



**Analysis of the Legal and
Human Rights Centre
(LHRC) on the Electronic
and Postal Communications
(Online Content)
Regulations, 2020**

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a. Introduction

Legal and Human Rights Centre (LHRC) has analyzed the Electronic and Postal Communications (Online Content) Regulations, 2020 issued by the Ministry of Information, Culture, Arts and Sports and published in Government Gazette No.538 on 17th July 2020. Under regulation 22 of new online content, regulations have repealed and replaced the Electronic and Postal Communications (Online Content) Regulations, 2018.

In nutshell, this analysis focuses on the conformity of the Regulations with the international standards on freedom of expression. This analysis seeks to highlight the extent to which the regulations are in line with the standards. Furthermore, it seeks to provide recommendations to improve both legal and policy framework on the fundamental freedoms.

International and National legal standards

LHRC has analysed the Regulations in line with *Art.19 of the United Nations Convention on Civil and Political Rights, 1966* which set out freedom of expression. It is stated that everyone has the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of his choice. Therefore, the analysis measures the extent to which Regulations comply with *Art.19 of the ICCPR,1966*.

Furthermore, the analysis reflects the *Art.9 of the African Charter on Human and Peoples Rights* which provides for the right to disseminate information and the general right to freedom of expression.

On the other side, *Art. 18 of the Constitutional of the United Republic of Tanzania, 1977* provides for the right to freedom of expression which includes; freedom of opinion and expression of his ideas; has a right to seek, receive and, or disseminate information of regardless of national boundaries; has the freedom to communicate and freedom with protection from interference from his communication as well as a right to be informed at all times of various important events of life and activities of the people.

Synopsis of the Regulations

In general, the Regulations consist of four (4) parts which have 22 provisions and 3 schedules compared to 2018 which consisted of five (5) parts which had 19 provisions. Furthermore,

prohibited contents in the new regulations are explained in detail in the third schedule made under Regulation 16.

New incorporated things in the Regulation

1. Improved interpretation of the word "content" in line with the interpretation provided in the Electronic and Postal Communications Act, 2010 by excluding private communication from the general interpretation of the word content.
2. List and description of prohibited contents are incorporated in the third schedule of the regulations.
3. List of documents which are required in the application for online content service license which includes; Tax Identification Number Certificate, the editorial policy guide, and a copy of the Tax Clearance Certificate.
4. Categories of license for online content providers to include news and current affairs, entertainment, education, or religious categories.

The positive aspect of the regulations

- i. The regulation provides general protection of the public by emphasizing social morals.
- ii. The regulation provides for appeal mechanism for the aggrieved party over the Authority decision. It specifies that the appeal should be filed to the Fair Competition Tribunal. LHRC commends this incorporation as the 2018 regulation the issues were not well formulated.
- iii. The regulation widens the scope of the term content to exempt private communication. It also a positive aspect as the 2018 regulations this was not clear. It was open to abuse and subject to various interpretations.

5. License for online content service providers

The Regulations set out three types of licenses which include; (i) online content service (ii) Simulcasting Television License (Streaming contents on the internet) and (iii) Simulcasting Radio License (Streaming contents on the internet). The license to provide online content service is further divided into three categories namely;

- i. News and current affairs,
 - ii. Education or Religious and;
 - iii. Entertainment.
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A table showing categories of license

	Categories of license		Application fees (TSH)	Initial license fees (TSH)	Annual license fees	Renewal fee	Duration of license
1.	Online Contents Service	News and current affairs,	100,000	1,000,000	1,000,000	1,000,000	3
		Entertainment,		500,000	500,000	1,000,000	3
		Education or Religious.		500,000	500,000	500,000	3
2.	Simulcasting Television License (Streaming contents on the internet)		50,000	200,000	200,000	200,000	3
3.	Simulcasting Radio License (Streaming contents on the internet)		50,000	200,000	200,000	200,000	3

The above table shows fees in a different category of license applied, it is quite clear that the licensing fees for the provision of contents which include events, news, and current affairs is higher compared to the rest of the categories.

i. Interpretation of the word “online contents services”

Rule 3 and rule 4 of the regulations make it difficult for a person who wants to post online content. For instance, rule 3 sets out the broad definition which might include a large group of social media users, since it stipulates that contents services provider means a person who provides online contents service. The definition of the online content service among other things includes instant message tools that most social networks are included in instant message tools such as Facebook, Viber and Instagram.

These regulations are inconsistent with *Principle 7 of the African Declaration on Internet Rights and Freedoms* which provides for the right to development and access to knowledge. It is important to note the role of the internet to the right to development, social media users have been benefiting from the use of internet through sharing of contents such as artistic works, business, innovation, and education, imposing mandatory licensing of online contents provider might curtail the right to development. Therefore, regulations 3 and 4 restrict the right to freedom of expression per Art. 18 of the Constitution of the United Republic of Tanzania, 1977, and right to development as said in the Declaration.

LHRC is concerned with the application of regulations 3 and 4 by imposing a mandatory requirement for licensing online contents provider, the provisions are prone to abuse and subject to various interpretations. For instance, a person who uses his or her account for "Facebook Live" may encounter the consequence of translation as it can be considered as a way of broadcasting the contents to public unlicensed which is an offense under the regulations.

ii. **Application for online content services license**

Apart from the licensing requirement discussed above, LHRC is also concerned with the registration for provision of online contents services is limited to the body corporates. Again, it forms another layer of the process for a person who wants to share his or her contents to the public, the regulation 6 sets the criteria for an applicant to which among of the required documents in the license application is a certificate of incorporation or registration. Therefore, it is difficult for a person who does not have the registered entity to share his or her contents to the public. This hurdle is inconsistent with *Art. 19 of the ICCPR, 1966* which provides for the right to disseminate information.

iii. **Restriction for demonstration and marches**

The third schedule under clause 3 prohibits content that involves planning, organizing, promoting, or calling for demonstrations, marches, or like which may lead to public disorder. The provided restriction is objectively not measurable to what extent such planning or organizing of demonstration could lead to public disorder. It is a clear contradiction to *Art. 20 of the Constitution of the United Republic of Tanzania, 1977* which provides for the right to association and assembly. Furthermore, the African Declaration of Internet Rights and Freedom stipulates that everyone has the right to use the internet and digital technologies about freedom of assembly and association.

iv. **Suspension and revocation of the license**

Regulation 8 stipulates that TCRA may suspend or revoke a service provider's license if it is satisfied that the terms and conditions of the license have been violated. The rule does not provide an opportunity for a licensee to rectify the anomaly or breach. Moreover, the TCRA should state in writing reasons for suspension or revocation of the licensee. The regulation does not give a right to a licensee to respond stated reasons from TCRA decision to suspend or revoke a license. This regulation conflicts with *Art. 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977*, and clause 11 of the African Declaration on Internet Rights and Freedoms provides for a right to due process. Therefore, a right to a fair hearing is a prerequisite for a right to due process.

v. **Restriction for simulcasting**

LHRC has reviewed regulation 10 which prohibits media with a regional or district registration from broadcasting its content through its social media. The regulation deprives citizens who are out of the respective district or regional to access information of the particular area. The regulation is a potential threat to the right to access to information. This regulation imposes a barrier to the economic, social, political, and cultural rights due to its restriction on the right to disseminate information. The implication of regulation 10 could be reflected in the decreased accountability and transparency in those areas as it limits the spread of information which could be used by citizens to question the implementation of development projects in the respective area. According to *principle 4 of the African Declaration of Internet Rights and Freedoms*, all information with the support of public funds should be freely available to all including on the internet.

vi. **Possessing application or technology which gives access to prohibited contents**

LHRC is also concerned with Regulation 16 sets out the prohibition to limit the possibility of a person accessing or obtaining prohibited content. The prohibition does not take into account the right of software developers and networking companies to possess such kind of software. In Information and Communication Technology (ICT) field one program can perform several functions that cannot be limited by its making. Furthermore, a certain program may be used for more than one purpose including unintended activity. Therefore, Regulation 16 creates the possibility of incriminating a developer may merely having a program that could be intended to allow users to access restricted content away from the basic functionality of that program. According to the principle of criminal law, the crime must have two (2) elements namely; *actus reus* and *men's rea*, thus prohibiting without regard to the intent of the person to poses such technology or application increases the likelihood of convicting innocent persons. LHRC is referred to as programs such as *AirCap*, *AirCrack*, *VPN* and *OphCrack* software are used for functionalities.

Recommendations

Legal and Human Rights Centre provides the following recommendations as follows;

- i. To consider the need of having a special clause in the regulations to exempt individuals from licensing a provision of online content.
 - ii. To repeal regulation 10 as it restricts the right to access information, for example, a person from the Ruvuma region who is in Dar es salaam is not able to get updates on what is going on in Ruvuma through internet due to the imposed restriction not to simulcast.
 - iii. To amend regulation 16 by adding a basic ingredient of crime which is the intention aspect of a person to commit a crime.
 - iv. To remove the annual license fees for all license categories. The imposition of license fees reduces the access to information for the public, considering the intent has been a great tool for easy conveying of information in many parts of the country.
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