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# MOBILE CELLULAR COMMUNICATION AND ITS EFFECT ON PERSONAL DATA PROTECTION IN TANZANIA

PRACTICAL AND LEGAL ANALYSIS UNDER TANZANIAN LAW

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## **Dedication**

I dedicate this thesis to my beloved mother (may her soul rest in peace)

I finally made it Mama, one more step with you in my head, heart and soul, you said I can do anything when I put my head into it, you've always been my inspirational and my guardian angel from above.

**R.I.P Mama.**

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## **Abbreviation**

### **TCRA**

- Tanzania Communication Regulatory Authority Act, 2003

### **EPOCA**

- Electronic and Postal Communications Act, 2010

### **EU**

- European Union

### **PDP**

- Data Protection Directive (Directive 95/46)

### **URT Constitution**

- United Republic of Tanzania Constitution of 1977 and its time to time amendments.

### **WSP**

- Wireless Network Providers



# 1. Introduction

## 1.1. Overview

This is introductory chapter of this thesis aims on providing the reader the brief knowledge about what this thesis is about. It will also discuss on the background of the study, statement of the problem, definitions of some terms used in this paper, scope of the study, objectives of the study, justification of the study, thesis, synopsis and methodology used in writing this thesis.

Development of mobile cellular communication has its positive and negative effects in the Tanzanian community.

Mobile helps in facilitating communication within and outside Tanzania, the 1990s Tanzania is quite different from the current Tanzania in communication wise, this also goes as far as to the business sector, nowadays most business are done online and the basis for online business is the database. This gives room for the database owners to be in a good position to do business over such database with other companies and making a good profit while the subscribers whose data are into business gains nothing but disturbances and online commercial solicitations.

Initially SIM Cards were owned without any form of registration, so the mobile operators did not have the kind of database which they have now. It was only possible to know how many customers they have but not who is in their database. Registration of SIM Card opened a new venture of business for them as they now know who is in their database as an individual. This opened the doors to another problem which is commercial solicitation. It is now possible for a customer to receive texts from deferent WSP's advertising their products and services, this is somehow a disturbance to those customer who do not need such adverts.

The system of registration also opened the room for identity theft due to absence of uniformity in identification system. Some forms of identifications such as recommendations later from employer of local government authority can easily be forged and hence contributes to the identity theft.

It is not the aim of this thesis to be against the registration of SIM Card as a mandatory qualification of owning a SIM Card as the risk of having anonymous SIM Card users can be as bigger as the risk of having personal data on the hands of profit oriented companies. So here I will discuss what is to be done for the purpose of making this logical idea of SIM Card registration meaningful and with positive effect to all concerned parties. This paper will also discuss how this can affect the personal privacy right and how to legally reduce the problem if not overcoming it once and for all.

## **1.2. Background of the study**

Mobile phone communication in Tanzania is one of the very successful private sectors which serve the majority of Tanzanians in urban areas and also some part of rural areas.

The rapid growth of this industry and its nature is what makes it so sensitive. It is the type of industry which individual information is the key asset as well as the commodity.

Here I mean it's the industry which involves numerous kinds of data such as registration data, content data and traffic data.

Registration data are all of the information gathered from the subscriber during registration of SIM card as per the requirement of S.93<sup>1</sup> of EPOCA, 2010.

This information is including the age, street, gender and some other which are obtained from the copy of traveling pass, driving license, social security ID or any other documents of identification obtained for that purpose as indicated in the Public Notice on SIM Card registration as well as the Law governing SIM Card registration (EPOCA, 2010).

Content data are the data relating to the content of communication between the subscribers such as video, audio or texts.

Traffic data are any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof<sup>2</sup>.

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<sup>1</sup> Tanzania Electronic and Postal Communications Act, 2010 (EPOCA)

For the purpose of this paper I will only discuss on registration data. This is due to the fact that the trend of development in technology and business strategies has the direct effect to the subscribers by the use concerned data.

One can argue that the mobile phone number in a data base is of no deferent from the number in a phone directory, so it is the public document. But the fact that the mobile operators are practically doing the business of selling database to the third part companies which disseminates contents to the subscriber makes it quiet deferent as the contents such as entertainment information, football and so on which are sent to the personal number without the knowledge or consent of the subscriber most of the time relates to the age group of the subscriber.

Also it should be noted that, in Tanzania there's no public phone book directory containing the mobile phone subscribers' numbers, so the major means for the companies to access personal numbers is via mobile operators' database.

In the interview with the Mobile operators they didn't object in database sharing between them and WSPs, at the same time WSPs went as far as disclosing that the profit obtained from the use of database is divided between them and the mobile operators based on the agreed percentage.

This leaves out the question as to whether or not the sold database includes only the phone numbers or it also includes the age and geographical location of subscribers. And if this is the case, then does it violate the right to privacy?

Right to privacy is a constitutional right. Art.16 (1) of the United Republic of Tanzania constitution of 1977 (and it's time to time amendments) enshrined the right to privacy as one of the fundamental rights to every Tanzanian, "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."<sup>3</sup> and in

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<sup>2</sup>Art. 2(b) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)

<sup>3</sup> Art. 16 (1) of the United Republic of Tanzania Constitution, 1977 (and its time to time amendments)

Art.16 (2) the exception to that right is stipulated for, it clearly states that “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.”<sup>4</sup> So the fact that both Section 98 and Section 99<sup>5</sup> of EPOCA do not give out the procedures for what is to be done after completion of powers given to law enforcement agents leads to the question of whether or not it is unconstitutional and if it needs amendments or being repealed.

Mobile phone took over the major means of communication and business transactions at large, they are now doing the tasks used to be done by the Tanzania Postal Corporation and also Banking services such as sending and receiving money and purchasing or paying various kinds of bills, by doing so not only things are done in a simple and fastest way but it also means that the volume of personal data given to the private mobile phone operators and at the same time exposed in an online environment via technology is higher than before while the laws do not protect the data subjects well enough.

### **1.3. Statement of the problem**

Technology grows very fast and new things comes with it, sometimes it end up creating new problems which were not in a certain community before, reaction of the community towards the problem do differ from one community to the other.

Mobile phone communication in Tanzania grew so rapidly, the majority is now using it for communication and commercial purpose.

In making sure that the users are well protected and it becomes the safest ground for lawfully uses, the government came up with the idea for registration of all SIM Cards as a mandatory qualification for owning them.

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<sup>4</sup> Ibid. Art.16(2)

<sup>5</sup> Tanzania Electronic and Postal Communication Act, 2010 (EPOCA)

This is not a new or unique strategy, it is used worldwide, countries such as Norway, USA, and UK and so on are using the same system and it has been proved to be the safest way to insure the national security as well as individual SIM Card users.

Initially the SIM cards were sold by anyone with a capital to start a business, anyone could buy, use and dispose a SIM card without get known, and there was no proper registration of the SIM card owner, this means there was no big volume of consumers' personal data in anyone's hands.

Mobile phone became a major means of organizing crimes, the law was made for governing the users by introducing mandatory SIM card subscription<sup>6</sup>.

Initially it was publicized in a Public Notice of 2009 that the registration of SIM Card is mainly for security purpose and combating crimes done by way of mobile cellular phone. The uses kept on increasing but the public who are the subscribers were not made aware as it was the agreement between the Mobile Operators and the government on the other side by the use of TCRA.

There's a problem in the whole system of SIM Card registration. The subscribers are not made aware of any other uses of their data. They are not being told by the time of registration whether there might be some other uses or there will be a third part who will have access to some of his personal data such as mobile phone number or not. This means he is not being given the choice to consent or deny any other uses over his data apart from the security purpose. This is because there are no specified principles for data collection.

SIM Card registration also leads or contributes to another problem which is going to be discussed in this paper also.

After registration, mobile phone operators got a very big database containing the subscribers' important information. In the modern world business is done online, one of the major assets for any company in this type of business is its database. By knowing so, the mobile operators are doing a very good and profitable business by the use of their database. They

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<sup>6</sup> S. 93, EPOCA 2010

share the database with the WSPs for the agreement of distributing the profit resulted from the use of such database. This leads into another problem of commercial solicitation.

Subscribers are receiving the text from WSPs soliciting them into buying, using or joining a certain service provided by the WSPs. It's a normal thing to receive texts from 3-5 per day from WSPs soliciting the subscriber.

So here the law against online commercial solicitation is needed to combat this problem.

Another problem resulted from the SIM Card registration is the Identity Theft.

Documents needed for SIM Card registration such as Recommendation later from local government or employer, Voters' Identification Card and so on are to some extent contributes to the problem of Identity Theft.

The quality is not that good and they are not uniform, so this leaves the challenge for authentication of the quality of the document on the hands of the mobile operators agents who deals with the registration and SWAPING of the stolen SIM Cards. These documents can easily being forged, a good example of the poor quality document is a recommendation later from the local government authority or employer. This kind of documents can easily being obtained under false pretense as per the fact that the practice shows that those local government authority leaders do not know their people well and there is no proper registration of address in case of moving in or out of a certain area.

So this shows that Tanzania needs a uniform identification.

## **Definitions**

### **1.3.1. SIM Card**

A subscriber identity module or subscriber identification module (SIM) is an integrated circuit that securely stores the international mobile subscriber identity (IMSI) and the related key used to identify and authenticate subscribers on mobile telephony devices (such as mobile phones and computers).<sup>7</sup>

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<sup>7</sup> [http://en.wikipedia.org/wiki/SIM\\_Card#Usage\\_in\\_mobile\\_phone\\_standards](http://en.wikipedia.org/wiki/SIM_Card#Usage_in_mobile_phone_standards)

In Tanzanian law, this has been defined as Subscriber Identity Module which is an independent electronically activated device designed for use in conjunction with a mobile telephone to enable the user of the mobile telephone to transmit and receive indirect communications by providing access to telecommunication systems and enabling such telecommunication systems identify the particular Subscriber Identity Module and its installed information<sup>8</sup>

### 1.3.2. Subscriber

In Tanzanian law it has been defined as a person who receives an applications service or a content service under an agreement with or pursuant to terms and conditions established by an applications service licensee or a content service licensee<sup>9</sup>

For the purpose of this paper subscribers shall mean all Individuals or companies which subscribes for SIM card, these are the data owners.

### 1.3.3. Third party

Any natural or legal person, public authority, agency or any other body other than the data subject, the controller, the processor and the persons who, under the direct authority of the controller or the processor, are authorized to process the data<sup>10</sup>.

In this thesis this will refer to all of the Wireless Service Providers (WSPs) who are using the mobile operators' database for disseminating their short messages.

### 1.3.4. Privacy

Privacy has been defined differently by deferent scholars but at the end it goes back to the same content, some defined it as 'the right to be let alone'<sup>11</sup>. This is due to the fact that a

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<sup>8</sup> S. 3 of EPOCA

<sup>9</sup> Ibid. S. 3

<sup>10</sup> Article 2 (f), Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995

<sup>11</sup> S. Warren and L. Brandeis, "The Right to Privacy," The Harvard Law Review, vol. 4 (1890), pp. 193-220; quoted from North American Philosophical Publications

<http://www.jstor.org/stable/20010117?origin=JSTOR-pdf> last visited on 06 November 2013

human being should be free from any kind of interference as far as his personal life is concerned.

Some scholars also have defined it as ‘the condition of not having undocumented personal knowledge about one possessed by others’<sup>12</sup>, all in all it means that one individual have the right to his own life and information concerning him and that right should not be interfered by another.

According to Prof. Lee A. Bygrave Privacy can be defined as “a condition or state in which a person (or collective entity) is more or less inaccessible to others, either on spatial, psychological or information plane”<sup>13</sup>. Lee A. Bygrave also continued by considering privacy as a form of autonomy, eg, a person’s capacity to control the flow of information about him or herself to others. By so doing it is considered that “the person is having capacity to live his or her life according to his or her wishes”<sup>14</sup>.

So at the end of the day this shows that privacy is a notion which in its main sense denotes the personal right to be in control of what is concerning him or herself in a sense of identifying him or her from others.

#### 1.3.5. Data and personal data

Data means information and personal data means information about and individual capable of identifying that individual from another person, this includes information about names, address, blood type, phone number, mail box, medical records, social or economic pattern and many other.

#### 1.3.6. Mobile phone communication data

For the purpose of this thesis I will discuss about the registration data and the content data.

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<sup>12</sup> William Prosser, "Privacy," California Law Review, vol. 48 (1960), pp. 383, 389; quoted in E. Alderman and C. Kennedy, The Right to Privacy (New York: Alfred A. Knopf, 1995), pp. 155-156.; quoted from North American Philosophical Publications <http://www.jstor.org/stable/20010117?origin=JSTOR-pdf> last visited on 06 November 2013

<sup>13</sup> Lee A. Bygrave, data Protection Law, Approaching its Rationale, Logic and Limits, Pg.23

<sup>14</sup> Ibid. Pg. 24



#### 1.3.6.1. Registration data

Registration data are the data collected during SIM Card registration as per the fulfillment of S. 93 (1) and (2) of Electronic and Postal Communication Act of 2010 (EPOCA)<sup>15</sup> and Public Notices of 29<sup>th</sup> Nov 2009 and 2010. These are including age, name and address, phone number, postal address, copy of traveling pass, driving license, social security ID and alternative phone number.

#### 1.3.6.2. Content data

These are the data concerning the content of communication between the mobile subscribers; it includes conversations of all types, such as video, audio or texts.

#### 1.3.7. Persona right to privacy

This is the right of an individual over his personal life and personal information. 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<sup>16</sup>. So this is a constitutional right which is there to be enjoyed by everyone.

### **1.4. Justification of study**

The study is for the purpose of providing an in-depth understanding of the critical issues surrounding Privacy in the telecommunication sector related to the SIM Card registration, this is also including the indirect breach caused by some external forces such as law enforcement organs.

It is also emphasizing and exposing the legal issues surrounding privacy and inadequacy in the mobile operators' policies and regulations.

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<sup>15</sup> The Electronic and Postal Communications Act, 2010

<sup>16</sup> Art. 16 (1) of the Constitution of the United Republic of Tanzania CAP.2 of 1977 and its amendments

It will also contribute on the movement for having privacy act and other ICT specific laws and laws against commercial solicitation. This is due the fact that development and technology can't be separated, at the same time the rights of the users of such technology can't be jeopardized for the sake of enhancing the development. So the right of privacy must be legally recognized and protected.

### **1.5. Objectives**

To analyze whether or not and to what extent does the SIM Card registration affects personal privacy.

To analyze the key points to be considered in amending the current legislations or coming up with new legislations which abide with the right to privacy as per Art.16 of the URT Constitution of 1977 (as amended from time to time).

### **1.6. Thesis**

Lack of common, up to dated and legally recognized laws covers only ICT Privacy might be one of the sources for infringement of privacy right.

For any right to be recognized and easily obtained by the majority without the necessary need of legal experts should be documented and not obtained through technical interpretation.

Majority of the Tanzanian population do not belong to the educated class, even the educated once are not lawyers, that makes them to be within the laymen class. They are not at the position of interpreting what could be the legal meaning and implications of the text.

It should be known that even the most educated once are still ignorant when it comes to legal language.

Strong powers given to law enforcement organs like policy and court of law may also cause the major breach. This doesn't mean they should not have power to intervene, it rather means that the powers should be used with due care and with the same level of technology, it's very clear that our police force is still using the printed copy of documents as part of exhibits in several cases and its storage security cannot be that much trusted.

Mobile operators' business strategies sometimes lead them into interference with the right to privacy.

Data collector uses the agents who are not even aware of the importance of the data which they are collecting neither the repercussions of its leakage, this might be due to the nature of laborers (cheap labors) or due the fact that they haven't been made aware of the situation.

### **1.7. Scope**

The study will deal with the mobile phone communications development and its effects to the personal privacy in Tanzania.

This research will only deal with the Mobile Cellular due to the following reasons.

Firstly is due to the fact that it's the rapidly growing sector of communication in Tanzania which took over the place for most means of communication and by so doing it touches the lives of the vast population of the Tanzanians.

Secondly is due the fact that it has been privatized unlike Land Line phone communications and this attracts the competition between the mobile operators which at the end of the day can be for the benefit of the consumers or for the loss the consumers based on how it is regulated.

And lastly is the fact that, the rapid growth of mobile cellular phone business leads into the need for SIM Card registration. Mobile operators also got database and access to personal information capable of identifying the subscriber as an individual. This database is in one way or the other used as a source of income where by the mobile operators sales it to the WSP's.

### **1.8. Synopsis**

This thesis will consist of 4 chapters where's chapter one will be on introduction, in chapter two I will be discussing the status of mobile development in Tanzania, chapter three will cover the data analysis, laws applicable, strengths and weaknesses of the current legislation, comparison between Tanzania and EU situation in a nutshell and chapter four will be about recommendation and conclusion.

## 1.9. Methodology

This research will mainly be conducted by the use of desk review on Laws, Regulations, Articles, Reports and other Researcher's works.

Structured and non-structured qualitative interviews of the professionals and field workers will be used in getting most of the data concerning the practical part of the laws, regulations and policies applicable in Tanzania for the time being.

Here are the questioners used in collecting data, these did not bind me from asking other questions out of these when needed and when the answers directed me into some important information during the interview.

### QUESTIONERS

- ✓ What are/is the law/s governing SIM Card Registration in Tanzania?
- ✓ How do you collect data for your customers?
- ✓ What are the primary uses of data collected?
- ✓ What happens after the primary uses?
- ✓ Who is responsible for data storage after registration?
- ✓ How do you ensure the privacy/data protection?
- ✓ Does the company have special department for data collection and storage?

#### IF YES

- ✓ \*What are its duties?
- ✓ Does the company transfer data to any other company?

#### IF YES

- ✓ \*Who authorize the transfer?
- ✓ \*Does the data subject being contacted before such transfer?

#### IF NO

- ✓ \*How does the WSP's gets the subscribers numbers?
- ✓ Is here any protection for a customer against commercial solicitation?
- ✓ Can the data subject access his/her data after processing them?
- ✓ Does the company have privacy/data protection policy?

- ✓ What are the challenges faced by mobile operators in collection and storage of registration data?

Data collected from the mobile operators and third part companies were collected for the academic purpose only. To make sure that is the only case I had to collect data after accepting to bare the duty of confidentiality for the purpose of protecting the sources as well as their business entities, so there shall be no mentioning of names or specific company to which the specific statements were obtained. However, this does not prohibit quoting of actual statements as well as representation of the ideas when needed for the purpose of further clarifications and criticism.

Legal analysis on the changes and what gave birth to those changes will be done as a way of finding out whether the goals have been achieved, if not, then what went wrong from the scratch point or somewhere during the implementation of the concerned laws. This will help to know what to eliminate, emphasize, change or bring about.

## **2. Status of mobile phone communications development in Tanzania**

### **2.1. Overview**

This chapter will deal with the development of mobile phone communications in Tanzania and the challenges facing it.

Status of mobile phone development in Tanzania can be traced by dividing it into stages. In this chapter I have divided it into Mobile phone era and Registration era. Then I will explain some practical challenges faced by the mobile operators in implementing the government order and legal requirement under EPOCA for SIM Card registration as a mandatory qualification for SIM Card ownership in Tanzania.

Both of these stages are mainly characterized by social, economic and technological development.

## **2.2. Privatization and Mobile phone era**

Privatization era and mobile era are two stages of mobile phone development in Tanzania which goes hand in hand. This was in 1990s, Tanzania experienced various changes in sectors such as political, social and economy, it was the time when privatization policy was introduced. This is the process of transferring ownership of a business, enterprise, agency, public service or public property from the public sector (a government) to the private sector<sup>17</sup>. Telecommunication sector was among the sectors affected by this policy, after the introduction of privatization policy the Telecommunication services were privatized, many other telecommunication companies such as Vodacom, Zantel, Airtel and Mobitel came into the market, all these were mobile phone operators. So the Tanzania Telecommunication Company Limited (TTCL) which deals with land line phone remained in the hands of the government.

Privatization gave room to free market economy where profit making is the major goal and social welfare comes as a secondary priority in making most of the decisions on how to behave in the market. Competition became the main feature for determining who is to remain in the business, all these things affects the mobile communication users.

SIM cards were sold without any kind of registration, SIM card owners were anonymous to the law enforcement agents and even the mobile phone operators themselves, crimes were organized and committed by the aid of mobile phone, life threatens and defamation was done by using mobile phone.

## **2.3. Registration era**

The registration era which came in late 2000s; to be specific it was in 2009, this is the current era of this development stages so far.

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<sup>17</sup> <https://en.wikipedia.org/wiki/Privatization>

In 2009 the government introduced the new idea of SIM card registration, no laws were made by then to govern this registration and the reasons laid down for such registration, some of them were too political.

Mobile operators and Tanzania Communication Regulatory Authority after their joint meetings came up with the public notices<sup>18</sup> emphasizing to put the government order into practice without even questioned the laws behind it, these changes gave rise to another worry to the users of mobile phone which is privacy violation as per the fact that the volume of data exposed was too huge and no one knew who is responsible for their safety.

By 2010 the Tanzania Electronic and Postal Communications Act (EPOCA) was enacted, but still there are lots of inconsistencies on that law and it's very clear that the law focused on offence and punishment rather than protecting the SIM card user. The act made SIM card registration as the mandatory qualification for owning it, the customer must subscribe himself to the mobile operator or its agent before buying the SIM card<sup>19</sup>. Mobile operators got a huge database from such registration, content data became more meaningful also as individual identification became such an easy thing after registration.

The estimated number of customers is seventeen millions (17,000,000)<sup>20</sup> while the national population is forty two millions (42,000,000) practically this means the mobile operators have got access to personal data (registration data) to almost half of the Tanzanians population.

In modern business database is one of the major assets of the company, this means that data can be sold or transferred from one company to the other and making profit out of the joint business under the umbrella of providing new services.

Mobile phone took over the major means of communication and business transactions at large, this is to say they are now doing the jobs used to be done by the Tanzania Postal Corporation and also Banking services such as sending and receiving money and purchas-

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<sup>18</sup> Public Notice [http://www.tcra.go.tz/images/headlines/public\\_notice\\_corrected-3.pdf](http://www.tcra.go.tz/images/headlines/public_notice_corrected-3.pdf) and <http://www.tcra.go.tz/headlines/simcardRegEng.pdf> and Daily News, January 29, 2009, p.3

<sup>19</sup> S. 93 of Tanzania Electronic and Postal Communications Act, 2010

<sup>20</sup> The Regulator <http://www.tcra.go.tz/images/documents/regulator/regulatorJanMar2013.pdf>

ing or paying various kinds of bills, by doing so not only things are done in a simple and fastest way but it also means that the volume of personal data given to the private mobile phone operators and at the same time exposed in an online environment via technology is higher than before.

On the other hand, human rights are getting its recognition in Tanzania and Africa at large and people becomes aware of their rights from day to day based on how they are being affected by the development.

Initially technology was not a big deal in Tanzania as it wasn't affecting people's daily lives as it is nowadays, so no one thought of any violation of their personal rights in an online or technological advancement lifestyle, but as days goes on so does the level of technology and its direct connection to people's daily life. People changed the means of communication from writing later to sending short messages by using mobile phone and from traditional banking system (monetary institution) to sending money by using mobile phones. Some companies (tiGo – Tanzania) even goes further to the level of coming up with Android Application system for mobile money transaction. This is the vivid example on how technology has changed and connects itself to people's daily life.

So for these reasons it's about time when there must be a law telling the operators what to do and what not to do as a way of protecting the users directly.

The law should be specific for the protection of data privacy. This is because the situation as it is now it is not so easy to get that protection as per the fact that, first of all the laws are too general and with loop holes, they don't specific aim on the privacy in ICT but privacy at large, the law concerning ICT lacks procedures for obtaining data<sup>21</sup> and hence becomes un-constitutional as per article 16 (2)<sup>22</sup>. So the companies have been using such loop holes to benefit themselves.

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<sup>21</sup> Ibid. S. 99

<sup>22</sup> The United Republic of Tanzania Constitution of 1977 (as amended from time to time)



## 2.4. Commercial Solicitation

Solicitation is one of the means of doing business, this is when the seller convinces the buyer to buy the product by explaining how good the product is, when this is done by the consent of the buyer it is termed as the best strategy in doing business.

Changes and technological developments made this simple by changing from street adverts nature to individual based strategy. In Tanzania this is done by the way of mobile phone, it's a normal thing for a person to receive more than 3 and up to 6 SMS per day soliciting you to subscribe into a certain services provided by deferent companies.

In my interview with one of the mobile operator stuff member in a marketing department I asked how does the companies get the subscribers number and this was the reply "normally we enter into a contract with the company by allowing it to use our database, send the texts to subscribers about their services, making the subscriber accept their services by the agreed price and then the profit is divided between the company and mobile operator"<sup>23</sup>.

The law is silent about this type of commercial solicitation.

In reality, there are various situations arise out of this kind of solicitations, firstly they end up in making the consumer make a decision which if not due to them he would have never made it as per the fact that it is for the detriment of his own finance, especially when the service is not that important.

Secondly, it causes a lot of disturbance and interference with personal communications. It is very possible to receive more than 3 soliciting SMS concerning deferent services from the companies which the consumer never sign any contract or agreement with, imagine the situation when a subscriber is waiting for an important SMS but keep receiving unimportant SMS's convincing him to join some services.

Thirdly, the fact that mobile operators share the database with other companies for marketing and profit making means that they are misusing the subscribers' personal data and here the question is does this affect personal privacy?

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<sup>23</sup> Reply from the interview between the researcher and the mobile operator stuff in marketing department.

Mobile operators have got access to personal number and capable of identifying the customers, so the fact that most of the subscribers receive SMS concerning the services surrounding their basic daily life routine and environment brings about the question of whether the information provided to the third part companies are that much accurate or it's just a matter of coincidence.

However the reality is in that situation, still we can't ignore the fact that digitalization does not give rise to the right of commoditization of personal data, and the database transaction between the mobile operators and WSPs such as PUSH MOBILE and others amounts to commoditization of digitized information.

## **2.5. Challenges encountered by mobile operators**

Among the major challenges faced by the mobile operators in ensuring privacy and personal data security is Identity theft.

Tanzania do not have a single uniform of identification, and this is why even the laws governing SIM Card registration (EPOCA) allows the subscribers to use so many kind of identification such as copy of license, traveling pass, voters identification, security fund, employers letter of introduction and also the latter from local government authority.

Quality of all these mode of identifications differ and even its authenticity differ from one another, some are easily being forged and leads to Identity theft, when one steals the identity it means that he can use the data of that individual however he wants, including tempering with personal communication and even selling of such data.

Mobile operators goes further by revealing that the problem of identity theft is contributed by the spouses as they know lots of details about the subscriber, so it's easy to forge the identification card as there's no uniform identification system.

Majority of Tanzanians never wants to trouble themselves learning new things, especially where there is a possibility for such things to be done by someone else for them, trust is not an issue, it's a normal thing for a person to go to the mobile bank agents such as *M-Pesa*,

*tiGo-Pesa* and so on and give his particulars to the agent for the purpose of letting him do the whole transaction for him.

In many instances this has been the major cause for identity theft which ends up into privacy breach where the agent is not that much trustworthy.

### **3. Protection of personal data in Tanzania**

#### **3.1. Overview**

This part will show how personal data are being protected in Tanzania. I will show the laws which are protecting personal data, this will include the URT constitution and other specific laws such as EPOCA and the Public Notice of 2009 which was the result of stake holders meeting.

In this part I will also discuss on the laws concerning commercial solicitation and its connection to the individual data privacy.

Personal data protection is simply meaning that the right people (but only right people) get the right information (but only right information) for the right purpose (but only right purpose)<sup>24</sup>

It is also stipulated that “everyone has the right to the protection of personal data concerning him or her”<sup>25</sup>, the basics of the rights for any human being do not differ from one part of the world to the other and this is to say the same protection is presumed to be taken to Tanzanians over their personal data.

When personal data are protected automatically the right to privacy will be upheld.

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<sup>24</sup> P. Sieghart, legislation and data protection proceedings of the Rome conference on problems relating to the development and application of legislation on data protection, Pg.16

<sup>25</sup> Art. 8 (1) of Charter of Fundamental Rights of the European Union of 2010

### **3.2. URT Constitution**

Personal data are to be protected by law and it is well stipulated in Tanzanian constitution “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.”<sup>26</sup> It is also stipulated that 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<sup>27</sup>.

This is due to the fact that even though the right to privacy and protection of personal data is to be given but at the same time it should not overrule the security of majority, certain community, and individual or national at large.

When interpreting this part of the constitution, it is wise to use the mischief rule. This will help the law to be in a position of ensuring the privacy to the registration details of the person to whom the SIM Card is registered to for the purpose of communication.

This part of the constitution has been adopted from the Universal Declaration of Human Rights which states that “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.”<sup>28</sup> This is also referred as the Bill of Rights in URT constitution.

### **3.3. EPOCA**

In the communications sector, Electronic and Postal Communications Act is the law which deals with personal data and offers the legal protection.

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<sup>26</sup> Ibid Art.16 (1) and (2)

<sup>27</sup> Ibid Art. 16 (2)

<sup>28</sup> Art. 12 of Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948

It is well stipulated in this law that “Every person who owns or intends to use detachable SIM card or built-in SIM card mobile telephone shall be obliged to register SIM card or built in SIM card mobile telephone.”<sup>29</sup> The registration data is a very huge collection of personal data as the information and copies of the documents such as Driving License, Traveling Pass, Social Security ID Card and so on which are to be provided for registration are too personal and very capable of identifying the SIM Card owner as an individual.

To make sure this personal information is preserved there is another provision in the same law which states that;

“(1) A person who is member, employee of application service licensee, or its agent, shall have a duty of confidentiality of any information received in accordance with the provisions of this Act.

(2) No person shall disclose the content of information of any customer received in accordance with the provisions of this Act, except where such person is authorized by any other written law.”<sup>30</sup>

All this is to make sure that individual personal data are not randomly disclosed after collections for personal gain by anyone.

Apart from those main two legislations there are some regulations under EPOCA which in one way or the other they deal with personal data also.

These are including the TCRA act of 2003<sup>31</sup> Communication Act<sup>32</sup> Electronic and Postal Communication Act (EPOCA) 2010, the Licensing regulation<sup>33</sup>, Numbering and Addressing regulation<sup>34</sup>, Consumer protection regulations<sup>35</sup>, Number portability regulations<sup>36</sup>.

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<sup>29</sup> S.93 of EPOCA

<sup>30</sup> Ibid. S.98(1) and (2)

<sup>31</sup> The Tanzania Communication Regulatory Authority Act, 2003

<sup>32</sup> The Tanzania communications Act, 1993

<sup>33</sup> The Electronic and Postal Communications (Licensing) Regulations, 2011

<sup>34</sup> The Electronic and Postal Communications (Electronic Communication Numbering and Addressing) regulation, 2011

<sup>35</sup> The Electronic and postal communications (Consumer Protection) Regulations, 2011

So it is very clear that in Tanzania we have a number of legislations which in one way or the other touches the issue of data management, but the major one is EPOCA, 2010 which also stipulates the registration of SIM card<sup>37</sup> as a mandatory qualification for owning a SIM card. Additionally that any person who owns or intends to use a detachable SIM card or built in SIM card mobile telephone shall be obliged to register that SIM card<sup>38</sup>.

So in Tanzania privacy is to some extent recognized by constitution as well as other laws but in a practical sense there are areas where the same laws are having some problems, and this is going to be well discussed in the next chapter.

### **3.4. Public Notice of January 29, 2009 (Registration of SIM card)**

In Tanzania SIM Card were being sold like any other commodity by any person in the street who has the capital of opening any type of business, these businessmen were allowed to sell the SIM cards without any type of registration until 2009. The rapid growth mobile phone users and randomly selling of SIM card made it impossible to monitor who is using what SIM card, the crimes committed by using mobile phone increased, this included the threatens to some members of parliament, so the parliament decided to pass an order for all SIM cards to be registered.

To resolve the situation parliament passed an order for SIM Card registration and place this responsibility to TCRA, in response to that TCRA held the meeting with mobile operators and agreed on the deadline for SIM Card registration<sup>39</sup> basically for security purpose.

Again in 2013 the government via TCRA kept insisting on the registration and gave out the new deadline “the general public is hereby informed that, as from 10<sup>th</sup> July 2013, all unreg-

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<sup>36</sup> The Electronic and Postal communications (Mobile number portability) regulations, 2011

<sup>37</sup> S. 93 (1) and (2) of EPOCA

<sup>38</sup> S. 10 (2)The EPOCA Consumer Protection Regulations 2011

<sup>39</sup> <http://www.tcra.go.tz/headlines/simcardRegEng.pdf> and Daily News, January 29, 2009, p.3

istered SIM Card which were in use disconnected. To reactivate disconnected SIM Card, one has to go through registration and verification process”<sup>40</sup>

All this was to make sure that SIM Card users enjoys their personal communications and at the same time this rapid developments in the mobile communications industry do not become a threat to anyone’s private life or community at large.

### **3.4.1. Binding Nature of a Public Notice**

Public Notice in Tanzania is acting as a valid ministerial order by law and it is lawful as long as it has not been challenged in a court of law, this means that the order given by the Public Notices from TCRA stands valid and binding laws to all the subscribers.

Good example is the SIM Card Tax Public Notice which is now challenged in a court of law by the suit filed by Carriers and according to the local newspaper “The Citizen” of Friday November 29<sup>th</sup> 2013<sup>41</sup> the High Court allowed the consumers also to join the suit, this means the SIM Card Tax authorized by the Public Notice will not be charged until the matter is determined by the court of law.

Binding nature also is determined by the date of publication, this is to say that in case of publication of the new Public notice about the same subject matter from the same authority, the old one is automatically overruled by the old one.

So the 2013 Public Notice on SIM Card registration is automatically overruling the 2010 Public Notice just the same way as the 2009 Public Notice was overruled by the 2010 Public Notice.

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<sup>40</sup> The Regulator <http://www.tcra.go.tz/images/documents/regulator/regulatorJanMar2013.pdf> visited on 28/10/2013

<sup>41</sup> The Citizen <http://www.thecitizen.co.tz/News/Dar-telcos-join-consumers-in-lawsuit-over-SIM-card-tax/-/1840392/2026062/-/o4nbm4z/-/index.html> last visited on 29/11/2013

## **4. Practical and Legal analysis under Tanzanian law**

### **4.1. Overview**

This chapter will deal with the analysis on how the laws, regulations, companies and individuals play part in the practical sense of privacy protection. In this part I will critically analyze some of the things which raise the question of whether subscribers' privacy is violated or not. Some of them are caused by the laws, some by the operators and some of them are mainly contributed by the subscribers themselves.

### **4.2. SIM Card Registration**

SIM Card Registration was introduced by the parliament with a very good intention, it aimed on making sure that mobile phone communications industry is secured and the society is safe from any kind of misuse. However it should be known that no matter how good the intentions are for doing a certain act it never make it a good act as long as it affects the rights of its subjects.

The primary purpose for SIM card registration was for security purpose according to the public notice issued by TCRA<sup>42</sup>.

By the time this order was passed and TCRA put it into implementation there were no any laws or regulation governing such registration<sup>43</sup>, but mobile operators and Tanzania Communication Regulatory Authority (TCRA) put the order into practice anyways. And that is where the first mistake was done.

Mobile operators decided to minimize the costs for the whole procedure by employing very few agents who also ended up employing unskilled laborers for law wages to cutter the costs.

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<sup>42</sup> Ibid. <http://www.tcra.go.tz/headlines/simcardRegEng.pdf> and Daily News, January 29, 2009, p.3

<sup>43</sup> Alex B. Makulilo, Computer and telecommunications law review, 2011. Registration of SIM cards in Tanzania: a critical evaluation of the Electronic and Postal Communications Act 2010, Pg. 1



All this was possible because there was no law or regulation which would govern these agents apart from the contract between them and the mobile operators. The contract is stipulating the number of customers to be registered per week.

The whole process seemed not to be successful and there was an extension of time where another public notice was issued by the same authority<sup>44</sup>, but this time it came with additional reasons including to protect consumer from misuse of communication services, enable identification of consumers, enhance national security and enabling the telephone companies to provide better services<sup>45</sup>. Let's bear in mind that, the Public Notice is automatically repealed in case of new publication of a Public Notice by the same authority over the same subject matter.

So in a simple language this means that the people who registered their SIM card under the first public notice did not consent to these new reasons and their information are being used for more than what they consented on.

### **4.3. Constitutional conflicts**

In 2010 the law governing electronic communication "EPOCA"<sup>46</sup> was made, the same law made the SIM card registration one of the mandatory qualifications for owning a SIM card<sup>47</sup>.

In the Tanzanian Constitution<sup>48</sup> the right to privacy is well enshrined in Art. 16. In any general rule there is an exception to it, so while sub article one gives the right to privacy at

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<sup>44</sup> TCRA

<sup>45</sup> Part 8 (i), (ii), (iii) and (iv) of the 2010 Public Notice.

[http://www.tcra.go.tz/images/headlines/public\\_notice\\_corrected-3.pdf](http://www.tcra.go.tz/images/headlines/public_notice_corrected-3.pdf)

<sup>46</sup> The Electronic and Postal Communications Act, 2010 (EPOCA)

<sup>47</sup> Ibid S. 93 (1) and (2)

<sup>48</sup> Art. 16 of the United Republic of Tanzania Constitution of 1977 (and its amendments)

the other hand sub article two<sup>49</sup> is giving out the situation in which such right can be taken, this is to make sure that someone's absolute right to privacy do not jeopardize the national, group of people or another person's rights and security.

EPOCA falls under the situations approved by sub article two of the constitution, but at the same time it fails to attain the qualifications for constitutionality, when talking about procedures as per art.16 (2), according to Art. 16 (2) there should be a procedure, in a simple interpretation based on mischief rule of interpretation, this can be construed as to mean that there should be procedures for obtaining, storing, using, time limit and what is to be done after being used. S.99<sup>50</sup> does not say how the information should be stored, what is to happen to the obtained data after the primary use is over. This leaves the person who obtained data/information under EPOCA with a lifetime rights over someone's personal information.

#### **4.4. Conflict of Laws**

Tanzania Communication Regulatory Authority was established by law<sup>51</sup> and its functions are stipulated in S. 6<sup>52</sup> TCRA, the authority has not been conferred powers neither duty to keep records of the subscribers as it has been established in S. 91<sup>53</sup>. This conflict of laws leaves the unanswered question of who is the custodian of such data.

EPOCA stipulates for the licensee to submit the subscribers' updated data once a month<sup>54</sup> to the authority which is TCRA. This can be construed as the duty to keep and protect the database conferred to TCRA by EPOCA, though it is not in TCRA's duties as per S. 6 of the act established the board.

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<sup>49</sup> Ibid Art. 16 (1) and (2)

<sup>50</sup> EPOCA

<sup>51</sup> S. 4 of the Tanzania Communications Regulatory Authority, 2003

<sup>52</sup> Ibid S. 6

<sup>53</sup> EPOCA, 2010

<sup>54</sup> S. 91 (3) and (4)

So this leaves a question as to what powers does the authority have over the database and who is to be held responsible if the same data in the database will be misused by any means.

This it leaves the room for the mobile operators to tamper and do some other things with the personal data collected as they wish claiming to serve the customer under the umbrella of part 8 (iv) of the Public Notice<sup>55</sup>. This part of the Public Notice stipulates for the one among the reasons for SIM Card registration to be for enabling telephone companies to provide better services. In my interview with one staff member in a legal department within one of the mobile telephone companies said that “marketing is part of ensuring better services, in order to know what your clients’ needs you should categorize them into age group and geographical location, this will help you in providing better services according to the needs”<sup>56</sup>.

By this kind of answer it is clear that in order to identify those groups, one have to go through the information in the database.

In a very simple and layman language, this is clearly a new reason for registration which the customer is not being told by the time of registration, this conflict brought up by the edited version of Public Notice<sup>57</sup> which technically was not consented by the subscribers who subscribed before its publication.

#### **4.5. No Principles for data Collection**

In Tanzania data are being collected without any written down or documented principles, for instance the SIM card registration data are based on the EPOCA<sup>58</sup> which gives only the mandatory order for data collection but it doesn’t state any principles to be followed during that collection. So the data subjects are only obliged to give out their personal data for obtaining the SIM card without even being told what are the reasons for such collection,

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<sup>55</sup> Public Notice [http://www.tcra.go.tz/images/headlines/public\\_notice\\_corrected-3.pdf](http://www.tcra.go.tz/images/headlines/public_notice_corrected-3.pdf)

<sup>56</sup> Reply to the question asked in the Interview with Mobile Telephone Staff member.

<sup>57</sup> Public Notice [http://www.tcra.go.tz/images/headlines/public\\_notice\\_corrected-3.pdf](http://www.tcra.go.tz/images/headlines/public_notice_corrected-3.pdf)

<sup>58</sup> S. 93 (1) and (2)

whether there will be any other uses of their data apart from being given the SIM card, this is why the mobile operators feels so comfortable trading data with the third part companies for gaining extra income from the customers loss.

The reason for registration given for the first time in the government gazate in 2009 (public notice of 2009) and another English newspaper<sup>59</sup> was the security purpose, both sources can be accessed by very small population of Tanzanians who are either well educated or living in urban areas.

This means the majority of data subjects are not aware of why do they give out their information.

Its unarguably legal truth that ignorance of law is not a defense, but how can one understand what has never been well explained to him? Is it true that just put the reason in a document which is not that much accessible enough to assume that a subscriber knows all about the reasons for registration?

I believe more information needs to be given during registration for SIM Card.

#### **4.6. Equality between the rights and responsibilities of the stake holders**

Implementation of EPOCA needs all concerned parties to do their parts, this means the customers should do their part as per S.93 (1) and (2)<sup>60</sup> read together with S. 10 (2)<sup>61</sup> which both stipulates for SIM card registration as the mandatory qualification for owning a SIM card.

At the other hand mobile operators also should do their part as per S. 97 (1) and S.98<sup>62</sup> read together with S. 33 (1), (2) and (3)<sup>63</sup> which stipulates for the duty to register a subscriber

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<sup>59</sup> <http://www.tcra.go.tz/headlines/simcardRegEng.pdf> and Daily News, January 29, 2009, p.3

<sup>60</sup> EPOCA 2010

<sup>61</sup> Consumer Protection regulations 2011

<sup>62</sup> EPOCA 2010

<sup>63</sup> Licensing Regulations, 2011

before selling the SIM card and the confidentiality duty over the data obtained in his line of duty.

Lastly the Law enforcement agents should do their part as per the powers vested to them by S. 98 (2) and S. 99<sup>64</sup>.

In implementation of all parties rights and duties seem to have some element of inequality and this brings about the loop hole for violation of privacy and protection of consumers personal data.

The law orders the consumer to give out his information to and copy of his very important documents such as Passport, National ID card, Pensions, Social Security Fund ID, driving license, SACCOS ID, Bank Card ID, Work ID card with signed Employer introduction latter, Local government introduction latter with certified photograph, Birth certificate with photograph or Zanzibar Residents ID card. Any of these very personal data are given to the agent for the exchange of SIM card, but at the other hand there is nowhere where such agents is obliged to tell or give the document showing the consumer what are the primary uses of their personal data or even verbal explanations about such thing. All agents pre-sumes that subscribers knows what are the reasons for registration, this might have some element of truth, but what about the secondary uses such as “database transaction between the mobile operators and WSPs” which the subscriber is not being told at any time.

Another inequality is the fact that the law enforcement agents have been given the super powers without any limitation of time or instruction to delete the obtained data after the completion of their investigation. The situation is the same whether the obtained personal information attained the intended goal or not, the law does not stipulate for any further actions after obtaining such data.

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<sup>64</sup> EPOCA 2010

This means consumer's content data might be kept for as long as the law enforcement agents wish or being stored forever in their offices while having less or no power or control over them<sup>65</sup>.

So the absence of equal rights and responsibilities among the above mentioned stake holders' ends up creating the negative effects to protection of personal data.

#### **4.7. Poor technology on the law enforcement agents side**

Law enforcement agents have been given the mandate to obtain information from the network licensees as per S. 98 (2) and 99<sup>66</sup>.

This seems good for the sake of national security and also for making sure that the privacy of one person do not interfere the rights of another person in one way or the other.

In additional to that in year 2000 the High Court of Tanzania for the first time in its proceedings it recorded the electronic evidence as the piece of credible evidence in the case of *Trust Bank Ltd v. Le-Marsh Enterprises Ltd and others*<sup>67</sup>. This marked the development and acceptance of technology in Tanzanian court system. In response to that there was an amendment in Tanzania Evidence Act<sup>68</sup> which accommodates the electronic evidence.

To the other hand this also mark the legalization of violation of right to privacy in mobile technology, it widened the doors for law enforcers to claim for personal information from the mobile operators' database when looking for presumably evidence under EPOCA<sup>69</sup>

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<sup>65</sup> M. Froomkin, "The Death of Privacy?" (2000) 52 *Stamford Law Review* 1464; quoted from Alex B. Makulilo, *Computer and telecommunications law review*, 2011. Registration of SIM cards in Tanzania: a critical evaluation of the Electronic and Postal Communications Act 2010, Pg. 4

<sup>66</sup> EPOCA 2010

<sup>67</sup> • The Tanzania LAW REFORMER JOURNAL, Vol. 2, number 1 of 2009  
<http://tanlex.wordpress.com/2008/10/02/admissibility-of-electronic-evidence-in-tanzania/?blogsub=confirming#subscribe-blog>

<sup>68</sup> S. 32, 33, 34 and 35, Part IX of amendment of evidence act, No.15, Written Laws (Miscellaneous Amendments)

<sup>69</sup> S.98 (2) and 99

which by the way it creates an open ended freedom for law enforcement agents as seen above.

#### **4.8. Social awareness in Protection of personal data**

Majority of Tanzanians who lives in rural areas knows nothing about the value of personal data, most of them are not even aware what is personal and what is not personal apart from their body parts. This might be due to education system or nature of the society itself, Tanzania is among the communities which believe in extended families, so things like addresses and phone numbers are not that personal. This contributes to the problem at hand now as no one cares who is having what data and for what purpose as long as it does not affects him financially.

This is why most of the cases of private violations arose from mobile banking transactions violation and very few from defamation and matrimonial problems.

#### **4.9. Uniformity in National ID system**

Tanzania is one of the nations where there is no uniform national ID Card, so identification of the data owner varies from one person to the other, even the quality of those identifications differs a lot, when registering a person can use any of the following documents, copy of Passport, National ID card, Pensions, Social Security Fund ID, driving license, SAC-COS ID, Bank Card ID, Work ID card with signed Employer introduction latter, Local government introduction latter with certified photograph, Birth certificate with photograph or Zanzibar Residents ID card.

Apart from the Passport, all these other documents can easily be forged and used by another person without being easily noticed so when a person needs someone information might forge such documents and claims to have lost their mobile phones so they need a SIM SWAP. This is most of the times done by the collaboration between the untrustworthy agents and the other person who needs the information, in many cases this other person is a spouse who knows a lot of details concerning the really owner of the SIM card.

## 5. Comparison between EU and Tanzanian situation

### 5.1. Overview

In this chapter I will discuss on the comparison between EU and Tanzania, this comparison will mainly base on the laws, technology, implementation and consumer understanding on the personal data. I will also point out that though the right I universal but there's a possibility for impracticability based on the state of development.

There are things which are almost the same and some which are not the same, the first part will be discussing on similarities and then I will move on to the second part in giving out things which are different when comparing the situation in EU and in Tanzania.

### 5.2. Similarities

#### 5.2.1. Mandatory registration

SIM Card Registration in various parts of the world is mandatory. This is in many occasions for security purpose. It is very easy to truck down law violations by using of phone records, this might be content, traffic and any other records, but all in all it starts from the registration data.

In EU the situation is the same as in Tanzania, among the core qualifications of owning a lawful SIM Card is registration, so everyone who owns a SIM Card must be registered.

In Tanzania this is well stipulated in the s.93 of EPOCA.

#### 5.2.2. Universal recognition of privacy right

Right to privacy of an individual is a universal recognized right. The universal declaration of hum rights stipulates that “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks”<sup>70</sup>.

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<sup>70</sup> Art. 12 Universal Declaration of Human Rights



All states signed the recognition of such Act are bound by it as it is also well stipulated that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it is independent, trust, non-self-governing or under any other limitation of sovereignty”<sup>71</sup>.

So this means that the right to privacy is universally recognized, especially to the nations which signed the ratification such an agreement and domesticate it and Tanzania is one of them. However it cannot be treated equally all over the world but the fundamentals are the same.

So the fact that such kind of equality is hard to be attained it is not enough to be an excuse for violation of individual rights to privacy.

When comparing the situation between Tanzania and Europe various things can be put into consideration and for the purpose of this paper i will deal with the laws in these two parts of the world.

### 5.3. Differences

#### 5.3.1. Laws

In Europe there is Data Protection Directive<sup>72</sup> and Directive on Privacy and Electronic Communications<sup>73</sup> which are there for the whole of Europe dealing with personal data and privacy. In Tanzania the situation is deferent as there are several pieces of legislations being made from time to time for the purpose of governing Information and communication technology, this means that there is no specific law for data protection.

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<sup>71</sup> Ibid Art. 2

<sup>72</sup> Directive 95/46

<sup>73</sup> Directive 2002/58

The absence of one law governing personal data brings about the confusion on who has what duty, for example TCRA's duties have been stipulated in S.5 (a)-(f)<sup>74</sup> and there is no duty to keep personal data collected from SIM card registration, but according to EPOCA<sup>75</sup>, TCRA has the duty to keep the collected data and the mobile operators has the duty to submit their data to TCRA, the body which by virtual of law which established it, it has no such duty.

So this means that in Tanzania there so many pieces of legislation which are not accurate enough as the situation in Europe.

### 5.3.2. Principles

Directive 95/46 established the principles for data collection as enshrined in Art. 6 (1), (a)-(e) and (2) and

1. *Member States shall provide that personal data must be;*
  - a. *Processed fairly and lawfully;*
  - b. *Collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;*
  - c. *adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;*
  - d. *accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;*
  - e. *Kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are*

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<sup>74</sup> S. 5 (a)-(f), Tanzania Communications Regulatory Authority Act, 2003

<sup>75</sup> S. 91 (1) and (3), Electronic and Postal Communications Act, 2010

*further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.*

2. *It shall be for the controller to ensure that paragraph 1 is complied with.*

In Tanzania the situation is deferent as there are no principles. This is well demonstrated in EPOCA<sup>76</sup> which gives the law enforcement agent powers to obtain information from the mobile operator without giving out the procedures after completion of such lawfully duty or time limit for such powers of interception.

Directive 95/46 again stipulates about the for the notification<sup>77</sup> in case personal data are to be sent to the third part, this is to ensure that the data subject knows what is going on with his data, but in Tanzania the situation is deferent, it is very common to receive the solicitation texts from deferent companies such as PUSH mobile advertising their services and soliciting the consumer to subscribe for their services, it should be noted that the consumer did not sign up for such advertisements when registering the SIM card but most of mobile operators uses the gape of part 8 (iv) of the Public Notice<sup>78</sup> which stipulates for the service improvement as one of the reasons for SIM card registration.

### **5.3.3. Identification system**

Tanzania is lacking a systematic and uniformity in identification, this means one person can use deferent types of identifications such as Reference later, Copy of diving license, social security number, and voters' identification and so on. These identifications at some point they even differ from one another, also the quality of such identifications is questionable. As a result, identity theft becomes an easy thing. Mobile operators claims that among the things which makes it hard for them to track who owns what registration data and SIM Card is these problems in identification.

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<sup>76</sup> Ibid. S. 99

<sup>77</sup> Art. 19 of Directive 95/46

<sup>78</sup> Public Notice [http://www.tcra.go.tz/images/headlines/public\\_notice\\_corrected-3.pdf](http://www.tcra.go.tz/images/headlines/public_notice_corrected-3.pdf)

Registration is meaningful when the true registered person can be identified when need but when it's possible to hide the true identity it create a room for some people to gain access into others personal information.

In EU this is deferent, the identification system is good and reliable, a good example can be in Norway. Norway uses the Norwegian Identification Number system, this system is very reliable as the number are into national database and when putting the number it gives you the needed information on the person concerned and not just a person who pause to be.

#### **5.3.4. Laws on commercial solicitation**

In Europe and specifically in Norway, commercial solicitations which aimed direct to a personal communications such as mobile phone is illegal unless there's a prior consent of the subscriber, this is well stipulated for in Directive 2002/58 "The use of automated calling and communication systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may be allowed only in respect of subscribers or users who have given their prior consent"<sup>79</sup>.

There is a possibility for such solicitation only when they have a direct connection with the primary uses of the collected data by the same company which collected them, and in case of such uses, the subscriber is to be given the option to opt out as it has been stipulated by the same Directive 2002/58/EC "Notwithstanding paragraph 1, where a natural or legal person obtains from its customers their electronic contact details for electronic mail, in the context of the sale of a product or a service, in accordance with Directive 95/46/EC, the same natural or legal person may use these electronic contact details for direct marketing of its own similar products or services provided that customers clearly and distinctly are given the opportunity to object, free of charge and in an easy manner, to such use of electronic contact details at the time of their collection and on the occasion of each message in case the customer has not initially refused such use."<sup>80</sup>

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<sup>79</sup> Art. 13 (1) Directive 2002/58/EC

<sup>80</sup> Ibid. Art. 13 (2)

In Tanzania the situation is deferent as even the EPOCA which is the one dealing with privacy issues is quiet on the matter of commercial solicitation, this is not being explained even in its Consumer Protection Regulations 2011, it creates the opportunity for the WSPs to conduct such business without the fear of law. There's a legal say that, it's not a crime unless it's forbidden by the law, so according to the situation so far they are not committing any crime for soliciting customers via their own mobile phone numbers.

## **6. Recommendations**

### **6.1. Overview**

In this chapter I will give out some recommendations on how to minimise the problem discussed in this paper. These recommendations will be into both legal perspective as well as social perspective. Lastly I will also have the conclusion part of my thesis.

### **6.2. Making laws**

Law is a system of rules<sup>81</sup> , and a good law is the one which brings about the duties and responsibilities to its entire subject.

A good law is not all about being the perfect law, but it is the law which avoids the unnecessary inconveniences and inequalities on the rights and responsibilities.

EPOCA is missing this quality for not giving the duties to the mobile operators or their agents the duty to disclose the purpose for data collection to the data subjects when registering SIM card<sup>82</sup> while the subscribers are having duty to disclose their personal information.

Tanzania needs a good law in protecting the personal privacy. This law should not be unconstitutional as it has been shown above on EPOCA<sup>83</sup> which gives room for obtaining subscribers personal information on the grounds of law enforcement but do not have

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<sup>81</sup> Herbert Lionel Aldophus Hart (H.L.A. Hart) 1907-1992, Legal Positivist

<sup>82</sup> S. 93, EPOCA, 2010

<sup>83</sup> Ibid. S. 99

procedures as it has been enshrined in Art. 16 (2)<sup>84</sup>. Such rights to obtain individuals data should be given with time limit and procedures to be followed after the completion of such legalized obtaining of personal data. This should include the deletion of data collected.

Good law should consider the level of society development and the right of its subject.

This is to say that instead of having the amendments of evidence act<sup>85</sup> which gives room for electronic evidence due to technological changes, there should be a specific provision for ensuring that such evidence is given in the encrypted form and produced by an expert instead of a hard copy of document which its storage is not that much safe.

A good law should be compiled in as few pieces of legislations as possible, that is if its not possible to be into one piece of legislation.

So Tanzania needs to have a single compiled piece of legislation which will deal with privacy of personal data.

A good law gives room for its amendments and the procedure, so instead of having Public Notices<sup>86</sup> which comes up with new things Tanzania should have a written law which will have the procedures for amendments as a way of preserving the rights of data subject from the introduction of new things which arise from stake holders meetings which do not involve the data subjects.

Tanzania also needs to consider making laws concerning commercial solicitation. Based on the development of technology, business is now not done in a traditional ways where you would find a group of people dancing and singing about some products on the highway. Most of the companies moved into advertising their products and services online and some has gone further by using personal mobile phone.

It has become a normal thing for a SIM Card subscriber to receive texts on advertising various products from WSP's. So it is about time now the law to forbid such kind of solicitation should be made.

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<sup>84</sup> United Republic of Tanzania Constitution of 1977 (and its time to time amendments)

<sup>85</sup> Part IX, S. 32-35 of Written Laws (Miscellaneous Amendments) Act No.15 of 2007

<sup>86</sup> Public Notice [http://www.tcra.go.tz/images/headlines/public\\_notice\\_corrected-3.pdf](http://www.tcra.go.tz/images/headlines/public_notice_corrected-3.pdf) and <http://www.tcra.go.tz/headlines/simcardRegEng.pdf> and Daily News, January 29, 2009, p.3

### **6.3. Rising awareness**

Tanzanian community is having the population of about 47 million people. Among these people there are educated and uneducated, learned and laymen.

So having a good law only will never cure the problem of privacy violation if subscribers do not know the value of their personal data and the risk for violation of privacy.

The society should be educated on the need to question when personal information are demanded by anyone, should be told why and whether the given reasons are the only one which will determine the uses of their information or there will be a secondary uses.

The society should be aware of what to do in case of any misinformation during the subscription which misleads them and consenting of the uses which they never intended, this should include the procedures to be taken to correct or revoke the unintended consent and remedies available for the breach.

The subscribers should also be made aware of the value of their data, especially in this era of e-commerce where database has become one of the biggest asset for many companies.

### **6.4. Uniformity of national ID**

In chapter four I explained about the challenges faced by mobile operators, and one of those challenges is the Identity theft, this problem can be cured by having a quality and uniform national identification system.

In some countries they use Numbers ID, and Norway is one of them. This system seems to be very successful as each citizen and non citizen resides in Norway has the identification number, it's not possible to forge someone's ID.

Tanzania should adopt this system, or at least a system close to it where each citizen and non citizen who resides in Tanzania will be having a uniform identity with good quality and not easily forged.

## **6.5. Law against online commercial solicitation**

There is a saying that no law no offence, so when a person does anything which is not covered by any legal prohibition he is on the safe side. This might have contributed a lot to the ongoing problem of commercial solicitation which is done via mobile phone.

There should be a law against commercial solicitation. This will help in reducing the business of database between the mobile and WSPs.

## **6.6. Personal data should be declared as property**

It's about high time to make personal data a personal property.

Database has become a profitable business to the mobile operators, they sign contracts with companies authorizing them to use their database to push various contents.

In this business the consumer is solicited to subscribe into a service provided by third part company for a certain price, at the end the revenue is divided between the mobile operator and the third part company.

This shows how the consumers personal data is the most important commodity which do not benefit the owner (data subject). However, this can be avoided by declaring them to be a property owned by the data subject himself.

The principle of individual autonomy including data protection has been emphasised well in the case of *Pretty v. United Kingdom* (2002), a general 'respect for private life' case, the Court ruled:

*As the Court has had previous occasion to remark, the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (X. and Y. v. the Netherlands judgment of 26 March 1985, Series A No. 91, p. 11, § 22). It can sometimes embrace aspects of an individual's physical and social identity (Mikulic v. Croatia, No. 53176/99 [Part 1], judgment of 7 February 2002, § 53). Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see e.g., the B. v. France judgment of 25 March 1992, Series A No. 232-C, § 63; the Burghartz v. Switzerland judgment of 22 February 1994, Series A No. 280-B, § 24; the Dudgeon v. the United Kingdom judgment of 22 October 1991, Series A No. 45, § 41, and the Laskey, Jaggard and*



*Brown v. the United Kingdom judgment of 19 February 1997, Reports 1997-I, § 36). Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, Burghartz v. Switzerland, Commission's report, op. cit., § 47; Friedl v. Austria, Series A No. 305-B, Commission's report, § 45). Though no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees<sup>87</sup>*

Property is protected by property law and when it's a personal property it means that the owner has the sole ownership right, so by declaring personal data a personal property will not only give the control to the data subject to have a say on his data but also it's going to reduce violation of privacy because one can't sell or transfer what's not his.

Lee Bygrave explains the control principle as a core principle of data protection law is that persons should be able to participate in, and have a measure of influence over, the processing of data on them by other individuals or organizations<sup>88</sup>.

This is due to the fact that property right establishes sole ownership and the right to earn income from the good, the right to transfer the good to others and the right to enforcement of property rights.

All these can only be legally enjoyed by the data owner or any other person under the consent of the original owner, in the case of personal data the owner is the subscriber.

Propertisation of personal data can be treated in a way that it won't affect the fundamental rights of ownership or ruin the business on the side of mobile operators. This means there might be a co-existence of the property right for both the subscriber as well as the controller.

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<sup>87</sup> Pretty v. UK, para 61, as quoted from Prof.mr. J.E.J Prins and Prof.dr. P.J.A. de Hert; Property Right in Personal Data: A European Perspective. Pg. 191

<sup>88</sup> Bygrave, Data Protection Law: Approaching Its Rationale, Logic and Limits, as quoted from Prof.mr. J.E.J Prins and Prof.dr. P.J.A. de Hert; Property Right in Personal Data: A European Perspective. Pg. 197

This kind of proposal is also discussed in EU and according to Prins and Prof.dr. P.J.A. de Hert in Property Right in Personal Data: A European Perspective, they go for the suggestion that the logic of propertisation does not completely rely on the choices predetermined for a data subject by a regulator when it comes to the data processing permitted, but also significantly relies on the individual's freedom to choose for himself. Although this freedom is not absolute and is subject to exceptions, the current data protection model cannot be said to preclude the propertisation of personal data altogether. Moreover, the liberal language of the Directive, including in the consent requirement, suggests that propertisation is one possible approach to data protection and regards the data subject as the holder of the significant property rights<sup>89</sup>.

So even in Tanzania there is a possibility of having the law which will declare personal data as a property and giving the data owners rights over their personal data without affecting the rights of the controller.

## **7. Conclusion**

SIM Card Registration is a good measure in insuring the security of mobile communication users as well as the national security. It is in the best interest of the nation to know who sends what kind of information when needed so the easiest and best way is by knowing who owns what SIM Card.

Protection of data obtained from the SIM Card registration is also very important for protection of personal privacy as well as enjoyment of the SIM Card using.

To make sure that it is possible to identify the subscriber well when need arises the nation needs a uniform identification with a good quality and not easy to be forged.

It is a good and logical idea to tell the subscriber what kind of uses are intended for his subscription data and also to seek for his consent in case of any secondary uses thereof.

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<sup>89</sup> Ibid pg.198

There should be a strong laws regarding commercial solicitation arose from the mobile number not given personally or under consent to any company conducting such solicitation.

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- The Electronic and Postal Communications Act, 2010 of Tanzania
- Consumer Protection regulations 2011 of Tanzania
- Licensing Regulations, 2011 of Tanzania
- Tanzania Communications Regulatory Authority Act, 2003

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### 8.5. Cases

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## 8.6. Links

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