the President's Office – Special Duties – Prof. Mark Mwandosya told Parliament on 26th of June 2015 that the move has been taken to accommodate more contributions from stakeholders.[11]

The 2015 general election came and passed. The new administration under the fifth phase government promised to continue with the process of finalizing the two bills. The then Minister for ICAS, Hon. Nape Mnauye said that while his Ministry was dealing with the Media Services Bill, the bill on Access to Information was being dealt with by MoCLA. It was said that this was a deliberate decision by the Government because the two laws would have different target audiences. Finally, the Minister

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[9]Domasa, S., "Press and government in TZ clash over 'stringent' media bills", available at ww.afrikareporter.com/press-and-govt-in-tz-clash-over-stringent-media-bills/ (accessed 3 April 2019).

[10]The Media Council of Tanzania, "Government Shelves Access to Information Bill", available at http://www.mct.or.tz/index.php/component /content/article/42-news/rokstories/367-government-shelves-access-to-information-bill. (accessed 3 April 2019).

[11] Media Council of Tanzania, "An in-depth accountability review of the cybercrime act, Statistics act, and Access to Information and Media Services bills: Stakeholders' perspective on the law making power, and implications for CSOs space in Tanzania; for Accountability in Tanzania programs", available at http://mct.or.tz/index.php/42-news/rokstories/367-government-shelves-access-to-information-bill (accessed 4 April 2019).

stated that his plan was to finalize the bill preparation process in the 2016/2017 financial year. According to the Minister, media stakeholders mostly representatives of Editors Forum were consulted. Hon. Minister, expressed readiness to accommodate contributions from the media stakeholders in preparation of the new bill. He stated that "I will make sure that we accommodate their contributions so that we won't be criticized again."[12] Despite this promise the Media Services Act, 2016 was passed without taking into consideration adequately proposals and inputs from media stakeholders. The Act was passed by Parliament on 5 November 2016 and signed by President Magufuli two weeks later. Being aggrieved by the contents of the law the Media Council of Tanzania, Legal and Human Rights Centre and Tanzania Human Rights Defenders Coalition filed a petition at the East African Court of Justice on 11th January 2017 to challenge the newly passed law.[13]

3. THE EAST AFRICAN COURT OF JUSTICE

The East African Court of Justice ("EACJ") is one of the organs of the East African Community ("EAC") established under Article 9 of the Treaty for the Establishment of the East African Community ("The Treaty"). The Court is a judicial body which is vested with the role of ensuring adherence by the Partner States to the Treaty and other laws established by the EAC. The Treaty provides, *inter alia*, that, "any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive,

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[12]This author conducted an interview with Minister Nape Mnauye in Dodoma during the 2016/2017 Budget Session.

[13]See the case of *Media Council of Tanzania (MCT), Legal and Human Rights Centre (LHRC) and Tanzania Human Rights Defenders Coalition (THRDC) v. Attorney General of Tanzania*, Reference No. 2 of 2017.

decision or action is unlawful or is an infringement of the provisions of the Treaty."[14] There is no requirement of exhaustion of domestic remedies before reaching to the Court. On the basis of the aforementioned provision (Article 33(1) of the Treaty) the three non-governmental organisations named above, filed a case before the EACJ challenging the provisions of the Tanzania Media Services ("the Act"). The main contention of the Applicants was that the Act contains many provisions/sections which are unjustified restrictions on the freedom of expression and thus freedom of the press, which is contrary to the provisions of the Treaty under Article 6(d); Article 7(2); and Article 8(1) (c). According to the Treaty, Partner States are required to respect and observe the principles which are contained in these Articles. For purpose of clarity these principles which were said to have been violated by Tanzanian law provide as follow:

Article 6 (d): The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include…good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

Article 7(2): The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.

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[14] Article 33 (1) of the Treaty for the Establishment of the East African Community of 1999 (as amended on 14th December, 2006 and 20th August, 2007).

Article 8(1) (c): The Partner States shall …abstain from any measures likely to jeopardize the achievement of those objectives or the implementation of the provisions of the Treaty.

It was the argument of the Applicants that the following provisions of the Media Services Act (in their groups) violate the above principles:

(i) Section 7(3) (a), (b), (c), (f), (g), (h) (i) and (j).

These provisions limit media houses to issue information which is alleged to: “undermine” national security, lawful investigation; or “impede” due process of law.

(ii) Sections 13, 14, 19, 20, and 21.

The above provisions deal with a system of accreditation of journalists, powers and functions of the Journalists Accreditation Board and provide the process of accreditation of journalists.

(iii) Sections 35, 36, 37, 38, 39, and 40.

The listed sections of the Media Services Act create what is called “Criminal Defamation”.

(iv) Sections 50 and 54.

These two sections create offences relating to media services, including practicing journalism without accreditation and publication of false statement likely to cause fear and alarm.

(v) Section 52 and 53.

These sections deal with offences which are called "seditious offences" and list various such offences including, uttering any words with a seditious intention.

(vi) Sections 58 and 59.

Lastly, these two sections empower the Minister responsible for media to prohibit importation of any publication which in his absolute discretion would be contrary to the public interest or otherwise jeopardizes national security.

4. DECISION OF THE COURT

After hearing both parties, i.e., the Applicants and the State Attorneys who represented the Attorney General of Tanzania (Respondent), on 28th March 2019 the First Instance Division of the EACJ made a judgement to the effect that all the provisions above are in violation of Articles 6(d) and 7 (2) of the EAC Treaty, in the sense that they unjustifiably infringe the freedom of expression which is one of the human rights standards Partner States are required to respect and protect. The Court directed the Government of Tanzania "to take such measures as are necessary, to bring the Media Services Act, into compliance with the Treaty."[15] This means that, the Government is required to repeal the Media Services Act, 2016 or amend it in order to ensure that Tanzania complies with its EAC obligation of abstaining from any measure that jeopardizes the principles of

[15] See page 49 of the Judgement.

good governance, rule of law and acceptable human rights standards.

Before the determination of the provisions of the Media Services Act which were challenged by the Applicants, the Court reiterated its earlier decisions which laid down the basis for determination of cases such as the present case. The Court stated that Tanzania as a Partner State has obligations under the principles stated under Article 6(d), 7(2) and 8(1) (c). It made reference in the case of *Samuel Mukira v. The Attorney General of Uganda*[16] where the Court had the occasion to state that:

> [T]hese principles are foundational, core and indispensable to the success of the integration agenda, and were intended to be strictly observed. Partner States are not to merely aspire to achieve their observance; they are observing these as a matter of Treaty obligation.

Again, the Court cited the case of *Plaxeda Rugumba v. Attorney General of Rwanda*[17] in which it remarked that:

> We are of the firm view that the principles set out in Article 6(d) and 7(2) were not inscribed in vain. The jurisdiction of this Court to interpret any breach of those Articles was also not in vain, neither was it cosmetic. The invocation of the provisions of the African Charter on Human and Peoples Rights was not merely decorative of the Treaty but was meant to bind Partner States hence the words that Partner States must bind themselves to “the adherence to

[16] Reference No. of 2011.
[17] Reference No. 8 of 2010 at para 37.

> the principles of democracy, the rule of law…as well as the recognition, promotion and protection of the human and peoples' Rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

The Court, furthermore, made reference to its earlier decision in the case of *Burundian Journalists Union v. The Attorney General of Burundi*[18] in which it observed that "freedom of the press and freedom of expression are essential components of democracy". And that "democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions." The Court went ahead to state that "under Articles 6(d) and 7(2) of the Treaty, the principles of democracy must of necessity include adherence to press freedom…and a free press goes hand in hand with the principles of accountability and transparency which are also enshrined in Articles 6(a) and 7(2)."[19]

As stated, the Applicants' contention was that several provisions of the Tanzania Media Services Act, 2016 are violative of the freedom of expression and thus the fundamental principles of the EAC Treaty. The Government on the other hand argued that freedom of expression is not absolute; therefore, it can be limited by the law for justifiable objectives/reasons such as national interest, public order and protection of the rights of others. And thus, the impugned provisions of the Media Services Act are not inconsistent with freedom of expression as alleged but are in line with the spirit and purport of the Treaty.

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[18] Reference No. 7 of 2013.
[19] Judgement of the Court at page 27, para. 59.

In the determination of the controversy between the parties, the Court posed this question: "What is the test to be applied by this Court in determining whether a National Law [such as the Media Services Act] meets the expectations of the Treaty?"[20] The Court adopted the tests that are usually applicable in human rights cases in the determination of whether a certain conduct or law that limits fundamental rights and freedom is violative of human rights standards. Reference was made to the Canadian case of *R vs. Oakes*[21] where a three-part test was set out by the Supreme Court of Canada and adopted by the High Court of Kenya in *CORD v. The Republic of Kenya and Others*.[22] The EACJ paraphrased the tests and posed the following three questions (three-tier test) which guided the determination of the case:

(a) Is the limitation one that is prescribed by law? It must be part of a Statute, and must be clear, and accessible to citizens so that they are clear on what is prohibited;

(b) Is the objective of the law pressing and substantial? It must be important to the society; and

(c) Has the State, in seeking to achieve its objectives chosen a proportional way to do so? This is the test of proportionality relative to the objectives or purpose it seeks to achieve.

In applying these three tests to the dispute, the Court agreed with the submission of the Applicants that, if any provisions of the

[20] Id., para. 60.
[21] (1986) ISCR 103.
[22] High Court Petition No. 628 of 2014.

impugned Act (the Media Services Act) fails to pass any of the three tests, that failure will constitute a violation of the right to freedom of expression and press freedom. Let us now summarize the opinion and analysis of the Court against each of the six groups of the provisions as challenged by the Applicants.

4.1 Section 7 of the Act

For purpose of space constraint, the provisions of the Act will only be paraphrased here. Attempt has made to mention relevant pages and/or paragraphs of the Judgement. Section 7(3) (a), (b), (c), (f), (g) (h) (i) and (j) of the Media Services Act limit media houses to issue information which are alleged to: "undermine" national security and lawful investigation; "impede" due process of law or endanger safety of life of person; constitute "hate speech"; involve "unwarranted invasion" of the privacy; "infringe law commercial interests"; "hinder or cause substantial harm to Government"; "significantly undermines" the information holder's ability to give adequate and judicious consideration to a matter; "damage the information holder's position" in any actual or contemplated legal proceedings."

The Court applied the tests and held that all the provisions above fail the first test, for being vague, unclear and imprecise.[23] The Court stated that, to be considered as law the provisions have to be drafted with sufficient clarity to enable an individual to adapt his behaviour to the rules. The Court held that in Section 7(3) (a) (b),(f) (h), (i) and (j) which contain the words "undermine," "impede," "unwarranted invasion", "infringe lawful commercial interests," "hinder or cause substantial harm", "significantly

[23] Judgement of the Court at page 31, para. 66.

undermines" and "damage the information holders position" and which form the basis of the offences, are too vague to be of assistance to a journalist or other person, who seeks to regulate his or her conduct, within the law.[24] Paragraph (c) which prohibits hate speech was also adjudged to be vague and potentially too broad because the Act does not define what would constitute hate speech. All the above impugned provisions, the Court stated, fall short of clearly defining scope and extent of the respective content restrictions, to enable journalists and other persons to properly appreciate the limitation to the right to freedom of expression or to be clear on what exactly is prohibited.

This decision follows the modern precedent on human rights standards. For instance, the English House of Lords (Lord Bingham) in the case of *R (Gillan) v. Metropolitan Police* Comr[25] held the view that, since the exercise of power by public officials affects members of the public, it must be governed by clear and publicly-accessible rules of law. Otherwise the public would be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred.

In determination of other tests, the Court observed that over and beyond the first test, the Respondent (Attorney General) failed to establish either that there was a legitimate aim being pursued by the Respondent State in enacting the limitation to freedom of the press in the impugned section of the Act, neither they were able to establish that the said limitations are proportionate to any particular aim.[26] The Court remarked that the "the aim of the content restrictions in Section 7 is not self-evident, nor did the

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[24] Ibid., pages 31-32, para. 66.
[25] (2006) UKHL 12; (2006) 2 AC 307.
[26] Judgement of the Court, page 34 para. 75.

Respondent make specific submissions on the same."[27] In conclusion the Court held that the cited provisions of Section 7 of the Media Services Act are in violation of Articles 6(d) and 7(2) of the EAC Treaty.

4.2 Sections 13, 14, 19, and 21

The Applicants challenged Sections 13, 14, 19 and 21 which deal with a system of accreditation of journalists as also being in violation of the said Articles of the EAC Treaty. To be specific, Sections 13 and 14 deal with functions and powers of the Journalists Accreditation Board respectively. Section 19 provides the process of accreditation of journalists and prohibition to practice as a journalist unless one is accredited. Section 20 provides issuance of press card by the Board to an accredited journalist, and Section 21 is about the requirement for the Board to maintain a roll of accredited journalists.

In the determination of whether a system of mandatory accreditation to journalists is violative of the right to freedom of expression, the Court recalled its previous decision in the *Burundian Journalist* Case (cited above). In that case the Court acknowledged that accreditation per se is not objectionable. It could not find any aspect of the accreditation scheme under Articles 5-7 of the Burundi Press Law to be undemocratic or in violation of the right to freedom of the press. In the present case, after having said that accreditation per se is not objectionable,[28] the Court continued to hold that "in the instant reference also, we see nothing objectionable to either section 13 which deals with functions of the [Tanzania journalists Accreditation] Board or

[27] Id., pages 32-33 para. 68.
[28] Ibid., page 35, para 77.

section 14 which deals with powers of the Board."[29] Without any detail analysis or reasoning as to the difference between the Burundian law and the Tanzania Media Services Act regarding the issue of mandatory accreditation, the Court in the present case declared Section 19 which provides for mandatory accreditation of journalists in Tanzania to be violative of the press freedom. This makes a clear departure from its earlier decision. In that case the EACJ found it difficult to assess the Press Law *in abstracto*, and thus could not foresee how aspects of the law, such as the accreditation scheme, could be liable to arbitrary abuse in the absence of specific practical examples.

In my analysis I found it important to revisit the *Burundian Journalist* Case. According to the Burundi Press Law, the accreditation scheme required that a journalist hold a "press card" before they could practice their profession. A "press card" entitled the holder to access certain places; such as court rooms, areas reserved for journalists, and official or public events. The Court viewed the scheme as a "purely technical and administrative registration process."[30]The Court stated, "it was within the discretion of the National Communications Council to refuse or withdraw accreditation from journalists who "abuse[d] the facilities granted to them". In the absence of any evidence by the Applicant concerning the abuse of power by the Burundi's National Communication Council in issuing or withdrawing press cards, the Court declined to invalidate the provisions because of the Council's discretionary power. It reiterated that the freedom of the press has never been an absolute right in any democracy it can be limited under reasonable justification.[31]

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[29] Ibid.
[30] Para 91 of the Burundian Case.
[31] Id. para 92.

In a sharp contrast to the Burundian case, in the present case the Court's analysis started with the definition of a "journalist" and the term "mass media." The Applicants submitted to the Court that under the Media Services Act the definition of journalist is too broad "to provide sufficient provision to allow an individual to foresee what activities they are forbidden from performing without accreditation," especially taking into account the definition of a "mass media". The Court accepted this argument. Under Section 3 of the Act a journalist is defined as "a person accredited as a journalist under the Act, who gathers, collects, edits, prepares or presents news, stories, materials and information for a mass media service, whether an employee of media house, or a freelancer." And mass media is defined as "includes any service, medium or media consisting in the transmission of voice, visual data, or textual message to the general public." The Court was of the view that Section 19 is problematic when the three tier-test already identified above is applied because the definition of who is a journalist is too broad. The Court cited with approval the decision of the African Commission on Human and Peoples' Rights in the *Scanlen v. Zimbabwe*[32] and held that in the context of section 19 of the Media Services Act; it is not clear as to what the legitimate aims are in requiring accreditation of journalists.[33] The Court went ahead to adopt the view of the African Commission in which the Commission took the view that a system of compulsory accreditation of journalists did not pursue the legitimate aims of public order, safety and protection of the rights and reputation of others. In that case the Commission stated the grounds of public order, safety or protection of reputation of others are not adequate and are thus unnecessary limitation of the

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[32] Case No. 279/05 (2009).

[33] Judgement of the Court page 36, para. 80.

individual to practice journalism.[34] In conclusion the Court decided that Section 19 does not pass the three tier test and thus is violative of the Articles 6(d) and 7(2) of the EAC Treaty and likewise Sections 20 and 21 which flow from Section 19 are also violative of the said provisions of the Treaty.

Due to these conflicting opinions of the same Court as to the legal status of compulsory accreditation when measured against the human rights standards pertaining to freedom of expression, it is worth examining an authoritative decision cited by the African Commission in *Scanlen v. Zimbabwe* case (above). An important source of legal authority on the subject of licensing schemes is the Advisory Opinion of the Inter-American Court of Human Rights rendered in 1985.[35] The Costa Rican government approached the Court for an advisory opinion whether the system of compulsory accreditation for the practice of journalism may be compatible with Articles 13 and 29 of the American Convention on Human Rights which allow limitation of rights. The Inter American Court held that licensing was a restriction on freedom of expression. The ostensible purpose of licensing schemes is usually to ensure that the task of informing the public is reserved for competent persons of high moral integrity. The Costa Rica government argued that a requirement for journalists to become members of a *colegio* (association) was legitimate for three different reasons: first, because it was necessary for public order and the 'normal' way to regulate the profession in many countries; second, because it sought to promote higher professional and ethical standards, which would benefit society at large and ensure the right of the public to receive full and truthful information; and third, because

[34] Ibid.

[35] See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A. No. 5.

the licensing scheme would guarantee the independence of journalists in relation to their employers.

Responding to the argument that a licensing regime is simply the 'normal' way to regulate certain professions, the Court distinguished between journalism and, for example, the practice of law or medicine. In summary, the Court was of the view that in practice the power to distribute licences can become a political tool, used to prevent critical or independent journalists from publishing. For this reason, and simply because the right to express oneself through the mass media belongs to *everyone*, irrespective of qualifications or moral standing, licensing schemes for media workers are considered to be in breach of the right to freedom of expression. The Inter American Court stated in this Advisory Opinion that;

> It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, inter alia, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of freedom and independence of journalists. The compulsory licensing of journalists does not comply with the right to freedom of expression because the establishment of a law that protects the freedom and independence of anyone who practices journalism is perfectly conceivable

> without the necessity of restricting the practice only to a limited group of the community...[36]

Other courts, national as well as international, have taken a similar point of view. For example, in August 1997, the High Court of Zambia in *Francis Peter Kasoma v. The Attorney General*[37] invalidated an attempt to establish a statutory body to regulate journalists, stating that any effort to license journalists would breach the right to freedom of expression, regardless of the form that effort took.[38] In conclusion it can be said that taking into consideration the widely acceptable standard that the system of licensing or registration of journalists is inimical to freedom of expression and the media, the decision of the EACJ is welcomed to be an important milestone.

4.3 Sections 35, 36, 37, 38, 39 and 40

The sections listed in the sub-title above are comprised in Part V of the Media Services Act that deals with the Criminal Defamation. The Applicants argued that criminal defamation laws are inappropriate means of limiting the freedom of the press. They submitted that the protection of the reputation of others, including public figures, which is the principle aim of defamation law, can be assured appropriately and proportionately by the civil laws of defamation. To buttress their argument the Applicants referred the Court to the 2010 African Commission on Human and Peoples' Rights Resolution No. 169 on Repealing Criminal Defamation Laws in Africa. This resolution called upon all State Parties to the African Charter on Human and Peoples' Rights to repeal criminal defamation laws or insult laws which impede freedom of speech.

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[36] Ibid., para 74.
[37] High Court Civ. Case No. 95/HP/2959.
[38] *Francis Peter Kasoma v. The Attorney General, High Court of Zambia*, 95/HP/29/59, at p.18

The Respondent in reply stated that sections 35 to 40 of the Act do not restrict the freedom of expression and right to access information but rather, ensure the rights, freedoms, privacy and reputation of other people or interest of public are not prejudiced by wrongful exercise of the rights and freedoms of individuals. Their submission was that "any reasonable government should have the protection of its society at the forefront."[39] The Court cited two cases in determination of the whether criminal defamation is contrary to freedom of expression. The first case was *Kimel v. Argentina*[40] decided by the Inter-American Court of Human Rights and *Federation of African Journalists v. The Republic of the Gambia*[41]decided by the ECOWAS Court of Justice. In this second case, the ECOWAS Court of Justice had this to say:

> The practice of imposing criminal sanctions on sedition, defamation, libel and false news publication has a chilling effect that may unduly restrict the exercise of freedom of expression of journalists. The application of these laws will amount to a continued violation of internationally guaranteed rights of the Applicants.

The ECOWAS Court held that the offences of sedition, false news and criminal defamation in The Gambia Criminal Code violated the right to freedom of expression under international law. In the first case, a journalist and historian, Eduardo Kimel, was given a criminal sentence for criticizing, in one of his books, the manner in which a judge conducted the investigation of a massacre

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[39] Judgement of the Court at paras. 86 and 89.

[40] Series C No. 177-2008 decided by the Inter-American Court of Human Rights.

[41] EWC/CCJ/JUD/04/18 decided by the ECOWAS Court of Justice.

perpetrated during the military dictatorship in Argentina. At the time of the investigation, the crime of false imputation of a publicly actionable crime (*calumnia*) was, according to the Argentinean Criminal Code stipulated as punishable with imprisonment from one to three years. The Supreme Court of Justice convicted Mr. Kimel to a one-year suspended prison sentence for the crime of false imputation of a publicly actionable crime (*calumnia*) and payment of 20,000 Argentinian pesos to the judge mentioned in the book for defamation. When the matter reached to the Inter-American Court of Human Rights the Court held that Argentina violated the right to freedom of thought and expression protected under Article 13 of the American Convention. The EACJ cited with the approval what was stated by the Inter-American Court of Human Rights in *Kimel v. Argentina*, that:

> The broad definition of the crime of defamation might be contrary to the principles of minimum necessary, appropriate, and last resort or ultimo ratio intervention of criminal law. In a democratic society punitive power is exercised only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impart or endanger them. The opposite would result in the abuse exercise of the punitive power of the State.

The Inter-American Court of Human Rights found that the Argentinian State violated Eduardo Kimel's right to free expression when it used the State's punitive power in an unnecessary and disproportionate way. The Court ordered the Argentinian State to, among others, reform the criminal legislation that protected honor and reputation.

Following the two cases above, the EACJ faulted the Media Services Act basically in two fronts. Firstly, the Court remarked that the definition of defamation under Section 35 of the Act is not sufficiently precise to enable a journalist or other person to plan their actions within the law, as it makes the offence continuously elusive by reason of subjectivity. The Court gave an example asking, how would an intending publisher, for the purposes of the section, predict what they intend to publish concerning X is likely to expose X to hatred, contempt or ridicule and therefore injure X's reputation? It reasoned that the definition falls short of clarity. Secondly, the Court turned to determine whether the criminal defamation has any legitimate aim and whether in seeking its objective the State has chosen a proportionate way to do so. The Court was in agreement with the decisions of the cases cited above that criminal defamation has a chilling effect that unduly restricts the exercise of freedom of expression and stated that the Respondent State has failed to demonstrate a direct and immediate connection between the specific threat, and the specific action taken. In principle, it also agreed with the submission of the Applicant that civil laws of defamation are adequate to protect the right of reputation of others, holding that the restriction by creation of the offence of criminal defamation does not meet the criterion of proportionality since this mode of restriction is not the least intrusive to the right in question.[42] In conclusion the Court held that sections 35, 36, 37, 38, 39 and 40 violate the provisions of Articles 6(d) and 7(2) of the EAC Treaty.

It is submitted that, while the EACJ was right in saying that criminal defamation can be a disproportionate measure to protect the right to honour and reputation, it was wrong to hold that the

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[42] Judgement of the Court at paras. 89 and 90.

second element of legitimate objective in protection of reputation was not established. Human rights standards have evolved to the extent of discouraging criminal defamation unless in exceptional situation. For instance, the European Court of Human Rights in *Castells v. Spain*[43]was of the view that criminal defamation may only be adopted where it is intended to react appropriately and without excess to defamatory accusations which are devoid of foundation or formulated in bad faith. While the protection of honour and reputation is regarded as a legitimate purpose consistent with human rights (see *Kimel v. Argentina* above), and that criminal law can be a suitable means to safeguard the right to honor and reputation, courts have always emphasized that any restriction to freedom of expression must be exceptional and cannot limit the exercise of this right in a manner that amounts to "a direct or indirect mechanism of prior censorship". Due to difficultness of establishing whether a criminal defamation and penalty attended to an accused person is strictly proportional, the tendency has been to discourage criminal defamation in national laws.

4.4 Sections 50 and 54

Sections 50 and 54 of the Act were also impugned by the Applicants. Section 50 creates what are described in the marginal notes to the section "as offences relating to media services." Section 54 in turns creates the offence of "publication of false statement likely to cause fear and alarm." The judgement of the Court does not go into detail in providing what the arguments of parties were with regard to the provisions of section 50. Neither does the Court make sufficient reasons in arriving at its decision. What is found from the judgement after citing extensively the provisions of section 50 is only a brief statement that:

[43] 23 April 1992, Application No. 11798/85.

> Applying the above three-tier test, and in particular the first limb thereof, to section 50, it seems to us to be largely unobjectionable. However, subsection 1(c) fails the test in that [Any statement the content of which is] “threatening the interests of defence, public safety, public order, the economic interest of the United Republic, public morality or public health,” is too broad and imprecise, to enable a journalist or other person to regulate their actions.[44]

Apart from subsection (1)(c)(i) to Section 50 which the Court found to be too broad and imprecise, it is not evident from the judgement as how other offences created under Section 50 are conforming to the three-tier test and thus not violative of freedom of expression. The Court only states that they are “largely unobjectionable” without assigning reasons. For example, if the Court reasoned that criminal defamation is contrary to freedom of expression and the press how could it find that subsection (1)(c) (ii), which punishes making a statement the content of which is injurious to the reputation, rights and freedom of other persons, not objectionable? Similarly, if the Court ruled that Section 19 of the Act which provides for accreditation of journalists is unnecessary restriction of the individual practice of journalism, how could the same Court and in the same judgement rules that Section 50(2) which criminalizes a person who practices journalism without accreditation is unobjectionable?

In all standards the EACJ has failed to go into detail as to how several provisions of Section 50 which establish various offences met the three tests of clarity (or legality), pursue legitimate

[44] Judgement of the Court at para 94.

objectives and proportionality, the tests that are applied when considering restrictions on freedom of expression.

With regard to Section 54, the Court were in concurrence with the Applicants' submission that in section 54, the phrase "likely to cause fear and alarm to the public or to disturb the public peace," is too vague and does not enable the individuals to regulate their conduct. This decision is correct following the jurisprudence already laid in the previous sections discussed above. The Court was referred by the Applicants to the case of *Chavunduka and Choto v. Minister of Home Affairs & the Attorney General of Zimbabwe*[45] and adopted its reasoning where the Supreme Court of Zimbabwe also struck down a similar provision. In the final analysis the Court ruled that only Section 50(1)(c)(i) and Section 54 were violative of Articles 6(d) and 7(2) of the EAC Treaty.

4.5 Sections 52 and 53

Sections 52 and 53 deal with offences which are called seditious offences (In Kiswahili "*uchochezi*"). Whereas Section 52 provides the definition of what is a seditious intention and what is not, Section 53 lists various offences which are regarded as seditious including, uttering any words with a seditious intention, publishing, selling, offer for sale, distribute or reproduce any seditious publication or import any seditious publication or having in possession any seditious publication without lawful excuse.

The Applicants submitted before the Court that both sections are incapable of qualifying the first limb of the three-tier test on clarity and certainty. That is to say, the definition of what can amount to seditious intention and the offences which are deemed to be seditious are vague and thus capable of being abused. It appears

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[45] Civil Application No. 156/99.

from the judgement that the Respondent did not make any submission on the provisions apart from saying that the provisions do not restrict freedom of expression and the right to access information as provided under the Tanzania Constitution. The Court agreed with the Applicants holding that section 52(1) fails the test of clarity and certainty. It also added that the definition of sedition makes it impossible for a journalist or any other individual to predict when his statement would be adjudged to be seditious. This also makes Section 53 problematic as what would amount to sedition would entirely dependent on the subjective interpretation.[46]

In support of their opinion the Court referred to two cases, one from the ECOWAS Court of Justice (*Federation of African Journalist v. Republic of the Gambia* (supra)) and another from Uganda (*Andrew Mujuni Mwenda and Others v. Attorney General)*[47], where similar provisions were struck out on the same ground of being vague and overly broad. For instance, in the ECOWAS case the Court stated that: "The restrictions and vagueness with which these laws have been framed and the ambiguity of the *mens rea* (seditious intention) makes it difficult to discuss with any certainty what constitutes seditious offence." The Court proceeded to point out that the provisions of Sections 52 and 53 also cannot meet the test of proportionality because of the imposition of custodial sentences for the offences created under the sections. The case of *Konate v. Burkina Faso*[48] decided by the African Court on Human and Peoples' Rights was also cited by the EACJ as an authority to buttress their opinion. Therein the Court warned that, apart from serious and very exceptional

[46] Judgement of the Court at page 44, para. 99.
[47] UGCC 5(2010).
[48] Application No. 004/2013/(2014).

circumstances like incitement to international crimes, or public incitement to hatred, discrimination or violence, the violations of the law relating to freedom of speech and the press cannot be sanctioned by custodial sentences. After having decided so, the EACJ declared that Sections 52 and 53 of the Media Services Act violate Articles 6 (d) and 7(2) of the EAC Treaty.

The Court's decision is in conformity with the modern day jurisprudence which discourages sedition laws unless they are clearly crafted. In 2010 the five judges of the Constitutional Court of Uganda unanimously agreed that the existence of sedition offences in the Penal Code is unconstitutional because it infringes on the freedom of speech and expression.[49] To ensure that sedition laws are not subject to abuse, courts have held that specific criteria must be met. The U.S Supreme Court held that to constitute incitement the speech must satisfy the test of 'direct incitement' and 'dangerous requirements'. This means that a mere speech is insufficient to evoke a seditious offence. The speech inciting violence must be accompanied by other criminal offences either against property or persons.[50]

4.6 Sections 58 and 59

The final provisions which were impugned by the Applicants are Sections 58 and 59 of the Media Services Act. Section 58 empowers the Minister responsible, "in his absolute discretion," to prohibit the importation of any publication which he "is of the opinion that the importation ... would be contrary to the public interest." Section 59 on the other hand also empowers the

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[49] *Andrew Mujuni Mwenda & Anor v. Attorney General* (Constitutional Petition No.12 of 2005) [2010] UGCC 5 (25 August 2010).
[50] *Brandenburg v. Ohio*, SC 395 US 444 (1969).

Minister to “prohibit or otherwise sanction the publication of any content that jeopardizes national security or public safety.”

The Applicants had the following arguments to support their case. They submitted that the two provisions do not qualify in the first test. As regards the first limb of the test on clarity and certainty, they argued that the provisions do not have sufficient clarity to enable a person to predict what publications would fall foul of the Minister’s subjective judgement as to what is “contrary to the public interest” in Section 58 and what precise context would “jeopardize national security or public safety” in Section 59. As to the third limb of the test, they submitted further that the powers granted to the Minister in these two sections, constitute a severe form of prior restraint and do not accord with Article 9 of the African Charter and Article 19 of the International Covenant on Civil and Political Rights (ICCPR). In response thereto, the Respondent stated that the Minister has to exercise his powers judiciously and not arbitrarily, and that such exercise of powers is subject to pre-conditions such as public safety and national security. Respondent further argued that a person aggrieved by the Minister’s exercise of power under these sections, may challenge the same by way of judicial review.

The Court stated that the powers granted to the Minister under these sections are far reaching, and clearly place limitations on the rights stated under Article 19 of the ICCPR as well as Article 9 of the African Charter.[51] The Court accepted the contention of the Applicants and stated that the Respondent has not been able to answer the question of subjectivity of the Minister’s judgement in deciding when to exercise powers, and more importantly, that this

[51] Judgement of the Court at page 46, para. 106.

subjectivity denies persons the precision and certainty that would enable them to plan their actions.[52] What the Respondent calls pre conditions, the Court stated, "are themselves subjective judgments of the Minister." In the final determination the Court rightly concluded that Sections 58 and 59 of the Media Services Act contain provisions that constitute disproportionate limitations on the right to freedom of expression and thus contrary to Articles 6(d) and 7(2) of the EAC Treaty.

Human Rights tribunals have always insisted the drafting of laws with clarity. It was stated by the European Court of Human Rights that a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. A citizen must be able, if need be with appropriate advise, to foresee to a degree that is reasonable in the circumstances, the consequences which any given action may entail.[53] This test is known as the 'test of foreseeability'.[54]

5. CONCLUSION: THE IMPLICATION OF THIS JUDGEMENT

When the First Instance Division of the Court rendered its decision on 28th March, 2019 human rights activists celebrated the decision as another milestone in the African region as far as human rights is concerned. For example, the CPJ Africa Committee to Protect Journalists Sub-Saharan Africa representative, Muthoki Mumo, said "We welcome the East African Court of Justice's ruling as an important bulwark against the erosion of press freedom in Tanzania and the East African region," and "We now urge the

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[52] Id., at page 47, para. 108.

[53] See Application 26229/95: *Gaweda v. Poland* (2002) 12 BHRC 486, at para 39.

[54] See Application 6538/74: *Sunday Times v. United Kingdom* (1979) EHRR 245; Application No 10737/84: *Muller v. Switzerland* A 133 (1988) 13 EHRR 212. *See* also Application 10038/82: *Harman v. United Kingdom* 38 DR 53 (1984).

government to repeal the controversial Media Services Act, and through an inclusive reform process, promulgate a law that safeguards freedom of the press.[55]" Whether this wish becomes a reality or not time will tell.

It is not certain at least until this analysis is written whether the Tanzania Government has appealed against the decision. According to Article 35A of the EAC Treaty an appeal from the First Instance Division goes to the Appellate Division. However any person who is dissatisfied with a decision of the first Court may only appeal if that decision involves errors of law, lack of jurisdiction or procedural irregularity. The Minister for Information was quoted saying by the *Citizen* newspaper on 30th March 2019 that the government disagrees with the decision and that it will take its fight against it to a higher court. Taking into consideration precedents of cases from within and outside Africa, even if the government decides to appeal, chances of success are very minimal. The decision of the Court is likely to stand unopposed. If this remains so, the immediate question is whether Tanzania will implement the order of the Court to take such measures as are necessary, to bring the Media Services Act, into compliance with the EAC Treaty? The decision was rendered on 28th March 2019. So far nothing has been done by the government to amend the law until publication of this paper. The question that follows is whether the Treaty prescribes methods of enforcement of the EACJ decisions.

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[55] CPJ, Committee to Protect Journalists, "East African court rules that Tanzania's Media Services Act violates press freedom", available at https://cpj.org/2019/03/east-african-court-rules-that-tanzanias-media-serv.php (accessed 4 December, 2019).

Like any other International Court, the ECJ due to lack of execution machinery of its own, relies on the procedure obtaining in the country where the Court decree/order is to be executed. Unfortunately again, this is only possible when the order imposes monetary obligation (Article 44 of the Treaty). This means that there is no provision made specifying particular methods of enforcement of the present decision imposing an order requiring the change of law. Failure to comply with the decision does not carry a serious threat of retaliation from the Applicants or citizens. Neither the Applicants nor any other victims are able to take any action as a result of non-compliance, perhaps because the parties are a State and citizens.

However, it should be made clear that the EAC Treaty is an international/regional treaty that is legally binding on those States that have ratified it and is intended to set standards that those States are required to observe. According to the Vienna Convention on the Law of Treaties, which is a primary treaty governing all treaties concluded between states, says that “every treaty in force is binding upon the parties to it and it must be performed by them in good faith” (Article 27). This principle is called *pacta sunt servanda*. The Vienna Convention requires a State Party to a treaty to “refrain from acts which would defeat the object and purpose of the treaty” (Article 26). Furthermore, it provides that “a State party to a treaty is not allowed to invoke the provisions of its domestic law as justification for failure to abide by the terms of a treaty” (Article 18).

The EACJ is a creature of the EAC Treaty that was voluntarily signed and ratified by the East African Partners States. Its decision is not supposed to be taken lightly by the Partner States. Logically, if a State has committed to the ideal of abiding by the principles of good governance, including adherence to the

principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights, it makes sense to assume that the State will also implement the decisions of the Court. After all, Article 38(3) of the EAC Treaty requires that "A Partner State…shall take measures required to implement a judgement of the Court." Failure to do so logically amounts again to the breach of the Treaty. It is hoped that this judgment will persuade Tanzania's Parliament to pass some amendments that are in line with judgement of the Court.

If the Government will not implement the order of the Court there are soft measures that can be taken. Constant reminder to the Government to abide by the decision of the Court is one of them. Engaging members of Parliament to regularly question the Government about implementation of the Court decision is another method. Reporting to various regional and international mechanisms or organs is quite another effective method. Such reports are potent power to pressurize States to comply with Court decisions. States normally want to have a good image in the community of nations. They want to be seen as law abiding nations, thus making the tactic of "name and shame" a workable power for change.