

Analysis of Tanzania's Electronic and Postal Communications (Online Content) Regulations 2017

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Introduction

Article 18 of the Constitution of the United Republic of Tanzania guarantees the right to freedom of opinion and expression and the right to seek, receive and impart information.² In the last three years, Tanzania has introduced legislation aimed at regulating online communications but which has in turn threatened citizens' realisation of these constitutional guarantees. Legislation such as the Cybercrimes Act, 2015 enacted to fight rising incidents of cybercrime such as bank fraud, mobile money theft, phishing attacks, website hacking and spoofing, has been used to prosecute online users perceived to be critical of the persona of the president or of other powerful individuals and institutions.³ The Act further criminalises publication of false information.

The Broadcasting Services (Content) (The Political Party Elections Broadcasts) Code 2015, gazetted on June 26, 2015 places burdensome requirements on online content providers "residing within or outside Tanzania territory" who create "content intended for Tanzania mainland using Swahili or any other languages which have large audiences" during elections. These requirements include registration with the [Tanzania Communications Regulatory Authority](#) (TCRA); compliance with Tanzania's laws and regulations governing the operations of electronic media; and ensuring that information provided in blogs is accurate, fair, factual, and balanced to all parties and independent candidates in elections. Furthermore, the rules require online content providers to make efforts to edit interactive discussions likely to hurt the feeling of any person, as well as offensive or blasphemous language that may provoke violence, sedition, or breach of peace.

The proposed Electronic and Postal Communications (Online Content) Regulations, 2017 join the catalogue of legislation related to online content in Tanzania that threaten citizens' constitutionally guaranteed rights. The regulations were developed pursuant to **section 103(1)** of the Electronic and Postal Communications Act, 2010 (EPOCA), which empowers the Minister of Communications to make regulations on content related matters. Enacted in March 2010, the EPOCA aims to keep the communications sector abreast with developments in the electronic communications industry by providing for a comprehensive regulatory regime for electronic communications and postal communications service providers.⁴

The regulations specify obligations of service providers and users of online platforms including social media, discussion forums, and online broadcasts (radio and television). They also confer powers upon TCRA to regulate online content, including through registration of users and platforms, and taking action against non-compliance with the obligations, such as ordering the removal of "prohibited content."

In this brief, we analyse provisions of the proposed regulations that have an implication on access to the internet, intermediary liability, user privacy, censorship, surveillance and freedom of expression in Tanzania. The analysis aims to inform advocacy, stakeholder engagements and inputs to the proposed regulations.

¹ CIPESA acknowledges the contribution of various Tanzanian civil society actors in the drafting of this brief including JamiiForums and advocate James Marenga.

² The Constitution of the United Republic of Tanzania, <http://www.judiciary.go.tz/wp-content/uploads/2015/09/constitution.pdf> and The Constitution of Zanzibar, <http://www.wipo.int/edocs/lexdocs/laws/en/tz/tz028en.pdf>

³ See for instance: Tanzania's Cybercrime Act Makes It Dangerous to "Insult" the President on Facebook, <https://advox.globalvoices.org/2016/04/18/tanzanias-cybercrime-act-makes-it-dangerous-to-insult-the-president-on-facebook/>; Man Charged Over Pinda Internet Jibe, <http://www.thecitizen.co.tz/News/Man-charged-over-Pinda-internet-jibe/-/1840340/2913954/-/1jf9kn/-/index.html> and Tanzanian police charge Jamii Forums founder, <http://www.bbc.com/news/world-africa-38341151>

⁴ Electronic and Postal Communications Act, 2010, <https://www.tcra.go.tz/images/documents/policies/epoca.pdf>

Analysis

1. Broad definitions

Some of the definitions provided in the regulations are ambiguous and wide in scope of application, with potential to limit freedom of expression and access to information. For instance, under **regulation 3**, hate speech is defined as “any portrayal (words, speech or pictures, etc.), which denigrates, defames, or otherwise devalues a person or group on the basis of race, ethnicity, religion, nationality, gender, sexual orientation, or disability” and such content is prohibited from publication under **regulation 12**. The term “portrayal” is open to misinterpretation and any action relating to information sharing online could be considered a breach of the regulations especially in light of denigration, defamation and devaluation of a person or group of persons. Worryingly, the definition of hate speech encompasses defamation which could be a basis for impunity especially in cases where presumed victims of hate speech are involved in scandals such as corruption or sexual violence.

Meanwhile, indecent material, whose publication is also prohibited under **regulation 12**, is defined as material which is “offensive, morally improper and against current standards of accepted behaviour which includes nudity and sex” (**regulation 3 paragraph 10**). It is unclear what constitutes “morally improper and against current standards of accepted behaviour”, which creates the risk of blanket prosecution of content providers and users who may provide or access sex and nudity content that falls within regulation 12 (1) (a) for reason of not getting approval from the film censorship board.

2. Registration and Powers of the Regulator

Regulation 7 (a) requires bloggers and online forums to register with TCRA and **regulation 4 (1) (a)** provides that TCRA maintains a register of bloggers, online forums, online radio and online televisions. Registration of bloggers and online platforms goes against the spirit of a free and open internet, and would have a chilling effect on freedom of expression, opinion and speech, and result in increased self-censorship among the citizenry. **Regulation 4 (1) (b)** gives the authority sweeping powers to take action against non-compliance with the Regulations, including by ordering removal of “prohibited content”.

3. Duties and Responsibilities for Online Content

Various obligations set out in the regulations are unclear and not realistic.

Under **regulation 6 (1)**, licenced service providers who provide online content or facilitate online content production⁵ are required to terminate or suspend subscriber accounts and remove content if found in contravention of the regulations, within 12 hours from the time of notification by the TCRA or an affected person. Swift content restriction or removal is also required of online content hosts under **regulation 8 (b)** and content providers and users under **regulation 5 (1) (h)**. While content such as revenge pornography and that which promotes violent extremism may be justifiably removed promptly, the regulations may be unjustifiably applied to content such as that relating to exposure of corruption or human rights violations. Whereas **regulation 14** provides for a complaints handling procedure, the regulations do not provide for the process nor mechanisms for legal recourse over contested content. The requirements such as in **regulation 5 (1) (h)** and **regulation 14 (2)** to ensure resolution of complaints and removal of prohibited content within 12 hours also place a heavy technical and human resource burden on content hosts and providers to have in place competencies to handle complaints within 12 hours.

Principle 6 of the African Declaration on Internet Rights and Freedoms aims to promote cultural and linguistic diversity of content online as a means of enriching the development of societies.⁶ However, **Regulation 5 (1)** is in total disregard of this principle, as well as diversity of opinion and without precise definitions, requires content providers to ensure that content “is safe, secure and does not contravene the provisions of any written law” and “take into account trends and cultural sensitivities of the general public”.

⁵ Under the regulations, “application services licensee” means a licensee of TCRA in the category of application service license limited to only the provision of online content or facilitation of online content producers

⁶ African Declaration on Internet Rights and Freedoms, <http://africaninternetrights.org/articles/>

Furthermore, the regulation places responsibility on content providers to use “moderating tools to filter prohibited content”. These provisions undermine sharing of information from different cultures and is likely to prompt TCRA to block content providers from outside Tanzania, or to order a blockage of local content the Authority may consider counter to Tanzanian culture, thereby undermining citizens’ access to information.

In contravention of Article 16 (1) of Tanzania’s constitution, which provides for the right to privacy, and Article 18(c), which guarantees citizens the “freedom to communicate and a freedom with protection from interference from [their] communication”, **regulation 5 (1) (f)** requires content providers to “have in place mechanisms to identify source of content”. This obligation poses a threat to the right to anonymity and whistleblowing and may lead to self-censorship.

While some of the obligations of internet cafes under **regulation 9** are essential, especially for protection of children from adult content and users from other prohibited content as defined by **regulation 12**, the requirement to install surveillance cameras is also in violation of the right to privacy. Abiding by the surveillance camera installation requirement is also a costly venture that may not be affordable to café owners. Such undue high costs may pose a barrier to market entry for businesses which in turn affects affordable internet access for citizens and stifles internet use and innovation.

Similarly, the obligations placed on bloggers and online forums under **regulation 7 (1) (b) (c) and (d)** including content review before publication, “use of moderating tools to filter content and set mechanism to identify the source of such content” and providing information on available tools including user ethics, adult responsibilities over children, and complaint channels, are extensive and unrealistic in as far as implementation is concerned. These regulations, which are applicable to “Tanzania residents, Tanzanian citizens outside the country, non-citizens of Tanzania residing in the country, blogging or running online forums with contents for consumption by Tanzanians”, place undue monitoring and maintenance skills and resource burdens on bloggers and online forums and could possibly lead to censorship of online content. It is also worth noting that various discussion forums, blogs and user groups run on the backbone of multi-national platforms such as Facebook and Google which have well established content policies, including reporting guidelines and are party to Mutual Legal Assistance Treaties for local law enforcement.⁷

Among the positive provisions of the regulations are the calls for user responsibility over content posted online under **Regulations 5 (2) (a)** and **10 (a)**, which state that every subscriber and user of online content shall be “responsible and accountable” for the information posted on an online forum, social media, blog and any other related media. Further, **regulation 10 (b)** requires users to use passwords for equipment to ensure that unscrupulous and unauthorized persons do not have access to social media users’ accounts. This promotes digital safety practices to ensure data and information security. The requirement for provision of easily accessible user terms and conditions by licensed service providers under **regulation 6 (2)**, adoption of code of conduct for content hosting (**regulation 8 (a)**) and internet cafes (**regulation 9 (b)**) are also commendable in ensuring user awareness of platform policies.

The regulations also provide important safeguards for child protection online. **Regulation 7 (d) (ii) & (iii)** requires bloggers and online forum managers to provide information about available tools and measures that can be taken to restrict children’s access to content which may be unsuitable. **Regulation 13** prohibits the registration of children to access or contribute to prohibited content online and also calls for provision of parental controls or filtering mechanism to restrict children’s access to unsuitable content.

4. Prohibitions

Regulation 12 on prohibited content lists various content restricted from publication online, whose definitions are broad and have potential to limit freedom of expression. In terms of scope, it includes unspecified content that “causes annoyance”; “uses disparaging or abusive words which is calculated to

⁷ A mutual legal assistance treaty (MLAT) is an agreement between two or more countries for the purpose of gathering and exchanging information in an effort to enforce public or criminal laws.

offend an individual or a group of persons”; and is “crude”, “obscene” or “profane” including in local languages. **Regulation 12** also prohibits the publication of “false content which is likely to mislead or deceive the public except where it is clearly pre-stated that the content is i) satire and parody ii) fiction; and iii) where it is preceded by a statement that the content is not factual.” Given the subjective nature of interpretation, the definitions under this regulation should be clear and specific, without broad or vague terms.

On grounds of national security and public safety, **Regulation 12 (1) (j)** prohibits circulation of information relating to possible terrorist attacks and disease outbreaks, yet this information should be available to members of the public to ensure they take necessary precautions for personal safety.

In a boost to privacy and data protection, **regulation 11** prohibits unauthorised disclosure of “any information received or obtained” by TCRA or any of its personnel during the exercise of its powers or performance of duties under the provisions of the regulations, except where the information is required for law enforcement purposes. Furthermore, **regulation 11** restricts use of information only to the “extent” that is “necessary for the proper performance of official duties.” Nonetheless, in the absence of data protection and privacy legislation in Tanzania, these safeguards could be rendered of little value and hence prone to abuse.

5. Offences and Penalties

Irrespective of the gravity or extent of non-compliance with the regulations, **regulation 16** provides for a uniform penalty upon conviction, of a fine of not less than five million Tanzania Shillings (USD 1,960) or imprisonment for a term not less than 12 months or both. The regulations should provide for lesser penalties for minor offences and only stipulate high penalties for extreme or repeat offences.

Conclusion

The regulations have some important provisions and set minimum standard requirements with regards to the protection of children online, fighting hate speech and extremism online, and promoting user responsibility and digital security practices.

However, the regulations should to reviewed and amended to have clear, unambiguous definitions and wording, and quash the requirement for registration of bloggers and users of similar online platforms. It is also essential that not too much power is vested in TCRA with regards to content take-downs and that diversity in content availability online is promoted. The obligations set out should not turn content service providers and publishers into monitors, by handing them responsibility such as use of moderating tools to filter content, conducting content review before publication, and undertaking mechanisms to identify sources of content.

Moreover, there should be a clear appeal mechanism against orders to remove or block content, and such remedial measures should also be applicable once an order for blockage or removal has been issued but not yet been effected. Overall, the regulations should uphold citizens’ rights to privacy, access to information and free expression. Furthermore, TCRA, pursuant to EPOCA’s objectives of promoting a developed telecommunications sector in Tanzania, should ensure that the regulations foster internet access and affordability without placing undue requirements on service providers or making costs prohibitive, which would act as a barrier to market entry, including for public access facilities such as internet cafes.