



**ANALYSIS OF  
THE ELECTRONIC  
AND POSTAL  
COMMUNICATIONS  
(ONLINE CONTENT)  
REGULATIONS, 2020**

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## INTRODUCTION

This is a brief analysis of the Electronic and Postal Communications (Online Content) Regulations, 2020 (hereinafter referred to as the “Regulations”). These Regulations were made under section 103 of the Electronic and Postal Communication Act, 2010. They were adopted on 17th July 2020 vide the Government Notice No. 538 of 2020. Among other things, the Regulations repeal and replace the 2018 Regulations (hereinafter referred to as the “former Regulations”). The Regulations are divided in four parts and have a total of 22 Regulations and three schedules. Part one provides for the preliminary provisions, part two deals with the licence requirement, part three provides obligations of the online content service provider and part four contains general provisions.

Briefly, the objective of the analysis is to show the level and extent to which the Regulations impact on editorial independence, media freedom, journalism practice and freedom of expression in general in Tanzania. Additionally, to show how the Regulations conform to international and regional standards, as well as good practices -in relation to press freedom and freedom of expression in online platforms. On the same note, the Regulations conformity with articles 6(d) and 7(2) of the Treaty of the East African Community, 1999, article 18 of the Constitution of the United Republic of Tanzania, and the National Broadcasting Policy of 2003 is tested. Finally, the analysis compares the 2018 and 2020 versions of the Regulations and shows the strengths and weaknesses of the new Regulations.

Firstly, the analysis shows that the Regulations contain a broad and open-ended list of prohibited content.<sup>1</sup> Secondly, they prohibit content in overly broad terms and impose confusing licensing requirements which are in breach of international standards on freedom of expression, articles 6(2) & 7(2) of the East African Community Establishment Treaty, 1999 as well as

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<sup>1</sup> See Third Schedule to the Regulations which provides a broad list of the prohibited content.

article 18 of the Constitution of the United Republic of Tanzania, 1977 and the National Broadcasting Policy of 2003.

Furthermore, the REGULATIONS reinforce criminal defamation, restrict anonymity, provide hefty punishments for the violations and grant sweeping powers of content removal to the Tanzania Communications Regulatory Authority (TCRA) and intermediaries. Generally, all these are incompatible with the internationally acceptable standards and have the effect of stifling legitimate freedom of expression and press freedom in Tanzania.

## **2. THE LEVEL AND EXTENT TO WHICH THE Regulations THREATEN PRESS FREEDOM AND FREEDOM OF EXPRESSION AND ITS POSSIBLE IMPACT ON JOURNALISM PRACTICE AND EDITORIAL INDEPENDENCE IN TANZANIA.**

Freedom of expression is undoubtedly the basis of journalism. The media should be free in seeking and imparting information to the general public without unreasonable restrictions. Any unreasonable restrictions imposed on freedom of expression impacts press freedom as well.

The Regulations contain some provisions which constrain or negatively impact editorial independence, press freedom, journalism practice and freedom of expression in general.

Freedom of expression is impacted in several ways by these Regulations. The following are some of the ways: -

- i) *The mandatory requirement of the licence for provision of the online content service as provided under regulation 4(1) of the Regulations.* The content has been defined under regulation 2 to mean information

in form of speech or other sound, data, text or images whether still or moving except where transmitted in private communications. This means any sharing of information in forms of speech, sound, text or images via the online platforms save for private consumption requires a license. This is strange taking into account that article 18 of the Constitution of the United Republic of Tanzania grants individuals with the right to seek, receive and impart information regardless of national frontiers. Internet is one such medium which can be used to seek, receive and impart information in order to enjoy that right. For that reason, imposition of the licence requirement is unreasonable restriction of the right to freedom of expression.

- ii) *The open-ended and broad list of the prohibited content as provided under regulation 16(1) of the Regulations.* The list of the prohibited content is provided under the Third Schedule to the Regulations. The prohibited content is provided in overly broad terms prone to multiple interpretation and manipulation. There are no clear definitions of some of the prohibited content and some are worded in open-ended fashion inviting the subjective interpretation of the enforcers. These may be used to restrict or censor certain information as prohibited content in case the Authority or Government doesn't like them. For example, publication of indecent material is prohibited, but the term indecent material has been defined to mean material which is offensive, morally improper and against current standards of accepted behaviour which includes nudity and sex. It is unclear what constitutes "morally improper and against current standards of accepted behaviour", which creates the risk of blanket prosecution of content providers.

*iii) Unsafeguarded removal of the content by the Tanzania Communication Regulatory Authority (TCRA) and service providers (intermediaries).* These are provided under Regulations 9(g), 11(3) & (4) and 15 of the Regulations. Under the said Regulations, TCRA or any party affected by the content published online may demand the licensee (online content service provider) or host (intermediaries) to remove the content. Upon such notification, the intermediaries are required to notify the intended person to remove the content within 2 hours. In 2018 Regulations, the period of removal was 12 hours but now the period has been reduced to 2 hours. Under regulation 11(4), the licensee has been empowered to suspend or terminate the subscriber's access or account in the event of failure to remove such content within 2 hours upon notification.

This is problematic in two ways. First, the Regulations do not contain any safeguard against malafide intention by individuals who may use that loophole to affect the rights of other individuals to express their opinions. This is because under the regulation the licensee or host is under legal obligation to take down the impugned post within 2 hours after notification. Then the overriding question is who judges or decides whether the content is actually a prohibited content? Is it the offended person, TCRA or licensees? In actual sense, the intermediaries seem to assume the role of the courts or judges and have been empowered to restrict the right of others to express their opinions. Second, there is no any express prescribed mechanism to challenge such take down, e.g appeals etc. What if the person is aggrieved by such decision to take down his or her posts? What is the remedy? The Regulations are silent on this.



- iv) Restriction on the use of anonymity.* In the digital era anonymity is an important component of freedom of expression online. However, regulation 9(e) of the Regulations requires the licensees to have in place mechanisms to identify source of the content. Technically, this means that, it is virtually impossible to be anonymous and post content online. This is coupled with the requirement imposed on the internet cafe providers to register users via recognized IDs, assign static IP addresses to their computers and put camera surveillance to record the activities in their premises. <sup>2</sup> All these are means to identify the users and thus get rid of the anonymity element of the users. As said before, lack of anonymity has far reaching consequences in freedom of expression online. When there is no guarantee of anonymity, individuals may not be free to express their opinion and thus their right to freedom of expression is impacted.
- v) Lastly, freedom of expression is impacted by the placement of the content filtering mechanism.* Under the Regulations, the licensees and internet cafe providers are required to put in place mechanism to filter the prohibited content. This is provided under Regulations 9 (d), 13(1) (c) and 18 (b) of the Regulations. While this requirement can be well understood in case of protection of child against some of the prohibited content such as pornography etc, the same cannot be said for the rest of the population taking into account the vague and overly broad terms of what may amount to a prohibited content. This may be used to restrict access to certain information by the licensees or internet cafe providers basing on their understanding or interpretation of what is a prohibited account. Consequently, this may impact

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<sup>2</sup> See regulation 13(1) & (2) of the Regulations.

the individual's right to seek or access information.

Now, since the freedom of expression is generally impacted by the Regulations, so are the media or press freedom and journalism practice in general. Specifically, the press freedom and journalism are impacted in the following ways:

- i) ***The mandatory licensing requirement as provided under regulation 4 and 5 of the Regulations.*** The Regulations has categorized licences into four categories to wit, predominantly news and current affairs, entertainment, educational/religious and simulcasting licenses.<sup>3</sup> Firstly, as we will see later on the requirement of mandatory licensing is deemed as a tactical censorship which may be used to constrain press freedom. Secondly, introduction of the categories of the licences seem to limit the scope of coverage in terms of both content and geographic location. For instance, unless the media is a mainstream media the rest are required to either specialize or obtain more than one licence, that is to say, to either specialize in news and current affairs, entertainment or religious. This is because there is a threshold set by the Regulations which may affect the licence of the holder.<sup>4</sup> Again, the mainstream media with district or regional licence are banned completely from simulcasting content using online platforms.<sup>5</sup> Technically, no one can share news or information to the public without a licence.
- ii) ***Disclosure of source of information.*** Regulation 9(e) requires the licensees to put in place mechanism to identify the source of the content. This may affect the

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<sup>3</sup> See regulation 5 of the Regulations.

<sup>4</sup> According to regulation 5(2) the content is said to be predominant if it is not below 85 percent of the licensed category measured on weekly basis.

<sup>5</sup> See regulation 10 of the Regulations.

source of the information and individuals may not be willing to provide information to the press or media for fear that their identity may be disclosed. This may impact the journalism in general since the individuals who are the sources of information may be afraid to share such information on the fear that their identity will be disclosed and thus placed in danger.

- iii) Overly broad prohibited content also affects the press freedom.* As provided under regulation 16(1) and Third Schedule to the Regulations, the list of the prohibited content is broad and open-ended. While some of the prohibited content is justifiable, others have been worded very broadly and ambiguously inviting the subjective interpretation of the enforcers. These may be used as indirect censorship of the content or information which is disliked by the Authority or Government. Again, the provisions may be used to harass some of the media houses with warnings or threats of de-registration.
- iv) Criminalization of false news and defamation.* Paragraphs 10 and 2 (b) of the Third Schedule read together with provisions of regulation 21 criminalize false news and defamation. Needless to say, these affect press freedom and journalism practice since journalists will not be free in discharging their duties for the fear of prosecution. For instance, under paragraph 2(b) it is an offence to publish private information of the individual even if such information is true if such publication will harm the person. It is hard to countenance the implication of this provision.
- v) Restriction on investigative journalism.* Among other things, paragraph 3 (e) of the Third Schedule to the Regulations prohibits publication of official confidential communications. This is a serious

restriction on investigative journalism because now it will be an offence to publish such information from confidential communications.

Editorial independence is also constrained by the provisions of these Regulations in the following ways:

- i) ***Overly broad list of the prohibited content.*** As said earlier, the list contains matters which are so wide and capable of multiple interpretation and manipulation.<sup>6</sup> Owing to that, it is possible for the Government or Authority to control the type of content they want to be published and those which they do not. And by doing so, it is possible to interfere with editorial independence.
- ii) ***Directing nature of the content to be published.*** Under regulation 9(b), the licensees (including media houses) are required to publish content that takes into account the trends and cultural sensitivities of the general public. This is a dictation on the content to be published and thus interferes with editorial independence.

In short, some of the provisions of the Regulations as discussed above threaten or impact editorial independence, media freedom, journalism practice and freedom of expression in general.

### **3. CONFORMITY WITH THE INTERNATIONAL, REGIONAL STANDARDS AND GOOD PRACTICES**

First, Tanzania is a signatory to a number of International Human Rights instruments including the International Covenant on Civil and Political Rights, 1966 (ICCPR) and the African Charter on Human and Peoples' Rights,

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<sup>6</sup> See Regulations 3(d), (c), (k), 9 and 10 on some of the prohibited contents which are in broad terms and capable of multiple interpretations.

1981 (AfCHPR). These instruments provide for the right to freedom of expression which is a basis of journalism. Freedom of expression includes the right to seek, receive and impart information or ideas regardless of frontiers.<sup>7</sup> Tanzania as a signatory to these conventions is required to guarantee the right to freedom of expression including the right to seek, receive and impart information.

In line with this, there is a Declaration of Principles on Freedom of Expression in Africa, 2002. Although not binding, it was adopted by the AU in order to guide the state parties to African Charter on Human and People's Rights (Tanzania inclusive) on how to implement the freedom of expression as provided under Article 9 of the Charter. The Declaration provides a guideline to states on how to ensure that their citizens fully enjoy the right to freedom of expression.

In addition to that there is a Joint Declaration on Freedom of Expression and "Fake News" Disinformation and Propaganda by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information of 2017. On best practices, there is the Manilla Principles on Intermediary Liability, 2015 which provides among other things the liabilities of the intermediaries.

Comparing the provisions of the Regulations with the principles outlined in these instruments, it is clear that some of the provisions of the Regulations have not reached

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<sup>7</sup> See Article 19 of the ICCPR, 1966. Again, the African Charter on Human and People's Rights gives a freedom to receive information, seek and express opinions within legal boundaries. This is provided under Article 9 of the Charter.

the acceptable standards and best practices in promotion of the freedom of expression. The Regulations have not met the acceptable standards and best practices as follows:

- i) ***Restriction on sharing of information only to the licensed persons.*** This is contrary to the acceptable standards on freedom of expression which require the right to seek, receive and impart information to be exercised by all people without discrimination. According to the UN Special Rapporteur on Freedom of Expression, journalists and bloggers shall not be subjected to registration or licensing requirements.<sup>8</sup> No one should be required to register with or obtain permission from any public body to operate an Internet service provider, website, blog or other online information dissemination system, including Internet broadcasting. In the same line there should not be licensing or registration of the individual internet users or service providers or content providers unless there is evidence that it is necessary for the maintenance of public order or protection of the rights of others.<sup>9</sup>

For example, Article I (2) of the Declaration of Principles on Freedom of Expression in Africa provides expressly that everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination. The gist of this article is to guarantee the right of freedom of expression against unnecessary interference by the government and more importantly to ensure that the right is exercised by all people without discrimination.

Moreover, the provision of Article X (2) of the Declaration states clearly that the right to express oneself through the media by practising journalism

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<sup>8</sup> This was stated by the United Nations Human Rights Committee.

<sup>9</sup> The 2011 Report of the UN Special Rapporteur on Freedom of Expression.

shall not be subject to undue legal restrictions. As stated earlier above by subjecting the right to freedom of expression online to a licensing legal requirement the right to freedom of expression is unnecessarily restricted.

Therefore, regulation 4(1) and (2) of the Regulations are in clear confrontation with this principle because licensing for online sharing of information is deemed to be unnecessary requirements which affects the right to freedom of expression and press freedom.

*ii) Criminalization of defamation and false news.*

Criminal defamation laws are especially problematic from the point of view of free expression. They can lead to the imposition of harsh sanctions, such as a prison sentence, suspension of the right to practice journalism or a hefty fine.<sup>10</sup> Even if they are applied with moderation, criminal defamation laws still cast a long shadow: the possibility of being arrested by the police, held in detention and subjected to a criminal trial will be in the back of the mind of a journalist when he or she is deciding whether to expose, for example, a case of high-level corruption.<sup>11</sup> International bodies such as the UN have recognized the threat posed by criminal defamation laws and have recommended that they should be abolished.<sup>12</sup>

Therefore, paragraph 2(b) and 10 of the Third Schedule to the Regulations which provide for criminal defamation and false news are unnecessary restrictions and fall short of the acceptable standards. Strangely enough, paragraph 2(b) has even eliminated the defense of truth in case one has published private

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<sup>10</sup> See more at <https://www.article19.org/pages/en/criminal-defamation.html> as accessed on 8th August 2020.

<sup>11</sup> *ibid.*

<sup>12</sup> *Ibid.*

information which has caused harm to the other person. The Regulations are silent on what kind of harm.

Article 2 of the Joint Declaration on the Freedom of Expression, “Fake News” Disinformation and Propaganda of 2017 prohibits criminalization of defamation and false news. The provisions call for abolition of general prohibitions on the dissemination of information based on vague and ambiguous ideas, including “false news” or “non-objective information”. Furthermore, criminal defamation laws are regarded as unduly restrictive and should be abolished.

- iii) Take down notification not coupled with an order of the judicial body or due process by intermediaries.* First, it is not acceptable for a third party such as internet service providers, bloggers or forum (intermediaries) to act on behalf of the authorities as censors and take down the content. It is argued that such involvement of private actors represents two major problems in regards to freedom of expression. First, these are not judicially qualified to determine whether a certain website or content might contravene the law or whether an individual user might be likely to publish something that is considered to be illegal. When faced with a borderline case, they are likely to err on the side of caution and decide not to host the site or remove the content. Second, there are no safeguards to ensure that these third parties do not abuse their powers and there is no system to call them to account. This is problematic, particularly since third parties’ actions will have an important impact on the right to freedom of expression of those who they decide to refuse access, as well as the right of others to receive information.



Under the international standards, the intermediaries (licensees or host) are required not to restrict or take down content unless there is an order by the court to that effect. Furthermore, they are required to follow the due legal process before taking down the content. The UN Special Rapporteur on Freedom of Expression recommended that any demands, requests and other measures to take down digital content must be based on validly enacted law, subject to external and independent oversight, and demonstrate a necessary and proportionate means of achieving one or more aims under Article 19 (3) of the ICCPR. This position is also reflected under articles 4(b) of the Joint Declaration on Freedom of Expression, “Fake News” Disinformation and Propaganda as well as principle II (a) and (b) of the Manila Principles on Liability of the Intermediaries of 2015.

The Regulations which provide for take down fall short of this standard and best practice. Regulations 9(9) and 11(3) and (4) of the Regulations do allow TCRA or any affected party to notify the licensees to take down the content and the content is required to be removed within two hours. There is no requirement of the order of the court or obligation to follow due process such as notice and appeals in case one is dissatisfied by such removal. This is contrary to the acceptable standards on removal of content by intermediaries. Also to put them in the position of having to decide the legality of content is deeply inappropriate and in breach of international standards on freedom of expression.

- iv) Overly broad and open ended list of the prohibited content.* Under the acceptable standards, there must be a limited scope of the prohibited content.

According to the UN Special Rapporteur on Freedom of Expression, the only exceptional types of expression or content that states are required to prohibit under international law are: (a) child pornography; (b) direct and public incitement to commit genocide; (c) hate speech; and (d) incitement to terrorism. He further made clear that even legislation criminalizing these types of expression must be sufficiently precise, and there must be adequate and effective safeguards against abuse or misuse, including oversight and review by an independent and impartial tribunal or regulatory body. Furthermore, expression that is not criminally punishable but may justify a restriction and a civil suit and expression that does not give rise to criminal or civil sanctions, but still raises concerns in terms of tolerance, civility, and respect for others may be prohibited. Short of that, no prohibition on the content is permitted.

Looking at the prohibited content under the Third Schedule of the Regulations, one may find that the scope of the prohibition is wide and broad. What is worse is, some exceptions are open ended which means that they can be used injudiciously. Again, some are too wide, for instance prohibited content on bad language is very unreasonable and ambiguous because the regulation does not stipulate exactly what may amount to bad language.<sup>13</sup> It only gives inclusive instances of where one may be said to have been using bad language. This means that this is an open ended exception, because what may amount to bad language to one person may not necessarily amount to bad language to another. With these kinds of prohibited content, it is without doubt that the Regulations fall short of this standard.

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<sup>13</sup> See paragraph 9 of the third schedule to the Regulations.

v) *Unnecessary and unreasonable restriction on freedom of expression.* The Regulations seem to unreasonably restrict the right to freedom of expression contrary to the acceptable standards. Internationally, the right to freedom of expression is provided under article 19 of the Universal Declaration of Human Rights and the International Covenant on the Civil and Political Rights, 1966. Regionally, this is provided under article 9 of the African Charter on Human and Peoples' Rights (the African Charter) 1987. Also there is a very instructive General Comment by the UN Human Rights Committee in relation to article 19 of the ICCPR.

Importantly, General Comment No.34 states that Article 19 of the ICCPR protects all forms of expression and dissemination of information including by internet. In other words, the protection of freedom of expression applies online in the same way as it applies offline. The right to freedom of expression was not designed to fit any particular medium or technology. Regardless of whether it is exercised online or offline, it is an internationally protected right to which almost all countries of the world have committed themselves.

While the right to freedom of expression is fundamental, it is not absolute. A State may, exceptionally, limit the right under Article 19(3) of the ICCPR, provided that the limitation is: (i) provided for by law; any law or regulation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly, (ii) in pursuit of a legitimate aim, listed exhaustively as: respect of the rights or reputations of others; or the protection of national security or of public order (*ordre public*), or of public

health or morals; and (iii) necessary and proportionate in a democratic society, i.e. if a less intrusive measure is capable of achieving the same purpose as a more restrictive one, the less restrictive measure must be applied.

Therefore, restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system are only permissible to the extent that they are compatible with sub-article 3 of article 19 of the ICCPR.

The restrictions of this right under the Regulations are too broad and more restrictive than necessary. For example, licensing requirement and a broad list of the prohibited content, the terms of which are overly broad and vague are unreasonable restrictions falling short of this standard as provided under article 19 of the ICCPR as well as article 9 of the African Charter.

*vi) Use of filtering systems which are not end-user controlled.* These are considered as a form of prior-censorship and cannot be justified. The distribution of filtering system products designed for end-users should be allowed only where these products provide clear information to end-users about how they work and their potential pitfalls in terms of over-inclusivity.

On this aspect, regulation 18 requires online content providers to provide users with content filtering mechanism and parental control. This is an end user filtering mechanism as required in international standards; however, the Regulations do not require the content providers to provide instruction on how these filtering mechanisms work to their users. Also, in some Regulations, the service providers are required to put in place filtering mechanism without stating that it should be end-user oriented. For instance,

regulation 13 (c) requires internet cafés to put in place a filtering mechanism to prevent access to prohibited content.

This means therefore that the Regulations have partly met the standard and partly not. They have met the standards on those Regulations where there is end user controlled mechanism. However, they have failed to require the licensees to provide instructions on how to use them, and also on some Regulations where the law is silent on the type of filtering mechanisms to be used. This creates a loophole for abuse.

*vii) Restriction on the use of anonymity in online expression.* The exercise of the right of freedom of expression through hidden identity or anonymity is an essential part of freedom of expression in the digital era.<sup>14</sup> Anonymity provides an individual with a zone of privacy online to hold opinions and exercise freedom of expression without arbitrary and unlawful interference or attacks.<sup>15</sup>

Regulation 9 (e) requires licensees to have mechanisms in place in order to identify the source of content. This regulation impacts citizens, journalists, and whistleblowers relying on secure and private communications to express themselves freely and carry out their duties. Even more alarming is the broad and unfettered power of surveillance that is being given to internet café providers as under regulation 13. According to the UN Special Rapporteur on Freedom of Expression the best practice is to encourage the use of anonymity and encryption tools in order to promote and protect the freedom of expression online rather than unduly limiting it by restricting the use of anonymity.

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14 The 2015 Report of the Special Rapporteur on Freedom of Expression on Internet.  
15 *ibid.*

The Regulations have to a large extent not conformed with the international, regional standards and best practices on promotion of the freedom of expression as stated above.

#### 4. CONFORMITY WITH ARTICLES 6(D) AND 7(2) OF THE TREATY OF THE EAST AFRICAN COMMUNITY, 1999

Under the Treaty for Establishment of the East African Community, Tanzania has obligation to uphold and protect human and peoples' rights standards as specified in Articles 6(d) and 7(2) of the Treaty. These articles provide for principles of the Community including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

The Regulations violate the provision of Articles 6(d) and 7(2) of the Treaty in the following ways:

- i) *Licensing requirement for publication of online content* as required under regulation 4(1) of the Regulations is an unnecessary and unreasonable restriction on the right to freedom of expression as guaranteed under article 9 of the African Charter on People and Human Rights and thus violate article 6(d) and 7(2) of the Treaty for the Establishment of the East African Community.
- ii) *Criminal defamation* as provided for under paragraph 2(b) read together with regulation 21 of the Regulations presses for unjustified restriction on the right to freedom of expression and right to access information and thus violate of Articles 6(d) and 7(2)

of the Treaty for the Establishment of the East African Community.

- iii) *Criminalization of the publication of false news* under paragraph 10 of the Third Schedule to the Regulations read together with regulation 21 is an impermissible restriction on the right to freedom of expression and access to information and thus violates Article 6(d) and 7(2) of the Treaty for the Establishment of the East African Community.

It suffices to say that the Regulations, much as they unnecessarily restrict the enjoyment of the right to freedom of expression, do not conform with the principles enumerated under article 6(d) and 7(2) of the Treaty for the Establishment of the East African Community.

## 5. CONFORMITY WITH ARTICLE 18 OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA AND THE INFORMATION AND BROADCASTING POLICY, 2003

The provisions of article 18 of the Constitution of the United Republic of Tanzania, 1977 provide for the right to freedom of expression. What is interesting about this article is that it does not contain any restrictions or limitations on itself on the exercise of this right. It guarantees everyone a right to freedom of opinion and expression of ideas and the right to seek, receive and impart information regardless of national frontiers.

The Regulations fail to conform to the standards of this article in the following ways as stated in the preceding sections of this report:

- i) *Requirement of licence to be able to share or impart information via the online medium* is a clear violation of this article. This is because, under this article everyone has freedom to seek, receive and impart

information without regard to the national frontiers. This limitation is unnecessary as there could have been other less restrictive measures to achieve the same purposes without subjecting individuals to the requirement of obtaining a licence.

- ii) *Criminalization of defamation and publication of false news* also violate the provision of article 18. While the provisions may be generally restricted under the provisions of article 30(2) of the same Constitution, introducing the criminal element in a freedom of expression online is an unreasonable restriction which cannot be saved by the Constitution. Civil liability for defamation could have served the purpose without interfering to that extent with the right of individuals to express themselves via the online medium.

On the part of the Information and Broadcasting Policy, 2003, the Regulations seem also not to be in total conformity with the provisions of the Information and Broadcasting Policy of 2003. The Regulations do not conform to this policy in the following ways:

- i) The Regulations do not create a conducive environment for flourishing of the media houses and press freedom as per Information and Broadcasting Policy, 2003.<sup>16</sup> While the policy requires such environment, the Regulations as we have seen in the previous section restrict the flourishing of media houses and press freedom. This is through unnecessary censorship and criminalization of defamation and false news.
- ii) While the Information and Broadcasting Policy, 2003 calls for the government to eliminate barriers which hinder citizens from accessing information, the Regulations seem to impose barriers on accessing

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<sup>16</sup> See Policy statement 1.2 of the Information and Broadcasting Policy, 2003.



information.<sup>17</sup> By Regulations insisting on strict requirement of the licensing and unnecessary censorship of the content the right of citizens to access information is thereby affected. This is because these stringent requirements impact the right to freedom of expression which in turn affects the right to access information.

The Regulations have not conformed to the extent explained above with the provisions of article 18 of the Constitution of the United Republic of Tanzania and the Information and Broadcasting Policy of 2003. This is because, while the two are promoting the right to freedom of expression and media freedom, the Regulations seem to provide for the contrary by restricting the rights through unnecessary legal requirements for the exercise of the right to freedom of expression online.

## **6. COMPARISON BETWEEN THE ELECTRONIC AND POSTAL COMMUNICATIONS (ONLINE CONTENT) Regulations 2020 AND ELECTRONIC AND POSTAL COMMUNICATIONS (ONLINE CONTENT) Regulations 2018**

Generally speaking, for the most part, the 2020 Online Content Regulations are similar with the 2018 Online Content Regulations save for few issues as outlined below:

### **i) Definition of Content**

The 2018 Regulations defines content to mean ‘sound, data, text or images whether still or moving.’<sup>18</sup> This definition was too broad and covered even the content through private communications. However, the 2020 Regulations have qualified the definition of the content by excluding content transmitted in

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<sup>17</sup> See Policy Statement 2.1.1 of the Information and Broadcasting Policy, 2003.

<sup>18</sup> See Regulation 3 of the repealed Online Contents Regulations of 2018.

private communications. Now, regulation 3 defines the content to mean information in form of speech or other sound, data, text or images whether still or moving except where transmitted in private communication. The impact of this change of definition is to narrow the scope of application of the Regulations. In other words, the Regulations will now not apply to private communications between individuals.

## **ii) Introduction of the Categories of Licenses**

In 2018 Online Content Regulations there were no categories of the licenses. In other words, the former Regulations did not provide for different categories of online content licences, but set out services fees payable in respect of an online content services licence, a simulcasting television licence (streaming content on the internet) and a simulcasting radio licence (streaming content on the internet). However, the 2020 Online Content Regulations have specifically introduced four categories of online content licences. These are:

- i) Licence for the provision of predominant news and current affairs issued to an online content service provider whose content covers news, events and current affairs.
- ii) Licence for the provision of predominant entertainment content issued to an online content service provider whose content covers music, movies, series, plays, drama, comedy, sports and any other related entertainment content.
- iii) Licence for the provision of predominant educational and religious content issued to an

online content service provider whose content covers religious information and content that aims at educating.

- iv) Simulcasting licence issued to mainstream broadcasting licensees with national coverage rights (this licence cannot be issued to mainstream content service providers with district or regional licences).

The term “predominant” has been defined by regulation 5(2) to mean content not below 85% of the licensed category measured on a weekly basis.

On one hand, this new feature has created certainty as to types of the licenses and regulated activity unlike in the former Regulations which was too general. On the other hand, this requirement of different licences for different types of content may impose additional cost to the licencees in the event that they may be broadcasting more than one type of content and meet the threshold of regulation 5(2) of the Regulations. For instance, if an individual is broadcasting current news affairs as well as entertainment on his or her channel, then the licence will be determined by the content which meets the threshold set under regulation 5(2). However it must be taken into account that the threshold is measured on weekly basis, so what happens if this week, one published news and current affairs more than entertainment and then next week published more entertainment than news and current affairs? Does this mean then that one should acquire a new licence? If yes, then this means an additional cost to the licencees because each licence is subjected to the fees.

### **iii) Scope of the Prohibited Content**

The 2018 Regulations identified prohibited content under Regulation 12. The prohibited content was

generally listed under this regulation. However, the 2020 Regulations have an expanded and more detailed list of prohibited content which is provided under the Third Schedule to the 2020 Online Content Regulations. The prohibited content has been put in thematic areas and there are 10 categories of prohibited content.

This means that the 2020 Regulations contain more prohibited content than its predecessors. Furthermore, although the prohibited content has been more elaborated than in the 2018 Regulations, the terms used are still very broad and vague and thus attract multiple interpretation and manipulation by the enforcing authorities.

Additionally, under the new Regulations, now even individuals owning private accounts in social media such as Instagram, tiktok, Facebook, snapchat, likee and others cannot post some content that is involved in planning, organizing, promoting or calling for demonstrations, marches or the like which may lead to public disorder. It is surprising that the Regulations assume that every demonstration or march is generally illegal while that is not the case because we have laws in place which allow demonstrations or marches, for instance the Constitution of the United Republic of Tanzania, 1977, the Political Parties Act, 1992 and the Employment and Labour Relations Act, 2004. One cannot understand why it should be an offence if one is using his or her online account to organize or planning such a demonstration or marches which are lawful under the laws.

**iv) Time for Notification to Take Down or Remove content**

While under the 2018 Online Content Regulations, an

application service licensee had 12 hours, from the time of notification by the Authority or by a person affected by the existence of prohibited content, to inform its subscriber to remove the prohibited contents, the 2020 Online Content Regulations has reduced this time to 2 hours.<sup>19</sup> Again, the time in which the application services licence holder is required to suspend or terminate the subscribers' account (the sanction for failure to comply with a take-down notice) has also been reduced to two hours from the previous 12 hours.

This is another regressive aspect of the Regulations. It is hard to understand the rationale of having such a short time for taking down the content upon notification taking into account that the order for take down does not originate from any judicial body but rather authority or any person affected by the content posted. Also, there is no any safeguard against malafide intention by those persons who may request the take down. With this position and trend, the right to freedom of expression via online medium is likely to be restricted unreasonably. Because under the regulation, if one is not pleased with what the other person has posted online, he is only required to notify the licensee who shall upon notification demand the subscriber to remove the content even without judging whether the content is really a prohibited content.

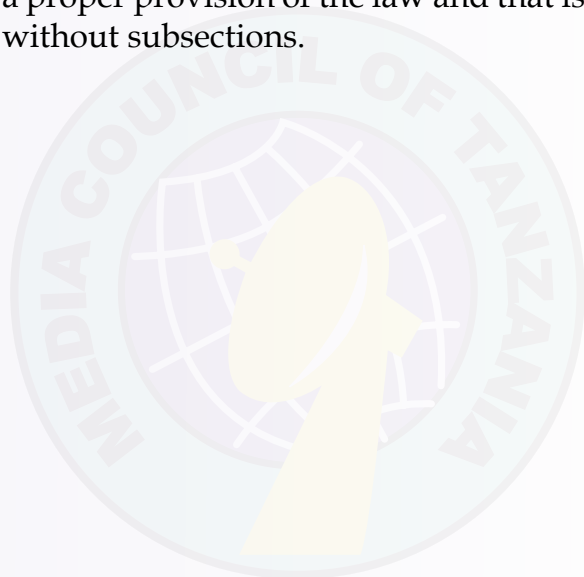
#### **v) Issue of Enabling Provision**

The 2018 Regulations were erroneously made under section 103(1) of the Electronic and Postal Communications Act, 2010. This resulted to institution of a judicial review via Miscellaneous Civil

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<sup>19</sup> See regulation 5(g) of the former Regulations and regulation 11(3) & (4) of the new Regulations of 2020.

Application No.12 of 2018 between Legal and Human Rights Center, Registered Trustees of the Media Council of Tanzania & Others v. The Minister for Information, Culture and Sports, TCRA and Attorney General. One of the grounds for this application was that the Minister had usurped powers not vested unto him under section 103 (1). Now, under the current Regulations they have rectified this mistake and cite a proper provision of the law and that is, section 103 without subsections.





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