

Uganda Communications Tribunal: Regulations Fall Short of Constituting an Impartial Arbiter

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Introduction

The Ministry of Information and Communication Technology and National Guidance is in the process of establishing the Uganda Communications Tribunal which is provided for by section 60 of the Uganda Communications Act.¹ According to section 64 of the Communications Act, the tribunal will, among others, hear and determine all matters relating to communication services arising from decisions made by UCC and the minister responsible for information and communications technology. Once it comes into operation, the tribunal will provide an opportunity for separation of the policy making and regulatory organ of the communications sector from the organ that delivers justice.²

The establishment of a Communications Tribunal has been long overdue as it was first provided for under the now repealed 1997 Communications Act.³ However, it was only in February 2021 that UCC and the ICT ministry published draft regulations for establishing the tribunal.⁴ The failure to establish the tribunal in a timely manner has in the past drawn criticism to the communications regulator for often failing to operate in a free, fair and independent manner.⁵ Further, the UCC has been criticised for failure to provide comprehensive and coherent information about its operations and its lack of independence from the executive branch of the government.

Moreover, UCC has been accused of overstepping its powers in ordering the suspension or revocation of operating licenses and meting out excessive penalties without providing avenues for redress for those that feel aggrieved by its actions. For instance, in May 2019, UCC ordered the suspension of journalists at 13 media houses over the broadcast of the arrest and detention of protestors.⁶ Earlier in June 2018, the regulator warned broadcasters against discussing certain topics.⁷ The regulator also issued threats to shut down The Daily Monitor newspaper website over alleged failure to register in compliance with the UCC directive to online service providers.⁸ In January 2021, during the general elections, the government through the UCC, ordered an internet shutdown⁹, blockage of social media sites¹⁰ and wrote to Google to block 14 YouTube channels over allegations of broadcasting information that compromised national security.¹¹

Increasingly, the commission has also taken steps to regulate online content including on blogs and social media, although there are contestations over its regulatory mandate over digital media. In regulating digital media, UCC cites sections 2, 5, and 27 of the Uganda Communications Act of 2013 and Regulation 5 of the Uganda Communications (Content) Regulations 2019, which it says gives it the mandate to license, regulate and set standards for the provision of all communication services in Uganda, including online broadcasting.

Under the Communications Act, communication services that are regulated by UCC and which will fall under the purview of the tribunal, constitute “services performed consisting of the dissemination or interchange of audio, visual or data content using postal, radio, or telecommunications media, data communication, and includes broadcasting.” This means individuals aggrieved by ministerial or regulatory decisions related to postal, online, radio, and television services will be able to lodge appeals with the tribunal.

This brief examines the regulations as proposed and whether they would provide for an effective and independent appellate body that will check the actions of the minister and the communications regulator.

¹ The Uganda Communications Act, 2013 <https://www.ug-cert.ug/files/downloads/UCC%20Act%202013.pdf>

² International Telecommunication Union, “Dispute resolution in telecom sector,” https://www.itu.int/itunews/manager/display.asp?lang=en&year=2004&issue=06&ipage=dispute_telecom&ext=html

³ Section 70 of the 1997 Uganda Communications Act <https://www.itu.int/ITU-D/ict/webs/ucc/uca1997.pdf>

⁴ The Uganda Communications Tribunal (Practice and Procedure) Regulations, 2020, <https://www.ucc.co.ug/request-for-comments-on-the-draft-uganda-communications-tribunal-practice-and-procedure-regulations-2020/>

⁵ Is UCC Going Rogue?, <https://www.independent.co.ug/ucc-going-rogue/>

⁶ Bobi Wine: UCC orders suspension of 39 journalists at 13 media houses, <https://observer.ug/news/headlines/60575-ucc-orders-suspension-of-39-journalists-at-13-media-houses>

⁷ UCC warns Broadcasters Against Facilitating Hate Speech, <https://www.softpower.ug/ucc-warns-broadcasters-against-facilitating-hate-speech/>

⁸ UCC threatens to shut down Daily Monitor website, <https://acme-ug.org/2019/02/08/ucc-threatens-to-shut-down-monitor-website/>

⁹ Uganda orders internet shutdown hours before election, <https://www.monitor.co.ug/uganda/news/national/uganda-orders-internet-shutdown-hours-before-election-3256550>

¹⁰ Africanews, Uganda blocks social media ahead of tense election, <https://www.africanews.com/2021/01/12/uganda-blocks-social-media-ahead-of-tense-election/>

¹¹ Alex Otto, UCC Asks Google to Block Pro-Bobi Wine YouTube Channels, URN, <https://ugandaradionetwork.net/story/ucc-asks-google-to-block-pro-bobi-wine-youtube-channels>

Operationalisation of the Tribunal

Section 93 of the Communications Act requires the minister to make regulations to put into effect the provisions of the Act. The objectives as set out in clause 2 of the proposed regulations are clear and reflect the tribunal envisaged in the Communications Act. Part II of the regulations provides that the president shall appoint the members of the tribunal.

The challenge

The tribunal should exercise its functions impartially, independently and free from external influence. The composition of the tribunal, according to Part II the regulations, where members are appointed by the president, leaves questions as to whether it will deliver justice in a fair manner.

To address these challenges, we propose:

1. The regulations should provide for a competitive recruitment process of all members of the tribunal. The recruitment should be done through public advertisement and subjecting qualified applicants to interview processes.
2. The Public Service Commission or the Judicial Service Commission conduct the recruitment.

Constitution of the Tribunal

Part II of the regulations provides for the composition of the tribunal as including a judge of the High Court and four other individuals. Two of the individual members of the Tribunal are appointed by the President on the recommendation of the Judicial Service Commission. Without describing the procedure for their appointment, the other two members to form part of the tribunal are described as “of high moral character and proven integrity”, with experience and knowledge in the communications sector. This regulation mirrors what is envisaged in section 60 of the Communications Act.

Challenges

The prescribed mode of composition under regulation 4 signals anomalies in the regulation and control of the sector. The past has shown that persons appointed by the Ugandan president often tend to be inclined to promote his interests which in most cases curtail freedom of expression and speech online and offline. This unfortunate situation has been evident in the partial sector control and regulation by UCC.

More so, regulation 4(3) provides for a term of office of four years for the chairperson and members of the tribunal, and this term can be renewed for an unspecified number of times. This could further curtail the operating environment of the communications sector especially if the chairperson and members are autocratic and inclined to promote the interests of the appointing authority or the state against ordinary citizens, critics and political opponents. Further, the regulations in the current state do not provide room for gender balance.

To address these challenges, we propose:

1. That the regulations provide for a term limit of four years renewable only for a single term.
2. That the appointment and composition of the tribunal caters for gender balance to give equal opportunity to both men and women.

Validity of proceedings not affected by defect in appointment

Regulation 6 provides that, “The proceedings or any act of the tribunal shall not be regarded as invalid because of a defect in the appointment of a member of the tribunal or a vacancy in its membership.”

Challenges

While the regulation intends to serve as a mechanism to quicken the justice process and not to unnecessarily derail the work of the tribunal, it could potentially lead to miscarriage of justice. A defective appointment always leads to defective processes. Such a provision could therefore provide loopholes to abuse lawful processes.

To address this, we propose:

1. That regulation 6 be repealed.

Decisions where members hold differing opinions

Regulation 7 provides that a decision of the tribunal shall be determined by a majority of the members present, and where the members present are equally divided in their opinion, the opinion of the chairperson shall prevail.

Challenge

In the current provision, there is no guarantee that the chairperson, particularly being a presidential appointee, would not exercise excessive powers to the detriment of some aggrieved parties that would appeal to the tribunal. This may lead to a potential miscarriage of justice at the whims of the chairperson. In proper administrative systems, differing opinions are put to vote to reach a decision.

To address this, we propose:

Decisions of the tribunal should be reached in a manner similar to that of judicial authorities of equal standing in the country with no provision for a tie-breaker vote for the chairperson.

Appointment of Technical Advisors

Regulation 9 provides for appointment of not more than four technical advisors by the tribunal from technical persons identified by the Minister. These advisors are appointed for specific assignments after which the appointment lapses. Regulation 9(3) provides for qualifications of advisors to be in the telecommunications, broadcasting and content, competition, postal and courier services, value added services, consumer protection, or film, motion pictures and public entertainment.

Challenges

Appointments by the minister limit the independence of the tribunal, since the minister is one of the people whose decisions are appealable to the tribunal. This provision may therefore lock well qualified, competent and independent persons out of the tribunal, especially if they may not promote the interests of the minister or the state. The proposed regulations do not provide for clear mechanisms of appointment such as a competitive appointment process.

To address these challenges, we propose:

1. The regulations should provide for a competitive recruitment process of all technical advisors of the tribunal.
2. The recruitment is done through advertisement of the existing positions, receipt of applications and subjecting qualified applicants to interview processes to choose the best suited and competent advisors based on merit.
3. That the Public Service Commission or the Judicial Service Commission carry out the recruitment process as opposed to the Minister.
4. Technical persons once appointed may not be tagged to a specific purpose but to various matters that come before the tribunal for a specified period of time such as four years. This is important to ensure that knowledgeable and competent individuals are retained to effectively perform tasks for the tribunal in the interests of justice.

Terms of Service of Members of the Tribunal

Regulation 10(1) provides that the Minister shall determine the terms and conditions of service of the members of the tribunal.

Challenge

Once again, ministerial discretion may be abused for instance to unduly gratify the members of the tribunal. This could also translate into undermining the roles of the tribunal while at the same time promoting partial exercise of authority and powers by the members.

To address this challenge, we propose:

1. The terms of service of members of the tribunal should be determined by the Public Service Commission to ensure some level of accountability and transparency of the tribunal's members.
2. A similar approach should be applied in appointing other staff of the Tribunal under regulation 18(1).

Functions and Powers of the Tribunal

Part III of the regulations (regulations 19-31) provides for functions and powers of the tribunal. The functions include the resolution of matters by mediation (regulation 19), listening to interested persons (regulation 20) and getting assistance from the registrar (regulation 21). The powers include those of the High Court (regulation 22), making interim orders (regulation 23), extension of time (regulation), investigation (regulation 26), summon of witnesses and administration of oaths (regulation 27), service of summons (regulation 28), and conduct of public open hearings (regulation 30). These regulations are elaborate and cover numerous issues and questions on the functions and powers of the tribunal. Moreover, this part of the law provides for mediation under regulation 19 as one of the strategies to be undertaken in resolving disputes by the tribunal. Notably, mediation as a form of alternative dispute resolution mechanisms has been proved effective in other jurisdictions like India.

Challenge

Regulation 20 goes against the spirit of section 64 of the Communications Act of 2013 which grants the right to any person aggrieved by a decision of the minister or UCC relating to communication services. Introducing such a subjective requirement for locus standi might limit the ability of complainants to access justice. All aggrieved parties should have a right to present their complaints, be heard and be granted a fair hearing. Moreover, regulation 24(4) could be problematic as it means that the tribunal can sit at night or on weekends.

To address this, we propose:

1. The deletion of the words "who satisfies the tribunal that he or she has substantial interest in a proceeding" under regulation 20.
2. Repeal regulation 24(4).
3. Introduce a clause requiring the tribunal to have due regard to the convenience of the parties in setting the date, time, place and purpose of hearings and to notify all parties within a reasonable time of the sittings.
4. Regulation 28 should provide for a method of service by parties, such as post, physical address, email or other means as the tribunal may prescribe.

Procedure of Appeals and Applications before the Tribunal

Part IV of the draft regulations provides for the procedure of appeals and applications before the tribunal. This Part of the proposed regulations (especially regulations 32-39) spells out a clear approach to appeals as well as representation. This is important for ensuring that justice prevails in the appeal process and application processes.

Procedure at Hearing

This section of the proposed regulations (regulations 40-61) is clear, elaborate and commendable and potentially stands to serve the intended purpose while at the same time ensuring proper process of the justice process. It establishes the procedures to be followed by the parties which eases the hearing of cases. But there are challenges.

Challenge

Placing the tribunal above the rule that governs admission of evidence will potentially lead to abuse. For instance, it could become a kangaroo court that considers other factors not presented as evidence by the parties. Worse still, ignoring the rule would mean that the tribunal at its own instance may seek and receive evidence which could be easily fabricated and used against persons before it. Moreover, regulation 32(1) gives individuals a short period of seven days within which to file appeals against the minister or UCC from the date on which the appellant receives notice of the decision being appealed against.

To address this, we propose:

1. That regulation 47 on admissibility of evidence be amended to require the tribunal to be bound by rules of evidence.
2. That the regulations provide for contempt and disobedience of summons by the tribunal.
3. That the tribunal is granted power to take judicial notice as a normal court would.
4. The period under regulation 32(1) should be increased to 30 days.
5. The tribunal should be bound to dispense cases within a reasonable period, say 90 days.

Conclusion

The long delay in establishing the tribunal has limited the ability of aggrieved citizens, the media and telecom service providers to swiftly challenge some of UCC's and the ministry's edicts. Once put in place the tribunal could potentially guarantee justice, and the speed of its delivery, in the communications sector. However, the effectiveness of the tribunal is dependent on independent and impartial operations that are not subject to external influence including from the appointing authorities. Hence, the recruitment of the tribunal's members and indeed the composition of the tribunal need to be rethought to enhance the independence of its operations. Similarly, provisions that hamper the swift and effective dispensing of justice by the tribunal need to be repealed.



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