LITIGATION DEVELOMENTS IN EASTERN AFRICA

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POLITICALLY SMART, LEGALLY SOUND DECISIONS OR BOTH?

A CURSORY REVIEW OF JUDICIAL DECISIONS ON FREEDOM OF EXPRESSION IN SELECT COUNTRIES

ARTICLE 19 EASTERN AFRICA is doing a lot of work on improving the state of freedom of expression and other related developments in 14 Eastern African states. This brief paper is a quick peek into some of the organisational work-particularly insights into how the judiciary, both national and regional, has been gradually liberated from the shackles of the executive and through targeted influence is emerging as a strong ally in the promotion, defence and protection of freedom of expression.

But the situation is not all rosy. While some stories of positive decisions have been witnessed, cases of regressive decisions are not rare and in some cases the judiciary is still a lame duck often deferring to the executive decisions whenever there are hard questions on actions taken to unduly limit free speech.

Before getting into the details of the emerging trends, a brief about the context is necessary. The Eastern Africa region was home to numerous terrorist attacks and internal political strife. Thus security concerns especially in Kenya, Somalia, Burundi, South Sudan and Uganda have greatly influenced the contours within which the scope, nature and the exercise of freedom of expression, media freedom and access to information has been defined by these states. Similarly, most governments were either seen to lack political legitimacy or wanted to change constitutional term limits to extend their tenure in office. The media, civil society actors and political opponents were thus seen as the problem whenever they exercised their rights.

A quick peek on the jurisprudential and other developments in the region in 2015 indicate a few positive trends. Although courts continued to entertain prosecution of individuals perceived by the states to hold divergent opinions, in five select cases across five countries on media regulation, criminal defamation, anti-terrorism and misuse of telecommunications have been dismissed as offending free expression. A brief about the cases below.

In Rwanda, on 5th June 2015, the Nyarugenge Court of High Instance overturned the guilty verdict on the defamation case against the Editor of Rushyashya newspaper,

Burasa Jean Guarbert. It ruled that the article in the newspaper was not written with bad intent and did not intend to undermine the integrity of the plaintiff, Muramira Regis, instead what was commented upon was the film and not the producer. The court therefore found no basis for defamation as had been found by the primary court.

In Ethiopia, the Federal High Court in the ***Federal Prosecutor Vs Soleyana Shimeles Gebremariam and Others (Zone 9 Bloggers)*** case acquitted four members of the Zone 9 Bloggers group finding that they had not participated in planning any kind of terrorism and that their writing was consistent with freedom of expressions guarantees in the Article 29 of Constitution of Ethiopia and the Mass Media proclamation.

A long-standing media censorship tool in Tanzania was challenged and won. Under the 1976 Newspaper Act, the Minister for Information has powers to ban or close down newspapers "in the public interest" or "in the interest of peace and good order" (Section 25).

The law has been used to temporarily suspend four publications in the last decade. Newspaper *MwanaHalisi* had been under an indefinite ban since 2012, justified by vague claims that certain 2012 editions of the newspaper were seditious, but it is more likely due to the newspaper's suggestion that state security forces could be complicit in the abduction of Dr Steven Ulimboka, a medical trade unionist who was part of a significant strike action at the time.

In September 2015, the ban was lifted. The High Court found that the Minister for Information had violated due process, as the newspaper had not been given the right to be heard when the ban was put in place. This judgment resulted from a three-year battle.

In Kenya, the High Court in February 2015, in the case ***Coalition for Reform and Democracy (CORD) & 2 Others v. Republic of Kenya & 10 Others***,[1] found eight sections of the Security Laws Amendment Act unconstitutional. In a victory for free expression**,** the Court agreed with ARTICLE 19, an interested party in the case that:

- The prohibition on the publication or broadcast of images of dead or injured people, which are "likely to cause fear and alarm in the general public, or disturb the peace", was disproportionate. The Court found that there was no rational connection between the limitation on publication and the fight against terrorism.
- The Court further agreed that the criminalisation of the publication or broadcast of information 'which undermines investigations or security operations" by the national police and defense forces would have a chilling effect on freedom of expression. The Court held that the effect of the prohibition would amount to "a

[1] Coalition for Reform and Democracy (CORD) & 2 Others v. Republic of Kenya & 10 Others [2015] eKLR paragraph 464 available at http://kenyalaw.org/caselaw/cases/view/106083/

blanket ban on publication of any security-related information without consulting the National Police Service".

In the case of ***Burundi Journalists' Union V. The Attorney General***, the East African Court of Justice found that sections 19 and 20 of the 2013 Burundi Press Law violated the East African Treaty as they placed impermissible restrictions on journalists by prohibiting them from disseminating information related to the stability of the currency, offensive reports on public or private persons, information that may harm the credit of the State and its national economy, and records of diplomatic activities and scientific research. It also held that it was unreasonable under Article 20 in forcing journalists to reveal their sources of information concerning the State security, public order, defence secrets, and the moral and physical integrity of individuals.

The above cases indicate somewhat a trend where courts are getting bolder to make progressive and legally sound decisions that incorporate regional and international human rights standards. However, as noted above, only in a few occasions do they declare offending provisions of the law unconstitutional or invalid.

This unfortunate situation opens up likelihood that those sections of the law may be used again by the authorities to undermine freedom of expression and other rights. This is evident in the case of ***Federal Prosecutor v. Ethiopia Muslim Arbitration committees*** and where the Minister of Information in Tanzania still used sections of the Newspaper Act to ban the East African for most of the part in 2015.

A positive trend worth affirmation can be traced in the Burundi case above where the EACJ used a Kenyan case to reiterate acceptable limitations on freedom of expression meaning that a regional court can draw positively from a national court.

Bad decisions where witnessed in the ***Federal Prosecutor v. Ethiopia Muslim Arbitration committees*** and in the ***Coalition for Reform and Democracy (CORD) & 2 Others v. Republic of Kenya & 10 others*** case. In the latter, the court failed to declare unconstitutional a number of provisions that further expand the surveillance powers of the Kenyan intelligence and law enforcement agencies without sufficient procedural safeguards:

- The Court considered that it was enough that a court order was required in order to authorise the monitoring of communications or the installation of any device designed to gather information by an intelligence officer. While this is an important safeguard, the new provisions governing the covert activities of the national intelligence services are much weaker as they lack detailed safeguards that required the court to consider the proportionality of the measures sought.
- The amendments to the Prevention of Terrorism Act muddle the procedure for interception of communications in terrorism cases. The Prevention of Terrorism Act (POTA) was amended to allow "National Security Organs" to intercept communications for the purposes of detecting or disrupting acts of terrorism in accordance with procedures to be prescribed by the Cabinet Secretary subject to parliamentary approval. While the Court rightly noted that other sections in the POTA contained procedural safeguards, it remains highly unclear how the

procedures to be prescribed by the Cabinet Secretary are to operate alongside existing safeguards.

The decision in the ***Primedia Broadcasting v. Speaker of National Assembly*** in South Africa may have set bad precedents as Kenya and Uganda have recently started efforts to amend standing orders and introduce measures that may be inimical to freedom of expression. [2]

Given the above situation, in 2016 clear issues of interest are going to revolve around enactment and enforcement of cyber crime and cyber security laws which are likely to have offending content related offences as is the case in Tanzania and Uganda.

In Kenya cases challenging the constitutionality of section 29 of the Kenya Information and Communication (amendment Act) on improper use of licensed telecommunication gadget.[3]

In sum, the situation of freedom of expression in Eastern Africa remains fluid and whether the judiciary will be a long term ally to free expression is not known given that they tend to delicately balance political expediency and legal soundness.

[2] https://www.article19.org/resources.php/resource/38319/en/kenya:-proposed-amendments-to-parliament-standing-orders-must-be-dropped

[3] https://www.article19.org/resources.php/resource/38241/en/kenya:-intimidation-and-harassment-of-bloggers-reaches-new-high