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The Position of Electronic and Postal Communication (Online Content) Regulations In Protecting Freedom of Expression in Tanzania

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Abstract

The paper seeks to analyze the electronic and postal communication (online content) Regulation, 2020 together with its amendment recognized as Electronic and Postal Communication (online content) Regulation (Amendment).¹ Freedom of expression is exercised either offline or online because of the development of science and technology which assert the use of the Internet. However, the right needs to be balanced with other issues including the protection of the rights of others, the protection of national health, and for security and interest of the general public. Tanzania is a signatory to the International and Regional instruments on human rights which also recognize the freedom of expression. International and Regional instruments include; the Universal Declaration of Human rights,² the International covenant on civil and political rights,³ the African Charter on Human And Peoples Rights,⁴ the Convention on the rights of the child,⁵ the African Charter on the rights of the Child, the Treaty on the Establishment of East African Community,⁶ The United Nation Human Rights Council Resolution.⁷ Also, Tanzania has its legal framework which protects and promotes the right to freedom of expression. these legal frameworks are the constitution of the United Republic of Tanzania 1977 as amended from time to time.⁸ Thus, the author conducts an analysis of the Electronic and postal Communication (Online Content) Regulation and its Amendment published in the Government Gazette No. 136 of 2022 in protecting the right to freedom of expression in Tanzania as well as its compliance with international standards.

Keywords: *Electronic communication, Postal communication, Freedom of expression, Tanzania*

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¹ GN No. 136 of 2022.

² Universal Declaration of Human Rights of 1948

³ International Covenant on Civil and Political Rights Adopted on December 16, 1966 by United General Assembly (New York City) [Entered into force March 23, 1976].

⁴ African Charter on Human and People's Rights of 1981.

⁵ United Nation Convention on Rights of the Child, Adopted by the United Nation on November 20, 1989.

⁶ Treaty on the Establishment of East Africa Community of 1999.

⁷ Resolution No. 13 of 2016.

⁸ Constitution of the United Republic of Tanzania of 1977 [CAP 2 R.E 2008].

1. Introduction

The Electronic and Postal Communication (online content) Regulations 2020 as subsidiary legislation was enacted as per Section 103 of the Electronic and Postal Communication Act and issued by the Tanzania Government on July 17, 2020. The purpose of the Regulation is to regulate online content service providers and online content users.

On the other hand, Freedom of expression is a constitutional enshrined as per Article 18 of the constitution of the united Republic of Tanzania of 1977 as amended from time to time. The right to freedom of expression covers the following aspects.

- Every person has the freedom of opinion and expression of his ideas;
- Has our right to seek, receive and, or disseminate information regardless of national boundaries;
- Has the freedom to communicate and freedom with protection from interference from his communication; and
- Has a right to be informed at all times of various important events of life and activities of the people and also issues of importance to the society.

2. Legal Framework on the Freedom of Expression

2.1. International Legal Framework on the Freedom of Expression

2.1.1. Universal Declaration of Human Rights of 1948⁹

Article 19 guarantee the right to freedom of opinion and expression; the right includes to hold opinion without interference and to seek, receive and impart information and ideas through any media and regardless of the frontier. Tanzania is a signatory to this Declaration, hence, it is bound to abide by the Declaration. The domestic laws made regarding freedom of expression need to be by the international standard including the universal declaration of Human Rights.¹⁰

2.1.2. International Covenant on Civil and Political Rights¹¹

Article 19 guarantees the right to hold opinions without being interfered with, and the right to freedom of expression including 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. As per the above paraphrase, the freedom of expression is guaranteed whether online or offline, Tanzania is a signatory to this convention so it is required to abide by the Covenant.¹²

2.1.3. United Nation Human Rights Council Resolution¹³

This was adopted by the United Nations on the twentieth session for the promotion, protection and enjoyment of Human Rights on the Internet. The resolution requires that the same rights that people enjoy offline must be protected in the online environment as well.¹⁴

2.1.4. Limitations on the Freedom of Expression Under International Instruments

The international instruments set the standards for limiting the freedom of expression, for the Universal Declaration of Human Rights, the standard for limiting Human Rights are provided as per Article 29 whereby limitation can be to secure due recognition and respect for the rights and freedom of others, meet the just of molarity, public order for the general welfare in a Democratic society.¹⁵

⁹ Universal Declaration of Human Rights of 1948.

¹⁰ Article 19 of the Universal Declaration of Human Rights of 1948.

¹¹ International Covenant on Civil and Political Rights of 1966 which was adopted in 1976.

¹² Article 19 of the international covenant on civil and political rights 1966 adopted in 1976.

¹³ United Nation Human Rights Council Resolution no. 13.

¹⁴ Paragraph 27 of the report of the special rapporteur on the promotion and protection of the right to freedom of opinion and expression (2011) retrieved from http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/AHRC.17.27_en.pdf accessed on Friday September 16, 2022 at 9:49am.

¹⁵ Article 29 of the Universal Declaration of Human Rights of 1948.

Moreover, The International Covenant on Civil and Political Rights is so specific on the limitation of the right to freedom of expression as per Article 29(3)(a)(b) sets the standards on limiting the freedom of expression including the respect of the right and reputation of others, protection of national security or public order or public health or morals. The East African Court of Justice has reiterated in the case of *Media Council of Tanzania and two others vs. AG of the United Republic of Tanzania*¹⁶. The court insisted that the limitation on the right to freedom of expression and media freedom should be compatible with international standards.¹⁷

2.2. Regional Legal Framework on Freedom of Expression

2.2.1. African Charter on Human and People's Rights

This is the legal framework regarding Human Rights applicable in Africa. It guarantees Human Rights in Africa. The charter guarantees the right as per Article 9 which provides the right to receive information as well as the right to express and disseminate his opinions within the law.¹⁸ As per the African Charter freedom of expression may be limited but all are subject to international standards.¹⁹

*2.2.2. Treaty on the Establishment of East African Community*²⁰

It is another legal framework applied by East African countries. It guarantees the respecting of Human Rights including freedom of expression as per Articles 6(d) & 7(2),(8) and (30) of the Treaty. The member states are required to principles enshrined in the Treaty on the establishment of the East African Community concerning promoting and protecting Human Rights in the respective states.

2.3. Domestic Legal Framework

In the domestic legal framework, the right to freedom of expression is a constitutional right but there is other legislation enacted by the parliament.

2.3.1. Constitution of the United Republic of Tanzania 1977

The constitution guarantees the right under Article 18 of the constitution of the United Republic of Tanzania. The Constitution of the United Republic of Tanzania (1977) protects freedom of expression in Article 18, which provides: 'Every person (a) has freedom of opinion and expression of his ideas; (b) has a right to seek, receive and, or disseminate information regardless of national boundaries; (c) has the freedom to communicate and freedom with protection from interference from his communication; (d) has a right to be informed at all times of various important events of life and activities of the people and also of issues of importance to the society.

2.3.2. Legislation Enacted by the Parliament

There is legislation enacted by the Parliament to promote and protect the right to freedom of expression in Tanzania including the Media Services Act of 2016, the Cybercrime Act No. 14 of 2015, the Access to Information Act of 2016, the Electronic and Postal Communication Act of 2022, and the Statistics Act of 2016.

But for this Article, the author analyzes the subsidiary legislation which is the Electronic and Postal Communication (Online Content) Regulation 2020 as amended by the Electronic and Postal Communication (Online Content) Regulation)Amendment GN No. 136 of 2022.

2.4. National Policy

2.4.1. Information and Broadcasting Policy 2003

The policy was enacted to enhance freedom of expression and freedom of the press in Tanzania. The Information and Broadcasting Policy of 2003 calls for the government to eliminate barriers which hinder citizens from accessing information.²¹

¹⁶ Reference No. 30 of 2017.

¹⁷ Article 19(3) of the International Covenant on Civil and Political Rights Adopted on December 16th, 1966 by United General Assembly (New York City) [Entered into force March 23, 1976].

¹⁸ Article 9 of the African charter on Human and Peoples Rights of 1981.

¹⁹ *Ibid.*, Article 9.

²⁰ Treaty on the Establishment of East African Community of 1999.

²¹ Information and Broadcasting Policy of 2003.

3. Changes Brought by the New Amendment of the Electronic and Postal Communication (Online Content) Regulation²²

3.1. The Requirement of License for Media Providers

The new amendment to the electronic and postal communication (Online Content) Regulations. Regulation 4 is amended by deleting the word service providers and replace by online media service.²³ The license does not include mainstreaming media which simulates or publishes the content through the internet. It is unlike the previous Amendment whereby the license included all of them.²⁴

Furthermore, the new amendment brought changes to the category of licence whereby the new amendment deletes them and substitutes the licence under two categories which are licence for online media service category A and Online Media Service Category B.²⁵ Where license category A is for online content service and licence category B is for aggregation.²⁶

3.2. Deletion of the Prohibited Content Online Service Providers with the District or Regional Licence

Before the Amendment, online service providers with trick or regional licences were prohibited from simulcast content using the platform. However, the regulation has been deleted.²⁷

3.3. Repeal of the Regulation Relating to Internet Cafes²⁸

Before the Amendment the law imposed an obligation to the internet cafe to ensure (a) ensure that all computers used for public internet access at the cafe are assigned static public IP addresses; (b) establish and publish a safe internet use policy for safe use of the internet with regards to online content and post it on a conspicuous place; computer home screen or display it on a visible area for users to read before using the service; (c) put in place a mechanism to filter access to prohibited content; (d) install a surveillance camera to record and archive activities inside the cafe, and (e) keep a proper service user register and ensure every person using internet service is registered upon showing a recognised identity card.²⁹

3.4. Obligation to the Online Content Services Licensee Regarding the Protection of the Children³⁰

The new amendment is unlike the previous law, the current place an obligation to the online content licensee, host or online content user to ensure the protection of children from accessing any harmful content to the child's well-being.³¹

3.5. The Amendment of the Third Schedule Ates the Prohibited Content.³²

The schedule is amended by deleting item (d) of paragraph 4 which provided "*content that promotes gambling and similar activities such as bets and lottery and those related to electronic gambling activities*" this was vague in terms of its interpretation which may create so many interpretations. The deletion of the content by the new amendment is one of the steps to protect freedom of expression in Tanzania.

4. Problems, Which Still Exist Though, The Amendment Has Been Done

4.1. Restriction on Investigative Journalism

Among other things, paragraph 3 (e) of the Third Schedule to the Regulations prohibits the publication of official confidential communications. Whereas this has become a serious restriction on investigative

²² GN No 136 of 2022.

²³ Regulation 4 of the electronic and postal communication (online content) Regulations (Amendment GN No 136 of 2022.

²⁴ Regulation 4 of the electronic and postal communication (online content) Regulations 2020.

²⁵ Regulation 5 of the electronic and postal communication (online content) Regulations (amendment) GN No 136 of 2022.

²⁶ *Ibid.*, Regulation 5.

²⁷ Regulation 9 of the electronic and postal communication (online content) Regulations GN No 136 of 2022.

²⁸ Regulation 11 of the electronic and postal communication (online content) Regulations (Amendment) GN No 136 of 2022.

²⁹ Regulation 13 of the electronic and postal communication (Online Content) Regulation 2020.

³⁰ Regulation 12 of the Electronic and Postal Communication (online content) Regulation (Amendment) GN No 136 of 2022 which Ammend Regulation 18 of the electronic and postal communication (online content) Regulation 2020.

³¹ *Ibid.*, Regulation 12 of The Electronic and postal communication (online content) Regulation (Amendment) GN No 136 of 2022 which Ammend Regulation 18 of the Electronic and Postal Communication (Online content) Regulation 2020.

³² Regulation 15 of the Electronic and Postal Communication (online content) Regulation (Amendment) GN No 136 of 2022.

journalism because now it will be an offence to publish such information from confidential communications.³³

4.2. The Overly Broad List of Prohibited Content

As said earlier, the list contains matters, which are so wide and capable of multiple interpretations and manipulation. Owing to that, the Government or Authority can 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.³⁴

4.3. Directing the 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 of the content to be published and thus interferes with editorial independence.³⁵

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 to guide the state parties to the 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.

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 been reached.

4.4. Restriction on Sharing of Information Only to 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. 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. Along the same line there should not be licensing or registration of individual internet users or service providers or content providers unless there is evidence that it is necessary for the maintenance of public order or the protection of the rights of others.

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 paper is to guarantee the right of freedom of expression against unnecessary interference by the government and more importantly to ensure that all people without discrimination exercise the right.

The Declaration states clearly that the right to express oneself through the media by practising journalism 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, Regulations 4(1) and (2) of the Regulations are in clear confrontation with this principle because licensing for the online sharing of information is deemed to be an unnecessary requirement which is the right to freedom of expression and press freedom.

4.5. 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. 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

³³ Third Schedule of the Electronic and Postal Communication(Online Content) Regulation 2020.

³⁴ Media Council of Tanzania (2020) Analysis of the Electronic and postal communication (online content) Regulation 2020. Before it's ammendment.

³⁵ Regulation 9(b) of the electronic and Postal Communication(Online Content) Regulation 2020.

corruption. International and Regional bodies such as the UN and AU have recognized the threat posed by criminal defamation laws and have recommended that they should be abolished.³⁶

Therefore, paragraphs 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 acceptable standards.

4.6. Unnecessary and Unreasonable Restriction on Freedom of Expression

The Regulations seem to unreasonably restrict the right to freedom of expression contrary to 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 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 about 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.³⁷ The right to freedom of expression was not designed to 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 the respect of the rights or reputations of others; or the protection of national security or public order (order public), or 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 requirements and a broad list of 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.

4.7. Continuation of the 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. 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.

Even though the new amendment deleted Regulation 13 which placed an option for the internet café providers to Register users via recognized IDs, assign static IP addresses to their computers and put camera surveillance to record the activities on their premises.

The problem still exists indirectly as Regulation 9 (e) requires licensees to have mechanisms in place to identify the source of content.³⁸ This regulation impacts citizens, journalists, and whistleblowers relying on secure and private communications to express themselves freely and carry out their duties. Requiring to identify the 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.³⁹ This may impact journalism in general since the

³⁶ Resolution 169 on Repealing Criminal Defamation Laws in Africa, 2010, ACHPR/Res.106 (XLVIII)10. By the African Commission on Human and Peoples' Rights, meeting at its 48 Ordinary session, held in Banjul, The Gambia, from November 10–24, 2010. Reaffirming its mandate to promote and protect human and peoples' rights under the African Charter on Human and Peoples' Rights (the African Charter); Nothing that the freedom of expression is a fundamental human right enshrined in regional and international instruments, including Article 9 of the African Charter, Article 19 of both UDHR and ICCPR, Article 13 of ACHR and Article 10 of ECHR.

³⁷ General Comment No. 34.

³⁸ Regulation 9(e) of the Electronic and Postal Communication(Online Content) Regulation 2020.

³⁹ *Ibid.*

individuals who are the sources of information may be afraid to share such information for fear that their identity will be disclosed and thus placed in danger.

According to the UN Special Rapporteur on Freedom of Expression, the best practice is to encourage the use of anonymity and encryption tools to promote and protect the freedom of expression online rather than unduly limiting it by restricting the use of anonymity.

5. Recommendations

However, the Amendment has been done concerning the electronic and Postal Communication (online content) Regulation 2020 still there are problems with the respcncerningotion and protection of the right to freedom of expression in Tanzania. On the other hand, the elaborated above problems on the electronic and postal communication (online content) regulation 2020 requires further Amendment for the best interest of the general public and democratic development. It is argued that further amendments are to be done to protect the right to freedom of expression in Tanzania.