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The Law Reform Commission of Tanzania

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The contents herein represent the views of the respective authors, and LRCT accepts no responsibility for the opinions reflected to advocate or advance a particular point of view.

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Commission Chairman's Statement

It is with much pleasure that I introduce you to this 4th edition of our Law Reformer Journal. The peoples of the United Republics of Tanganyika and Zanzibar, known as Tanzanians in International discourse, are at a critical juncture in the history of their respective states. Our stance in the on going constitutional Review process, will define the trajactile our united country will take, in the dynamic era of information technology and the changed paradigm of global economic and political power.

Prof. Ibarahim H. Juma, Justice of Appeal and my immediate predecessor, makes a wonderful case on the role legislation has played in the past in fostering integration of our many tribal nations into one nation, almost free of racial and religion differences that have hamited other nations in the making. He builds a food case that, law was one of the forces used to unify Tanzania mainland.

There are very good lessons for all of us as we struggle to redefine our relations in the set up of our two states.

In another paper, John William Nyoka and Prof. Sufian Hemed Bukurura make a brief analysis of the constitutional Review process with an infectious optimism.

The Commission marks its 30th years in October this year. Like the nation we were meant to serve, we are at a critical juncture. It is time to review our *modus operand* in order to realign ourselves to the ever changing needs of the society we serve. Three brilliant papers bring out this perspective.

The late Prof. Mwemezi Christian Mukoyogo, remains relevant and alive in a paper written in 2005, asking the question "**Is the Law Reform Commission keeping pace with the trend of Development of our Country?"**

John William Nyoka, brings his fundable experience in the Tanzania Prison Services, and argues a strong case for reform in the way, we, as a nation, conduct the business of fighting crime. He propagates for a complete new outlook to come up with a dynamic prisons system, geared at enhancing public safety other than keeping "prisoners in"

Finally, Deusdedit Simbakalia brings his enormous legislative Drafting skills to light, when he makes up a strong case for, making slight changes in the way Parliament makes amendments to various laws.

His paper Critical Appraisal of the Miscellaneous Amendments system in Tanzania, reminds the Law Reform Commission and other stakeholders, that access to Justice is a fundamental right. Therefore, the all too popular principle that "Ignorance of the law is no defence" imposes a converse duty on the state to make sure that the laws are easily accessible.

The current practice of amending various law under the cover of unscellaneous Amendments, has unwillingly made such amendments unknown and inaccessible, thus leading to decisions being made in courts of law in total ignorance of the existence of such amendments.

He makes a good case for an easier mode/process which would ensure ease of reference.

It is the duty of the Law Reform Commission, to ensure that all our laws are readily available and accessible. Our challenge is to do so in a cost effective manner. He shows such a way.

It is my hope that we will all find this edition of the Journal, instructive, educative, evocative and easy to understand.

I invite you all to be alive to this historical moment in the life of our young but vibrant nation – Tanzania.

A. K. MUJULIZI, J
CHAIRMAN
LAW REFORM COMMISSION OF TANZANIA

Editorial Note

This issue of the Law Reformer is being published at the moment of critical economic and political transformations in the country. On the political front, the Constitutional Review Commission, chaired by Hon Judge (Rtd) Joseph Sinde Warioba, launched its first draft of the Constitution. At the economic level, Tanzania Development Vision 2025, and its related Five Year Development Plan 2011/12-2015/2016, inform and give guidance to the work of both government and the private sector. The launching of the Southern Agricultural Growth Corridor of Tanzania (SAGCOT), as part of *Kilimo Kwanza*, intends to transform agriculture to the highest possible level. In addition, petroleum exploration companies, Statoil/ExxonMobil and BG/Ophir, have discovered huge reserves of natural gas in the deep sea of the Indian Ocean, and Big Results Now, at its pilot phase, sets out national priorities which are designed to have high impact deliverables.

All these developments are relevant to the statutory mandate of the Law Reform Commission of Tanzania (LRCT) which includes, *inter alia*, keeping under review all the laws with a view to its systemic development and reform (see Section 4(1)(a), the Law Reform Commission Act No. 11 of 1980, [Cap. 171 R.E. 2002].

This publication, also mandated by section 4(1) (h) of the LRCT establishing legislation, highlights a few aspects connected to political and economic transformation in the country. Four papers are published here together with summaries of recent developments. Although the papers and summaries are different in scope and content, they share certain underlying characteristics.

Three interrelated themes emerge, namely, the role of and lessons from history; the resilience of customary law and the significance of economic productivity and economic efficiency. Whereas economic efficiency, partly contributes to production of material resources, to be consumed by society, history, and customary law in particular, informs and organises social relations of human beings, the consumers of material goods. The fine balance between the two (economic efficiency and social relations) needs to be found as they are dialectically linked.

The familiar adage, that history is the best teacher, is captured in the four papers published here. Whereas, Professor Mwemezi Mukoyogo reminds us of the significant part played by colonialism and socialism in the creation of laws of this country, Justice Ibrahim Juma, on his part, outlines how law and politics have interacted over time in the making of the Tanzania as we know it today. The analysis by Justice Juma is both informative and critical. It is informative as it reminds readers of where this country has come from. It is also particularly critical at this point in time, for example, as the first draft of the Constitution, produced by the Warioba Commission refers to the Articles of the Union, entered into in 1964, forms the basis from which the proposed Constitution should borrow a leaf.

Deputy Commissioner John Nyoka and Advocate Simbakalia too, raise issues with historical relevance. Nyoka, for example, examines how the prison system has been used in the past, as part law enforcement, in combating crime. He sounds sceptical and raises his doubts about its current relevance. He uses the history of law enforcement to make recommendations of what should be done to improve the role of prisons in community protection today. On

his part, Advocate Simbakalia outlines the history of record keeping of laws from colonial times to the present. He narrates the system by which laws passed in Parliament are consequently recorded in the statute books. This system of record keeping is a critical to the legal principle - ignorance of law is no defence. Imagine lawyers going to court, to represent interests of their clients, without knowledge of the relevant and applicable laws! Put differently, ignorance of law becomes an issue not for laymen and women but of learned Brothers and Sisters too! Simbakalia concludes that the miscellaneous amendments system causes confusion and proceeds to recommend how it could be remedied.

The extent to which customary laws have survived, despite the forces of change exerted on them, is interesting. This explicitly emerges from the summaries of the projects on the review of customary laws and the review of land dispute settlement. Albeit implicitly, customary law is also touched upon by Justice Juma who refers, for example, to the Judicature and Application of Laws Ordinance, 1961 (JALO), now known as Judicature and Application of Laws Act (JALA), Cap 358 R.E. 2002), native authorities and native courts and unification processes that led to the making of the nation. It is no wonder that the Warioba Constitutional Commission draft also proposes the inclusion of unity among the seven (7) National Values.

The connection between economic efficiency and legal-political relations is the third theme emerging from the collection of papers published here. In view of economic transformations that have taken place in this country since 1995, especially the expansion of competitive market-based economic system, this should not be

surprising. The summaries of review of land dispute settlement and comprehensive review of civil justice system are directly relevant to this. On the one hand, significance of land to the majority of Tanzanians, and to the economic system as a whole in the country, cannot be overemphasized. On the other hand, expeditious disposal of economically-related disputes, through the civil justice system, is central to an efficient and effective economy. This particular theme is bound to engage the LRCT for a very long time to come.

It is my hope, as Chair of the Editorial Board, and that of the Editorial Board in general, that our readers and stakeholders will find the publication beneficial, in the information provided, and the analysis offered, interesting and relevant to their work and daily lives. It must be stated in no uncertain terms that the views expressed in these pages are those of the individual authors and do not reflect the views of the Law Reform Commission of Tanzania.

Sufian Hemed Bukurura
Full Time Commissioner and Chair of the Editorial Board
The Law Reformer Journal

Is the Law Reform Commission keeping Pace with the Trend of Development of our Country

By Mwemezi Christian Mukoyogo[1]

This thought provoking extract of the paper, delivered by the late Prof. M.C. Mukoyogo in May, 2005 examines the different phases of our country's development in relation to the requirements of the law. He noted that the bulk of legislation in Tanzania does not reflect the aspirations and values of the present generation. The laws that are not from colonial times are from the era of the Arusha Declaration which has since been modified by new market – oriented policies. What needs to be done? Read more …...

1. Meaning of the term Trend

According to the Cambridge International Dictionary of English[2] the term trend means "a general development or change in a situation or in a way that people are behaving". But according to Oxford compact Thesaurus in clear A-Z form[3], trend means tendency.

(i) Learning, bias, bent, drift, courses inclination direction;
(ii) Fashion, style, vogue, mode, look, *collogifadd*, craze, thing;
(iii) Trend, learn, be "biased", bent, drift, incline, veer, turn, swing, shift, head.

[1]Prof. M.C. Mukoyogo was Dean Faculty of Law Open University of Tanzania until his death on 21st May 2008
[2]Cambridge University Press London (Repr.1995,1996) pg. 1555
[3]Laurence Urdang (Author), Oxford 1997 pg. 642

In view of the above different meanings of the term trend, and taking into consideration that we are supposed to examine the trend of law reform in Tanzania, and the role of the Law Reform Commission of Tanzania, the term trend shall mean "change in a situation or in away that people are behaving". Meaning that from the very inception of the Law Reform agenda in Tanzania there have been shifting tendencies or trends dictated upon the policies of the time. In turn the policies have determined the operational outlook and methodology adopted by the Law Reform Commission of Tanzania. In this case we should examine the bias or inclination or swing in law reform in Tanzania. For example one can rightly say that at the very inception of the law reform programme in the 1980's the overriding policy was socialism and self-reliance, based on the Arusha Declaration 1967. Modern law reform programme are influenced by free trade policy which necessitated privatization of the 1990s.

2. What is Law Reform?

Law reform means development of a legal framework, based on research to ensure the attainment of a nation's development policies. The legal framework must give an expression of the aspirations of the people of that nation and reflect all aspects of their lives, and the times they are living in. Law reform must necessarily target the attainment of peoples aspirations, it must therefore be change anddevelopment of the law for the betterment of people's lives, the improvement of the ways the people manage their lives in relation to each other and how they regulate their business. Law reform is the making and maintenance of law that is always atuned to the changing conditions of Tanzania.[4]

[4]LRCT Revised Strategic Plan 2002 p.3

3. The Law Reform Programme

The law reform programme is developed on the basis of the Nation's development Vision 2025, as such review and research activities give high priority to the political, economic or social development aspirations of the country. The projects involved in the programme reflect the needs and aspiration of Tanzanians of the time. Since 1992, the government has been undertaking major macroeconomic change initiatives that have necessitated fundamental changes in the entire socio-economic and political thinking of the country. The government has been steadily withdrawing from the functions of direct production of goods and services and the previous reliance on control mechanisms and government ownership of major means of production.[5]

4. Core Business of the Law Reform Commission of Tanzania

The core business of the Law Reform Commission of Tanzania is to create a level legal playing field so that all stakeholders in the process of national development may achieve their objectives as set out in their strategic plans. The target for all this is the attainment of development goals which are defined in the 2025 national development policy. The Commission is responsible for the creation of a legal framework to support policies that target the promotion and attainment of high quality livelihood, peace, stability and good governance, a well-educated society and a strong and comprehensive economy.[6]

The vision of the Law Reform Commission of Tanzania is to become a centre for excellence in Law reform that plays a pivotal

[5]Ibid
[6]The Tanzania Development Vision 2025

role in achieving sustained economic growth andprosperity and eradication of poverty in the 21st Century. In this regard the Commission envisions itself as being able to completely fulfill its statutory mandate.

5. Mandate of the Law Reform Commission

The Law Reform Commission of Tanzanian mandate is contained in Section 4 of the Law Reform Commission Act [Cap. 171 R.E. 2002]

i) To take and keep under review all the laws of the United Republic of Tanzania with a view to its systematic development and reform.

ii) To review any law or branch of law and propose necessary measures to "bring that law in accordance with current circumstances of Tanzania, eliminate anomalies or other defects in the law, including the repeal of obsolete/ unnecessary laws and reduction of the number of separate enactmentandcodifyingorsimplifythatlaworbranchoflaw".

iii) To research and/or review particular laws or branches of law at the request of the Attorney general and undertake the preparation of any draft Bills pursuant to the amendment proposal made there from.

iv) To consider and advise or proposals for the adoption of new or more effective methods for the administration of the law and the dispensation of justice".

v) To offer legal education to the public by conducting of legal awareness programmes and

vi) To ensure that the Law Reform Commission plays a majorrole in the eradication of poverty, promotion of consumers welfare and the protection of natural resources.

In fulfilling the vision and the legal mandate, the Law Reform Commission of Tanzania is guided by the following Core Values.[7]

i) To promote fairness, cost effectiveness, accessibility and progressiveness in the Tanzania legal system.
ii) To promote respect for the rule of law by discouraging arbitrariness and excessive bureaucracy.
iii) To promote human rights in accordance with the African Charter of Human and people Rights and other Human Rights Instruments.
iv) To promote good governance and engage in the fight against corruption.
vi) To promote democracy.
vii) To promote gender equality, and
viii) To promote a legal and regulatory framework that will support economic and environmental reform.

6. Current Problems relating to Legislation in Tanzania

The bulk of legislation in Tanzania does not reflect the aspiration and values of the present generation. Those that are not from the colonial times are from the Ujamaa era, which has since been dismantled by new policies. Some of the present legal frameworks are ancient and have outlived their objectives, some are contradictory and more are outright irrelevant. The needs of today's society are so different from those of yesteryears. This calls for urgent steps to reform the legal set up and introduce one that will serve the aspirations of the present generation.[8]

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[7]The Civil Service Department: Public Service Reform Programme 2000 – 2011, see also Revised Strategic Plan 2002 p.10 and Law Reform Commission of Tanzania – Strategic Plan July 2001 – June 2004 Pgs.4-5

[8]Revised Strategic Plan 2002 p.12

7. Does the LRCT have a role in the law making process?

7.1 The law making process

The process of law making in Tanzania is based on the need to implement government of the day's policy i.e. the ruling party's political platform, or to give remedy to a public outcry on an issue or to give effect to an international covenant to which the government is privy. The proposal or Bill can be taken to parliament by either government or a private MP's motion. In more than nine times out of ten, the government would normally present the Bills. In the case where the government wishes to present a Bill to Parliament, the process would begin with the decision on the policy to be legislated upon. The relevant Ministry would present its proposal to cabinet through the Cabinet Secretariat, and the Inter-Ministerial Technical Committee. When a Cabinet's decision has been secured, then the Attorney general would be duly instructed to draft the necessary Bill.

The Law Reform Commission of Tanzania does not have a direct role to play in this process. It would however, be in a pivotal position in cases of law reform since that is itsmandate. In such a case recommendations would emanate from the Commission after thorough research, to the Minister for Constitutional and Legal Affairs who would then kick-start the process putting it in motion along the well defined law making process.[9]

7.2 Ministries

The Law Reform Commission of Tanzania has to arrange regular meetings with the Permanent Secretaries to the Ministries:

[9]Ibid pg.3

i) A renewed effort to seek access to the inter- ministerial committee meetings, and
ii) Establish regular meeting with heads of legal department in the ministries.[10]

7.3 Parliament

The Parliament of Tanzania, the legislative power, represents an obvious and important stakeholder to the Law Reform Commission of Tanzania. At one time, on of the Commissioners of the Law Reform Commission of Tanzania was also the Speaker of the National Assembly. The parliament through the Speaker of the National Assembly, had offered to facilitate a bi-annual interaction between the Law Reform Commission of Tanzania and the Parliamentary Committee on Legal and Constitutional Affairs: all new legislation will have to pass through this Committee and it also initiates changes.[11]

[10]Midterm Review of Project – Draft Note 2003 p.6
[11]Ibid pg. 5

Role of Law and Politics in Making a Nation and Integration
By Ibrahim H. Juma[12]

1. Introduction

In his article discussing the position and place of Law in society, Daphne Barak-Erez wondered aloud whether Law is a unifying power or a source of conflict.[13] He identified Law as one of the many unifying factors that can contribute to better national cohesion and integration:

> "….Prima facie, law presents itself as a feasible means for achieving such unity. First, law and justice enjoy universal support, at least in principle. Secondly, law purports to bridge over disputes and presumes to establish a rule for harmonious social conduct. Thirdly, in democratic discourse law often enjoys an elevated, quasi-religious status. Fourthly, in practice, numerous problems that are not solved by other institutions find their way to the legal system. In other words, the centrality of the legal system inpublic life is an additional factor making it a candidate for the role of society's unifying element. In fact, thinking of law as a tool of social integration is not new. Durkheim argued that as modern society lacks the natural solidarity which characterized simple and homogenous early societies, law can serve as modern

[12] Justice of the Court of Appeal of Tanzania, and former Chairman of the Law Reform Commission of Tanzania (2007-2012)

[13] Daphne Barak-Erez, Law in Society: A Unifying Power or a Source of Conflict? Source: http://www.tau.ac.il/law/barakerez/articals/freemanbook.pdf

> society's basis of social solidarity. Another approach relevant here is that of Habermas, who pointed out that law provides a problem-solving mechanism capable of replacing social processes when the latter fail."[14]

The "Role of Law in National Integration" discussed in this article takes its cue from Daphne Barak-Erez and Shonna Khurana.[15] Khurana defined "national integration" to mean the awareness of a common identity amongst the citizens of a country. It means that though we belong to different castes, religions and regions and speak different languages we recognize the fact that we are all one. This kind of integration is very important in the building of a strong and prosperous nation. I would like to adopt a thesis that law is one of the major unifying forces that has contributed to bringing together into a nation, all those formerly disparate tribal communities of pre-German East African days. I do not pretend that law has successfully rid the United Republic of Tanzania of all economic, ethnic, and religious divisions and differences which continue to threaten its unity. But law is one of the forces that makes sure that these societal divisions do not tear the nation asunder. The territory known as German East Africa, which later became Tanganyika and Mainland Tanzania; brought together different tribal communities and the country was to all intents and purposes a divided society which continues to be searching for a unifying force. Thankfully, the legal system in Tanzania and the Law provide the unifying force.

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[14]Ibid

[15]Shonna Khurana, "National integration: Complete Information on the Meaning, Features and Promotion of national Integration in India." http://www.preservearticles.com/201012271786/national-integration.html

2. Law as a Unifying Force for Tanzania Mainland

One theme cutting across the over 50 years of independence of Tanganyika, and many years yet to come is captured in one word "integration." The term "integration" has manifold uses that include unification of disparate racial, social, cultural and economic groups into one impartial system. Integration implies pre-existing segregation, discrimination and inequality.[16] Law has played a prominent role to integrate Tanzania into a sovereign United Republic it is today. Law continues to integrate the various peoples of Tanzania into a nation and nationhood. Without direct and indirect role of law, the various peoples from diverse parts of the Republic would not have been gelled together into a nation. This discussion is in agreement with sentiments expressed by Daphne Barak-Erez, but to also celebrate the role Laws of Tanzania have played to weave and gel the various races, religions, peoples and tribes of Tanzania together into one nation and nationhood. As we brace forward to a life under a new Constitution, the topic "Role of Law" enables me to look back and survey some salient integrative milestones where Law stood out to weld this part of Africa into a 50-year old nation. I therefore make a case that as we discuss and deliberate on the impending new Constitution, we should also find it appropriate, to revisit how the provisions of thecurrent Constitution of the United Republic of Tanzania have been underpinned by history and underlying philosophy which have given life and purpose to the provisions of this constitution.

[16]John Cameron, "Integration of Education in Tanganyika," in Comparative Education Review, Volume 11 No.1,1967,pp 38-56

3. Manifestation of Law in the Integration of Courts and Legal System

In my discourse celebrating the unifying role of Law, I shall inevitably draw lessons from the integration of courts and legal system to illustrate how Law has been used over the years to integrate the people of Tanzania into a nation and nation-hood. This article shall highlight moments when Tanzania had to enact specific laws to wrestle away religious, racial and even tribal prejudice. It is because of the elevated vision of founders of our nation who translated their vision into laws that freed Tanzania from racial, tribal or religious prejudice which continue to bedevil many of our African States. That is why, although Tanzania Mainland is acknowledged to be a land of more than 120 tribes and so many races and religions, one's tribal, racial or ethnic backgrounds have not been mainstreamed to factor in governance or polity. For example, law has been so crafted to detribalize and completely delink one's tribal background from legal definition of customary land tenure. The Interpretation of Laws Act, Cap.1 [R.E. 2002] has deliberately avoided "tribes" in its definition of "Customary Law" in the following way:

> Customary law means any rule or body of rules whereby rights and duties are acquired or imposed, established by usage in any African Community in Tanzania and accepted by such community in generalas having the force of law, including any declaration or modification of customary law made or deemed to have been made under the Judicature and Application of Laws Act, and references to "native law" or to "native law and custom" shall be similarly construed;

Many young Tanzanians take for granted the progressive provisions in the Constitution and laws, which prohibit discrimination on basis of colour, tribe, religion or station in life. These provisions have history and underlying philosophical concerns of the founders of our nation. These provisions are with us because of progressive minds which guided the private and public lives of nationalist leaders like Mwalimu Julius Kambarage Nyerere, Sheikh Abeid Amani Karume and Rashidi Mfaume Kawawa. These nationalist leaders were guided by strong philosophical convictions against any form of discrimination. In her book, *The Making of Tanganyika*,[17] Judith Listowel captures a tense moment at the Legislative Council (LegCo) meeting at Karimjee Hall, Dar es Salaam. It was on 18th October 1961, almost two months before Tanganyika attained her independence. The LegCo Members were debating *Citizenship White Paper* as background to the citizenship laws of emerging Tanganyika nation. Mwalimu Nyerere was strongly opposed to citizenship laws that would define citizens on basis of their race, tribe, religion, place of origin or by social status:-

> I [Judith Listowel] flew into Dar es Salaam on October 18, 1961. As I stepped on the tarmac, an African chauffeur handed me a letter, Marion, Lady Chesham, a European member of the Tanganyika Parliament whom I had come to visit, could not meet me because a crisis had blown up in the National Assembly. She wrote: 'I have to stay, Julius has said he will resign, anything may happen. Come straight to the National Assembly, I have a seat for you in the gallery. Keep your fingers crossed……. (page xvii).

[17] Judith Listowel – The Making of Tanganyika, Chatto & Windus, London 1965.

……Nyerere rose to reply. In a voice cold with suppressed anger, he told the racialists what damage they were doing. They were betraying the work of the party they had built up together, the Tanganyika African National Union (TANU), whose democratic principles they had sworn to uphold. 'Some people behave like little Hitlers, drunk with atmosphere, talking rubbish.' He was having none of this rubbish. Anger giving way to eloquence, he reiterated his democratic faith and ended: 'This evening we will have a free vote. Vote according to your consciences. If the decision goes against us, the Government will resign'.(page xviii)

….Laying in bed that night I realized that I had witnessed a historic event, an African legislature wrestling with Africa'smost challenging problem, racialism. My tired brain reflected on what had made the Tanganyika's what they are today… (page xix).

These historic flash-points shaped and moulded the progressive provisions of citizenship laws we now take for granted. Vision and foresight of nationalist leaders made that provisions of the laws integrate the peoples of Tanzania instead of dividing them along racial, tribal or religious lines. Today, the Tanzania Citizenship Act, Cap. 357 does not define a citizen by his or her race, tribe, religion, place of origin or by social status. Citizenship is obtained by birth or by descent or by naturalization irrespective of one's race, religion, tribe and place of origin. The election laws of Tanzania including the National Elections Act have ensured that candidates vying for

elective offices do not exploit tribal, racial or religious feelings as a vehicle to political office.[18]

4. Indirect Rule in the British Administered Tanganyika

Law during the British Administration in Tanganyika did not originally play the integrative role laws play today.

During this pre-independence era, the law played a different philosophical role from the integrative role the law plays today. The philosophy of "Indirect Rule" which had been introduced in Tanganyika was designed to allow tribal authorities to flourish separately at their own pace. Indirect Rule was brought as a necessity in a situation where the British Administration had very few personnel to administer the whole expanse of Tanganyika.

They opted to use and take advantage of any traditional leadership that was already on the ground. Speaking to the Legislative Council of Tanganyika in 1926, the Governor of Tanganyika vividly subscribes to this philosophy of Indirect Rule which was designed to gradually transform customary laws, deleting any customary practices that were considered repugnant to justice and morality as perceived by the British administration:

> .....if we preserve the tribal authority, gradually purging native law and customs of all that offends against justice and morality, building up a system for the administration of the affairs of the tribe by its hereditary rulers, with their advisers according to native custom, we immediately give the natives a share in the government of

[18]National Elections Act, Cap.343

> the country, and that, moreover, on lines which they themselves understand and can appreciate.[19]

Very few British administrators were available to govern the whole of Tanganyika and, what they feared most during the era of Indirect Rule, was a complete breakup of the tribal organization without having in place any system known to native Africans to govern. Great Britain could not at that time commit enough personnel to govern the whole expanse of what was Tanganyika.

Laws driving the philosophy of Indirect Rule used the Native Authorities to gradually integrate customary laws into the mainstream laws. A Report filed to the League of Nations by the British Administrators underscores the prevailing policy of the tribal-based customary law system (Indirect Rule) supervised by the few available administrators.

Apart from other reasons, a community lodged in a European environment, with European ideas and principles and nothing else constantly set before its eyes cannot always remain in a servile state. A portion of it will have acquired a European education and it will eventually, whether it takes one century, or two or three, for this development, claim a share, and a large share, in the administration of the country under the only system which would then exist, that is a system of government based on European methods.[20]

One of the most enduring effect of the system of indirect rule system today is that Tanzania is still made up of traditional (customary

[19]Report by His Majesty's Government to the Council of the League of Nations on the Administration of Tanganyika Territory for 1926, London: His majesty stationery office, 1927, paragraph 7,p.8

[20]Ibid

laws) co-existing with statutory system. The modern reflects the extent the customary law practices has been absorbed into the mainstream laws, political and administrative system.

5. Strategies Used to Modify and Mainstream Customary Laws

Native Authority Ordinance of 1927 was the main piece of legislation used to impact early change on customary laws. Britain's role in Tanganyika in attempting to gradually change (through the system of indirect rule) the indigenous people of Tanganyika can be seen through the agency of laws and legal framework. Britain's role in Tanganyika, according to Article 22 of the League of Nations Covenant, was that of a guardian. Morris-Hale has argued that Britain was expected to lead the Africans to their full maturity in order that they would be able to administer their own affairs. By implication, Britain's obligation to the League of Nations was to prepare the Africans for self-government. Preparation for self-governance must have involved inculcating into native Africans methods of administering mainstream laws and institutions. Britain however, set no final date for completing the task of preparing the Africans to govern themselves.[21] Leading the Africans into full maturity involved introduction of a new legal system, training the Africans the art of applying the new laws and legal system. The people of Tanganyika were not informed of these intentions which subscribed Article 22 of the League of Nations Covenant. One commentator has described this lack of information to have been an element of tragedy in the history of British rule in Tanganyika

[21]MORRIS-HALE, Walter, British Administration in Tanganyika from 1920-1945: with special reference to the preparation of Africans for Administrative positions, Geneva: IMPRIMO S.A. GENEVA, 1969,p.12

which grew out of a misunderstanding between the rulers and theruled as to what were the ultimate goals envisaged.[22] The legal system introduced by Britain in Tanganyika was little understood by native Africans. Laws and institutions were handed down in a top-down approach.

6. Indirect Rule: The Antithesis of National Integration

Integration of various peoples of Tanganyika into one nation was not the early concern of the British Administrators of Tanganyika. As a result, the laws that were enacted under the "Indirect Rule" system envisioned a gradual transformation of customary laws with the hope of finally unifying customary and mainstream national laws. Laws that were enacted before independence emphasized tribal and racial grounds of the people. A few examples of laws illustrate the extent laws failed to play integrative role. Statute books were littered with laws that emphasized the separation of races into Africans (natives), Europeans, Asians, Arabs, Somalis and even Comorians. Africans were referred to as "natives" with their own laws.

The Credit to Natives (Restriction) Ordinance of 1931 restricted financial credit which to non-Africans could extend to natives. Africans had their own law regulating their dhows, boats and other water vessels. Some of these laws have remained in the statute books well into independence. The Native Vessels Ordinance is an example of the racially based laws that continued into operation well beyond the Independence Day on December 9, 1961.[23] Even ownership of livestock by Africans was regulated by different

[22]Ibid. p.13

[23]This law was repealed in 1966 by the East African Merchant Shipping (Consequential Provisions) Act

sets of laws from those regulating livestock owned by Europeans and other non-Africans. Animals (Native) Livestock Ordinance survived independence of Tanganyika in 1961 to be repealed in 1994 by the Laws Revision (Miscellaneous Repeals) Act No.8 of 1994 and this repeal became operational as recently as 1st September 2004.[24] Transfer of livestock between Africans was also notifiable under Transfer of Native owned livestock (Notification) Ordinance. Employment of Africans was also regulated by the Master and Native Servants Ordinance, 1924. This law in fact controlled the engagement of natives for service within Tanganyika or outside Tanganyika. This control and regulation of African labour subsisted till 1957 when the Employment Ordinance came into operation. Africans of Somali origin preferred to be categorized as non-natives under the Somalia (Miscellaneous Provisions) Ordinance which came into operation in 1949. This categorization of citizens of Somali origin as non-Africans was forgotten in our laws until it was repealed by the Laws Revision (Miscellaneous Repeals) Act No.8 of 1994.[25]

7. Native Ordinance as an Indirect Rule Instrument

Native Authority Ordinance, 1927[26] exemplifies the earliest legislative attempt to modify customary laws and partially incorporate native Africans into the mainstream legal system. This Ordinance was a flexible piece of legislation allowing for the variety in traditional (African) authority patterns.[27] There were

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[24]GN. 123 of 2005

[25]This repeal became operational from 1st September 2004 [GN 123 of 2005].

[26]Operational from 1st February, 1927

[27]FRIEDLAND, William Herbert, "Evolution of Tanganyika's Political System," *Maxwell Graduate School Occasional Papers 8-16*, 1964, Rhodes Library, oxford (Rho, 740 18s.12(10)) at p.34

four recognised categories of native authorities. The first was the Paramount Chief as the native authority, having under him a group of subordinate chiefs. The second recognised category was a federation of chiefs, pooled for financial stability, each chief having authority over his own area but sitting as a council for common purposes. A tribal council was the third category, composed of petty chiefs or headmen, all of the same tribe, where a paramount chief did not exist. This council sometimes framed general rules for the total area but it was more usual for each unit to be autonomous.

Finally, there was recognition of a chief or village headman of an isolated portion of a tribe. Native Authorities constituted the earliest institutions through which Africans were opened up to mainstream governance.

Native Authority Ordinance empowered the Governor of Tanganyika to declare a Native Authority or Native Authorities for any specified area or areas.[28] Native Authorities were given several responsibilities.[29] Foremost responsibility was maintenance of order and good governance amongst the natives residing in the area.[30] Native Authorities were required to enforce applicable laws and generally prevent crimes in their respective areas. Native Authority Ordinance, 1927 was a very important document that sought to gradually break the indigenous system, and to progressively incorporate the indigenous people of Tanganyika intothe mainstream laws. Through the Native Authority Ordinance,

[28]Section 3(1) Native Authority Ordinance, 1927
[29]See sections 4,5,6(1), 7(1) and 8 of the Native Authority Ordinance, 1927
[30]In its incorporating of Africans into the mainstream system, Native Authority ordinance, 1927 defines natives subject matter of the ordinance to mean any member of an African race and includes a Swahili and a Somali.

Africans were slowly being taken away from their customary regulatory environment.

Several strategies were employed under the Native Authority Ordinance, 1927 to incorporate native Africans into mainstream laws. Native Authority Ordinance, 1927 created a duty upon all the indigenous peoples (natives) to assist their respective Native Authorities[31] and to attend before government officers when so directed by their respective Native Authorities.[32] Native Authorities were empowered to issue orders of general or particular nature,[33] which orders would: regulate local brews, prevent the pollution of water in any stream, watercourse or water hole.[34] Native Authorities had powers to issue ordersprohibiting, restricting cutting of trees;[35] preventing the spread of infectious or contagious diseases;[36] regulating movement of persons and livestock through a Native Authority area;[37] prohibiting and restricting the burning of grass;[38] and generally Native Authorities regulated anything done under native law or custom if seen to be repugnant to morality or justice. Through the Native Authority Ordinance, 1927, British Administration obliged existing indigenous institutions to take note of the mainstream administration. These provisions sought to gradually transform native Africans through a system of indirect rule.

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[31]Section 5, Native Authority Ordinance, 1927
[32]Section 7(1), Native Authority Ordinance, 1927
[33]Section 8, Native Authority Ordinance, 1927
[34]Ibid Section 8(e)
[35]Ibid Section 8(f)
[36]Ibid Section 8(g)
[37]Ibid Section 8(l)
[38]Ibid Section 8(n)

The formal objects of the indirect rule formula were: recognition of native authorities (chiefs) with power to enact by-laws; establishment of native courts; and establishment of Native Treasuries that were in effect local government treasuries. Amendments to the original Native Authority Ordinance in 1930, 1935, 1941, 1942 and 1946 were largely directed to increasing the autonomy of the local units by broadening the functions of the native authority.[39] An example of the increasing autonomy of native authorities came in theform of the Native Authority (Amendment) Ordinance, 1935[40] which provided that where the office of native authority established for any area was vacant the Governor could by order appoint any administrative officer to such office.

Native Africans in Tanganyika were introduced into mainstream legal system rather late. For most part of the British administration in Tanganyika, Africans had their own separate system of administration of justice quite apart from one catering for non-natives.

8. The Making of Tanzania by Integration of Courts and Legal System

The unified court and legal system we see today in Tanzania should not be taken for granted. Unification of court and legal system symbolizes the role law played in the integration of the country. Separate administration of justice between Africans and non-Africans underlies the political philosophy of indirect rule in then Tanganyika. Sir Donald Cameron a Governor of

[39]FRIEDLAND, William Herbert, "Evolution of Tanganyika's Political System," op.cit. at p.39.
[40]Ordinance Number 15 of 1935

Tanganyika between 1925 and 1931, told the 11th Session of the Permanent Mandates Commission that Tanganyika was to remain a predominantly African Country like Uganda. And Great Britain's duty was to develop the native of Tanganyika on natives' lines i.e. not westernize him and turn him into a bad imitation of a European (make a native a good African). The first essential for making the native a good African was the re-establishment of the traditional authority of the local chief. Hence, the separate court systems for natives and those for non-natives.

8.1 Courts Ordinance, 1920

This law concretized into concrete law the indirect rule doctrine of administration of justice along racial lines. For Europeans, Asians and Arabs there were courts (subordinate to the High Court) designated exclusively for non-natives. These subordinate courts were Courts of a Magistrate of District Political Officer (Subordinate Courts of the first class); Courts of Assistant Political Officer or the First Grade (Subordinate Courts of the Second class); and Courts of an Assistant Officer of the Second Grade (Subordinate Courts of the Third class).

Court Ordinance, 1920 also empowered the Governor to establish several categories of native courts. These were the native courts of Liwali, Kadhi, Akida, Chief, Headman or other persons specially empowered in that behalf by the Governor to be called Native Courts. It is important to point out that the Native Courts of Liwali, Kadhi or Akida were not religious courts but secular courts with jurisdiction to deal with disputes where Islamic law is applicable. The Court Ordinance, 1920 established Kadhis' Court, Courts of the Liwali, Akida and Headman within the framework of the Native

Courts, and these native courts were specifically created to exercise jurisdiction on matters between Africans. Kadhis Court were established to operate within an area defined by the instrument establishing the native court with localised jurisdiction and exercised jurisdiction only over native persons in that local area.

The statute books are replete with examples of courts of Akidas, Liwalis which though operating as native courts but were in fact secular courts for Africans. Liwali of Bagamoyo was as much a Native Court as Lukiko Court or Gombolola Court recognised by the Bukoba Native Court Rules, 1922 [GN 225/1922].[41] There are other examples of courts of Akidas and Courts of Liwalis operating as Native Courts. Sir Horace A. Byatt-the Governor of Tanganyika, proclaimed Native Courts.in Morogoro District[42]. Courts of Akida of Morogoro and Liwali of Kilosa were amongst the "Native Courts" that were proclaimed by the Governor.[43]Akida of Morogoro and Liwali of Kilosa had jurisdiction to hear minor criminal cases,[44] minor civil cases[45] and cases relating to personal status, marriage, inheritance and divorce where parties were Mohammedans.[46]

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[41]Under Rule 3 of GN 225 of 1922, all civil cases were under Bukoba native court Rules to be instituted in the Lukiko Court of Gombolola court of the area to which the defendant resided.

[42]Proclamation Number 3 of 1924

[43] Also proclaimed under same proclamation were-Mlali Native Court, MgetaNativeCourt, KissakiNative Court, Mvuha Native Court, Mtombozi Native Court, MkuyuniNative Court, MatomboNativeCourt, Ngerengere Native Court, Turiani Native Court, KinoleNative Court, KissaiNative Court, MamboyaNative Court, MvomeroNative Court, KisangaNative Court and Kidode Native Court.

[44]Where punishment did not exceed 15 days of fine did not exceed Shs30/=

[45]Where Value of the subject matter did not exceed Shs100/= in value

[46]Appeals against decisions of Akida of Morogoro and Liwali of Kilosa went to Court of the Administrative Officer in charge of the District.

On 23rd February 1924 Mr. F. J. Durman (Acting Chief Secretary of Tanganyika) directed that the Liwali at Kilwa, sitting with two headmen as assessors, to hold a "Native Court"under Courts Ordinance, 1920[47]. Liwali of Kilwa was given jurisdiction over minor criminal offences,[48] minor civil cases[49] and cases where parties were Mohamedan natives.[50] To underscore the fact that Akidas or Liwalis were "Native Courts," there were examples were Akidas were required to sit with such chiefs or headmen as appointed by the Administrative Officers.[51]

8.2 Marriage, Divorce and Succession (NonChristian Asiatic) Ordinance, (1923)[52]

Operational from 30th March, 1923, this law was also enacted during the period of indirect rule in Tanganyika. This law is an example of racial profiling of laws then prevailing during the British Administration of Tanganyika. Africans (natives), Europeans, Asians and even Somalis in Tanganyika had own separate laws on various matters. This law which is still in our statute book today is a sad legacy of racially profiling non-Christian Tanzanians of Asian origin. It is important to point out although as it stands today the Succession (Non Christian Asiatic) Act allows the courts to apply

[47]GN 36 of 1924 made under Court Ordinance no.6 of 1920

[48]Where fine did not exceed Shs. 40/= or imprisonment did not exceed a period of 15 days or whipping did not exceed 6 strokes.

[49]Where value of the subject matter did not exceed Shs500/=

[50]Relating to personal status, marriage inheritance and divorce.

[51]Under Proclamation number No. 7 of 1924, which established Native Courts in the Rufiji, the court of the Akida of Kikale, Court of Akida of Mtawi, Court of Akida of MagongoandCourt of Akida of Mtanzawere required to sit together with such chief or headmen. This Proclamation also established Liwalis of Utete and Liwali of Muhoro.

[52]This law was amended by the Law of marriage Act is now Chapter 28 of the laws of Tanzania under the title – Succession (Non-Christian Asiatic) Act.

religious, tribal or caste law of Non-Christian Asians to govern the succession to their property, the non-Christian Asiatics in Tanzania do not have their own special courts to decide their religious laws governing succession to property. It is ordinary courts (other than Primary Courts) which interpret and ascertain the religious law that should be applied to Non-Christian Tanzanians of Asian origin.

8.3 Native Courts Ordinance, 1929

The objective of Native Courts Ordinance, 1929 was to make the Native Courts part of the Native Administration. Native Courts were not regarded as part of the judicial and as such were under exclusive supervision of the Native Administrators and not the High Court. This law removed the Native Courts from the control of the High Court, excluded advocates from appearing before the Native Courts and provided for a system of appeals in the final resort to the Governor of Tanganyika. Section 3 of the Native Courts Ordinance, 1929 defined Native Courts widely to include Kadhis' Court, and provided for the establishment of native courts throughout Tanganyika.

The Islamic or Customary law that was administered by each native court was the law that was prevailing in the local area of a native court concerned, as long as it was not repugnant to justice and morality as perceived by the British administration.

The Native Courts Ordinance, 1929 provided for a self-contained system of native courts under administrative supervision. Native Courts Ordinance, 1929 made the native courts an integral part of native administration instead of treating the native courts as a part of the ordinary machinery for the administration of justice in the country. The principle on which the Native Courts Ordinance, 1929 was founded followed the then South African pattern. Explaining

this South African system of "Native Justice" which inspired the Native Courts Ordinance, 1929, the Hon. Secretary for Native Affairs, while rising to second the Native Courts Bill during its second reading in the legislative council on 3rd April 1929 said:

> "….The other point on which I think I may be of some assistance to honourable members is in connection with the principle on which the (Native Courts Bill) is founded and which my honourable and learned friend has explained. That is a principle which is very well known and adopted in certain cases in South Africa, a country which I have visited for the purpose of studying native affairs generally, and I think I cannot do better, with the leave of this honourable council, than to read a very few brief extracts from this history of native policy written by Professor Brooks, who is the Head of the Department of Politics and Public Administration and Lecturer in Native Law and Administration, Transvaal University. The first is an extract from a memorandum prepared by Mr. Shepstone, in 1879, ... It is essential that the natives should for some time to come be governed under and by their own laws and customs, and for this purpose it will be necessary to pass a law authorising such government, and the Governor or Administrator should be appointed supreme Chief with the power of

> appointing Administrators of Native Law to govern the natives in accordance with their own laws and customs, subject to appeal to him as supreme chief.[53]

The foregoing elaboration by then the Attorney General of Tanganyika illustrates how indigenous Africans of Tanganyika were expected during the time of British Administration to develop their own separate system of laws apart from the mainstream system. At independence in 1961, the contemplated African customary system of laws was not developed, and Africans had sufficiently not learnt the way the mainstream legal system operated.

8.3.1 Transformation of Kadhis' Courts to become Liwali or Courts of Akida

After the enactment of the Native Courts Ordinance in 1929, concerted efforts were made by the British Administration in Tanganyika to delink religious connotations from the native courts bearing the names "Kadhis' Courts" and rename them Courts of Liwali or Courts of Akida. The main reason behind this proposal to delink religious connotations from Kadhis Courts are set out in the letter dated 10/07/1936 that was written by the Provisional Commissioner of Tanga Province, in which it is stated that: "The post of Kadhi implies more a particularly the functions of a religious head of a Mohamedan community; administrative duties, as would also be performed by a Liwali, do not generally refer to Kadhi proper.[54]

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[53] Tanganyika proceedings of the legislative council, *Third Session, 1928-29, Native Courts bill (second reading), 3rd April 1929*, Dar es Salaam: government Printer 1930, p. 32

[54] Source: The National Archives, Reference No. 315/30

Again, pursuant to another letter dated 11/09/1936 written by the Provincial Commissioner of Tanga to the Chief Secretary, Dar es Salaam on the abolition of the post of Kadhi, the reasons for abolition have been amplified as follows:

> "The moment if opportune, the people wish it, and while no doubt the title of Kadhi under the Mohammedan administration is exceptional to the people, it is evidently not so under non-Mohammedan rule by reason, I suspect, of the quasi-religious functions accounted with it. It would be better to use titles which as far as possible connote strictly secular duties, such as Liwali and Akida. A Liwali is described as "Governor, Headman;" the title used to day denotes the latter classification and not that of the original Arab governors.[55]

The above archival communications are amongst the earliest examples of attempts that the British Administration in Tanganyika made to inculcate secularism in native courts.

8.4 Local Courts Ordinance, 1951

Africans and non-Africans continued to be regulated by different courts. This law in addition changed the names of courts catering for Africans from "native courts" under Native Courts Ordinance, 1929 to "local courts". Local Courts Ordinance, 1951 sought to link the Local Courts (former NATIVE COURTS) with the judicial system of Tanganyika. Up to 1951 supervision of Native Courts had been under personal responsibility of Provincial and District Commissioners and under them the District Officers.

[55]Source: The National Archives, Reference No 315/42

During the period the Local Courts Ordinance, 1951 was in operation up to 1963 when it was repealed and replaced by the Magistrates Courts Act, 1963, local courts of Kadhi, Liwali were exercising secular jurisdiction in their local areas. For example, under the Government Notice Number 384 of 1961 the Court of Kadhi in Dar es Salaam had jurisdiction over offences under the Cultivation of Noxious Plants (Prohibition) Ordinance, Cap. 134. Similarly, Government Notice Number 61 of 1962 the Court of Liwali of Bagamoyo had jurisdiction over offences undersection 9 of the Plant Protection Ordinance, Cap 133 and also under the Rules that were made under the Plant Protection (Coconut) Rules. Another example is Government Notice Number 61 of 1962 vested in the Court of Liwali of Moshi jurisdiction over matters arising from the Food and Drugs Ordinance Cap. 93.Government Notice Number 61 of 1962 vested in the Courts of Liwali at Mwanza, Shinyanga and Musoma Townships jurisdiction over offences under Rules 8, 47 (1), (3) and 62 of the Township Rules.

The Liwalis (Functions and Powers) Ordinance, 1958 went further to not only define a 'Liwali' to mean a person in the employment of the Govt who is appointed to the office of Liwali, Akida or Town Headman in an Urban area. This law went further by imposing a duty on every Liwali within the area for which he is appointed to the best of his ability to prevent the commission of any offence, to bring offenders to justice, and to assist in the maintenance of peace, order and good government.[56]

9. Independence of Tanganyika: Concern over Separated Court and Legal System

As prospects of Tanganyika getting her independence were looking

[56]Section 4 of the Liwalis (Functions and Powers) Ordinance, 1958

a reality, there was corresponding concern over the future place and position of both Islamic law and customary laws in the legal system of an independent Tanganyika. Concern was also over how Islamic and Customary laws would organically grow with emerging independent states and mature into mainstream secular laws instead of acting as divisive tools. These concerns were extensively discussed in a series of conferences which deliberated on future of law in emerging legal systems of independent African states. One such Conference was held in London under theChairmanship of Lord Denning, titled the "Future of Law in Africa."This Conference took place from 28th December 1959 to 8th January 1960. Then there was the Dar es Salaam Conference held between 9-19 September 1963. The Dar es Salaam Conference considered matters touching upon both Islamic law and customary law, in particular problems of: how to ascertain and record Islamic and customary laws and the conflicts of laws; the future of the local courts which applied customary and Islamic law; the place of customary and Islamic laws in the modern African legal systems.

Several other matters also arose from the Conferences on Future of Law in emerging independent African States. The Conferences deliberated on whether independent Tanganyika should continue to regard Islamic law as a variety of native law and custom, or as a distinct system of law. It is important to remember that both the Germans and the British in Tanganyika regarded Islamic law to be a local customary law. It was recognized from the very early date that the scope for Islamic law was complicated by the fact that in several of the African countries Islamic law had at times become fused with local customary law.

10. From a Divided Legal System to a Unified Legal System in Present day Tanzania

Tanganyika approached her independence with a legacy of laws that divided her people along their race, religion and tribes. During the British Administration in Tanganyika, the term "native law" included Islamic law.[57] Islamic law was administered by the Native Courts (later named Local Courts). Native Courts did not have jurisdiction over disputes involving persons like Indians, Muslim Indians etc who were not Africans, or between a Non-African and African. Two months before Tanganyika attained her independence, it was already clear that as Tanganyika was building a nation, and it was not desirable that Tanganyika should have two systems of courts catering for natives and non-natives[58]. This was a clear manifestation of the prevailing fears that if the divided system was allowed to continue, Tanganyika and later Tanzania was bound to develop along divisive religious or tribal lines to the detriment of unity. This trend was deemed divisive for emerging independent state of Tanganyika.

The vision of integration of courts system, customary laws and Islamic laws was recommended to build one State unified by unified sources of laws, court systems, customary laws and Islamic Law. This was the vision for laws in Africa and Tanganyika in the 1960s. Integration of laws was recommended to build one non-racial State unified by unified sources of law and a unified court system. Mwalimu Julius Kambarage Nyerere backed the vision of integration of courts, laws and legal system. As a Chief Minister of

[57]These were words of the Member for Local Government, 24th Session of the Legislative Council (1949-1950), while discussing the Local Courts Bill, 1950 (Second Reading) on 30th August, 1950, at page 189.

[58]Hon. Chief A. S. Fundikira the then Minister for Legal Affairs in the National Assembly in October 1961.

Tanganyika, Mwalimu Nyerere was fully behind the Project to unify customary law which was initiated in 1961 at his instigation. The Chief Minister of Tanganyika sent a circular letter to all Members of Legislative Council, the District Secretaries of TANU, chairmen of District Councils and to Provincial and District Commissioners, stressing the need to give Mr. Hans Cory, a Government Sociologist in Tanganyika, all possible assistance in carrying out the work of unification of diverse customary laws of Tanganyika.

This vision seeking one non-racial unified system for Tanganyika was concretized into pieces of legislation. These integrative pieces of legislation include the (i) Judicature and Application of Laws Act, 1961,[59] (ii) Magistrates Courts Act, 1963,[60] and (iv) Islamic Law (Restatement) Act, 1964[61].

10.1 Judicature and Application of Laws Act, 1961

Judicature and Application of Laws Ordinance (JALA)[62] was an important outcome of the desire to unify the laws applicable to all irrespective of their tribal, religious or even racial backgrounds. JALA lays down very detailed provisions relating to the circumstances in which customary law is applicable in a dispute. Enacted as the Judicature and Application of Laws Ordinance, 1961 (JALO) this piece of legislation recognizes primacy of statutory law but leaves some guidance on few occasions when customary laws or Islamic laws may be applied. JALA empowers the District Councils to identify and where necessary to codify rules of customary law to be

[59]Now Judicature and Application of Laws Act with an abbreviation of JALA, Chapter 358 of the laws of Tanzania.
[60]This law was repealed in 1984 by the Magistrates Courts Act, 1984
[61] Now Cap. 375 [R.E 2002]
[62] Now Judicature and Application of Laws Act, Cap. 358 R.E.2002

applied over any specified area of the District Council concerned. Few District Councils have taken advantage of the customary law declaration avenue offered by the JALA to record what constitute customary laws of their respective areas.[63]

The Judicature and Application of Laws Act (JALA) was and still is an embodiment of what Tanzania is, a nation made up of peoples from different religious, tribal and racial backgrounds but governed by laws which gives precedence to the Constitution and written laws. Written laws take precedence over customary and other sources of laws. Space and place of application of both Islamic and customary laws is destined to shrink as more written laws are enacted. This piece of legislation is very clear that customary laws and Islamic laws cannot apply over areas covered by written laws.

10.2 Magistrates Courts Act, (1963)[64]

This law formally abolished the Indirect Rule era system of a divided court system in Tanganyika which had provided separate system of justice for Africans (natives) and non-natives (Europeans, Asians, etc). In retrospect, this law was an important milestone in the integration and unification of laws of a newly independent Tanganyika. The Bill that led to the enactment of this milestone legislation was introduced in Parliament of Tanganyika by the Parliamentary Secretary to the Ministry of Education, Mr. Al-Noor Kassum[65]. Mr. Kassum informed the National Assembly that the Bill was designed to give a further step in the integration of the courts systems by replacing the existing Local Courts with new magistrates' courts called Primary Courts.

[63] See Local Customary Law (Declaration) orders, in laws of Tanzania, Subsidiary legislation [R. E.2002] Volume IX Chapters 340-365]

[64] This law was repealed and replaced by the Magistrates Courts Act, 1984 Cap.11[R.E.2002]

[65] He introduced the Bill in the absence of the Minister of Juctice.

The newly introduced Primary Courts became part of a single three-tier system of courts to replace racially based local courts. Primary Court Magistrates were employed by the Government and placed under a special judicial services commission. Primary Court Magistrates appointed under this law were employed by the Government and were all placed under a Special Judicial Services Commission. In so far as abolition of racially based courts is concerned, the coming into operation of this law meant that all persons in Tanganyika without discrimination based on their Race were subjected to the new primary courts both in criminal cases and civil cases. Apart from completing the integration process, Magistrates Courts Act, 1963 brought detailed provisions relating to the application of Islamic and customary laws.

10.3 Islamic Law (Restatement) Act, 1964

This law was yet another example of Law being used to advance the integration of the people. As an integrative milestone, this law was designed to unify courts and laws. Islamic Law (Restatement) Act, 1964 was passed by the National Assembly on 1st December 1964, assented to by the President on 10th December 1964 and came into operation the following day on 11th December 1964. This law provided for procedure to restate Islamic Law[66] that is to be applied in Tanzania Mainland. Before the enactment of this law, Local Courts (former Native Courts) only applied the Islamic law that was commonly applicable within the area of the local court concerned. Again, Muslims who were not of the African race were not subject of the jurisdiction of Local Courts. Amongst

[66]Oxford English Dictionary defines the word to "restate" to mean "to state or express over again or in a new way." " Restatement" – implies prior statement, that is the new statement of law brings together, clarifies, connects, rearranges in a more logical and comprehensive way, previous expressions of the law on a particular topic.

the objectives of the Islamic Law (Restatement) Act included:

i. To allow courts to have easy access to principles of Islamiclaws. Instead of courts relying on principles of Islamic law that were of common application in the area of Local Courts (former Native Courts) all courts in Tanzania would access similar and uniform principles.
ii. Introduce a framework law through which Islamic law principles were to be developed and applied by courts in Tanzania. We should always remember that before the Independence of Tanganyika (1961) and shortly thereafter, considerable Islamic jurisprudence was to be found in Native Courts and later Local Courts.
iii. Provide a legal framework for close participation of Muslim leaders in the formulation of Islamic Statements.

Purposive steps were taken to implement the Islamic Law (Restatement) Act when the Government convened a special meeting of prominent Sheikhs from various parts of the country. The group had its first meeting on 19th October 1964 at the Attorney General's Chambers, Dar es Salaam to discuss the codification of Statements of Islamic law. For example, the Khoja Shia Ithnaasheri(KSI) participated when Mohamed Dhirani who was at the time the President of KSI TerritorialCouncil of Tanzania, arranged for Allamah Rizvi to meet the lawyer in charge of the codification project in the Attorney General's Chambers. Allamah Rizvi wrote in English a detailed Shia law on related matters for use by the AG's office. Mr. Bashir Rahim, a Senior Parliamentary Draftsman finalized four chapters of marriage as accepted by three principal schools of Islamic law- *Shafi, Hanafi* and *Shia*. These were published under authority of Mr. Rashidi Kawawa,

then Second Vice President of the United Republic of Tanzania. It is clear that with the coming into force of the Islamic Law (Restatement) Act, the aim was to ensure that courts in Tanzania would no longer have to wonder around local areas looking for Islamic law principles to apply when resolving disputes where Islamic law applied. Principles of Islamic law restated under the Islamic Law (Restatement) Act, 1964 were designed to unify Islamic law into the legal system of Tanzania.

11. Future Integrative Role of the Laws: From 1965 and Beyond

Through the above-mentioned pieces of legislation, between 1961 and 1965 the Law played a very prominent national integrative role. As we discuss and deliberate on the impending new Constitution, we should not hesitate to look back at Laws that defined the destiny of our nation. Principles from these defining Laws should find place in any Constitution which Tanzania shall prepare to guide her destiny.

Integrative Role of Law is as good as we choose to respect and abide the Law. Problems facing the efficacy of Laws are bound to affect the Role the law is destined to play.

An in-depth diagnostic assessment of the challenges and problems facing the efficacy of laws in Tanzanian was carried out by a high-level task force headed by Mr. Mark Bomani a former Attorney General of the United Republic of Tanzania. The Task Force finished its work in 1996. Apart from a diagnostic assessment the Task Force also proposed remedial measures. The findings of the Bomani Report on problems facing the role of law are as relevant

today as they were when the Bomani Report was compiled. These challenges facing the role of law include:

(i) Inordinate delays in resolving disputes and dispensing justice;
(ii) Limited access to justice and legal services for the majority of the people;
(iii) Outdated systems and lack of responsiveness to emerging social, political, economic and technological developments;
(iv) Low levels of public trust in the legal system;
(v) Low levels competence and poor morale amongst public sector legal personnel;
(vi) Inadequate numbers of professionally trained personnel; and
(vi) Poor provision and maintenance of the work environment for most public institutions in the legal sector. Law can continue to play its integrative role only if these challenges are fully addressed.

It should be stated that efficacy and discipline of the law shall be enhanced where Tanzania continues to act and believe itself as a one nation where tribal, religious, racial or any forms of discrimination do not provide medium to political power. Examples should be drawn from the history of our nationhood to illustrate the dangers likely to result from tribal or religious bigotry. Long before Tanganyika gained her independence even the British Administration in Tanganyika had realized that experimentation of tribes and tribal chiefs as vehicles towards modern national governance were unworkable. Judith Listowel in her book *The Making of Tanganyika*[67]

[67]See page 91 of this book.

narrates incidents which brought in their wake very good reasons to fear use of tribe as vehicle to political power. Mr. A. Travers Lacey, was the first Superintendent of Education of then Tabora Province of Tanganyika. To maintain discipline at Tabora Boys School he adopted what he described as "for African conditions" a tribal system to maintain discipline amongst boys.

Mr. Lacey organized boys into tribes, corresponding roughly to the districts from which they came. Boys from each tribe present at Tabora Boys School elected a Chief and one or more sub-chiefs who, subject to the headmaster's veto, were responsible for the discipline and general behaviour of the school boys of their tribe. Lacey also set up a school court, on the lines of a Native Court. This system, it was hoped, would have trained the Tabora School boys in Native Administration. Unfortunately for Superintendent Lacey and those who thought tribes were proper vehicle to national governance, the tribe disciplinary system for school boys was not a complete success. African boys showed little respect for any but their own tribe. Most of them would not obey the orders of another "Chief". Gradually tribal rivalries began to upset Tabora School discipline. In 1934 the tribes were replaced by Houses, in which the boys from all districts were mixed up. With the introduction of Houses, discipline improved and tribal rivalries at Tabora Boys School died down. It is for a very good measure that a son of a tribal chief, Mwalimu Nyerere, saw it fit to abolish the office of tribal chiefs.[68] Mwalimu was building a nation, not tribal chiefdoms.

[68]See the African Chiefs Ordinance (Repeal) Act, 1963 [Act No.13 of 1963] which abolished the offices of chiefs. The African Chiefs Act No. 53 of 1969 followed this up by making sure that no former chiefs exercised any residual powers. This 1969 law was enacted to invalidate any customary law that still conferred upon any chief any function, power of authority.

Can Prison Reforms impact on public safety?

By John William Nyoka[69]

> "It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats highest citizens, but its lowest" Nelson Mandela.
>
> "The court, as now constituted, would be meaningless without the jail which gives its power. But if this is anything I have learned by being in jail, it is that prisons are wrong, simply unqualified wrong" Barbara Deming.

1. Introduction

This paper attempts to relate the work of Tanzania Prison Service (TPS) to that of the police and judiciary as social partners in fighting crime through the new concept of Risk Management to address re-offending. Can this approach embedded in prison reforms give new hope in addressing recidivism?

The above quotation by Barbara Deming highlights that the court, although legally constituted, would be meaningless without the jail which implements its incarceration power.

She adds that, "if this is anything I have learned by being in jail, it is that prisons are wrong, simply unqualified wrong'.

That is a reality if our prison institutions continue working in the present state of overcrowding, lack of attention from the government

[69]Retired Deputy Commissioner of Prisons.

in improving prisons architectural structures, denying community involvement and above all, neglecting the legal reforms giving way to best prison practices to ensure social reintegration of offenders as law abiding citizens. This paper discusses in details on how to address all these challenges with the ultimate hope of coming up with a dynamic Prison System capable of enhancing public safety.

2. Incarceration for retributive justice

It is a historic fact that TPS is very much linked to its historical colonial past. Prisons were essentially important components for the enforcement of the colonial administration. This is opposed to the popular euphemism that prisons were institutionsfor rehabilitation of offenders. Her Majesty's Tanganyika Prisons Service,[70] together with Police and the Judiciary, were coercive instruments of the state. This was justified by the way they were operating as Prison Service was administered under the Prison Ordinance.[71] Recruitment of personnel for both Prisons and Police was based on height, width of the chest and general smartness and good health. Unfortunately this does not appear to have changed.

The euphoria of independence carried a lot of expectations in the package of freedom. Many things were expected to trickle down and indeed some of them could physically be seen changing for the better. Unfortunately the envisaged change for prisons did not happen. The nature of the prison career still remains the same dealing with criminals who had and still have little sympathy from the public. There was and still is little attention from the

[70] From HM Prisons to Tanganyika Prison with love and care, the Daily news of 24th October 2011 by KiangiosekaziWa-Nyoka.

[71] Prison Ordinance – Cap 58 of 1933

government to give Prison Service a professional outlook. What was appreciated was the cheap labour prisoners provided and the vast prison farms were considered rehabilitation programmes. No wonder prisons today are perpetually overcrowded because of long time neglect with little attention to architectural prisons structural relevant to the legal reforms.

The colonial approach to prisons was based on a philosophy of retribution, with a view that the punishment should be sufficiently enough for deterrent purposes. Principally, the enforcement of that deterrence was based on confinement, general loss of liberty, hard labour and inadequate funds for rations. It was not surprising that penal diet was treated as part of the prison's punishments and continued to be so.

3. Prison Laws and other related legislations

The Prison Act 1967 replaced the colonial Prison Ordinance with no substantial changes. Tanzania is faced with multiple societal changes ranging from demographic problems, urbanisation, industrialisation, globalization and digital. All these are the socio-economic challenges which have a bearing on the crime and overcrowding of prisons. They all call for necessary legal reforms of the Prison System.

Nothing much, in terms of managing prisons, had changed from colonial pattern. The common denominator of prisons in Africais a litany of poor, overcrowded prison's squalid conditions, brutality and suffering of prisoners. The aging prisons structures reflect the old archaic nature of a prison system. All this is diametrically opposed to the desired dynamic correctional system.

From different quarters there have been some vocal outcries on the state of country's prisons. Although several issues are raised, overcrowding of prisons is the mother[72] of all problems in prisons. The Tanzania Human Rights Report of 2007(LHRC) highlighted serious problems ranging from administrative point of view to several breaches on human rights.

Overcrowding is a multi-dimensional[73] problem which involves the prisons department, judiciary, police force and other government agencies. Whereas prisons receive prisoners sent to prisons, there are many other agencies involved. The latter are not responsive to the challenges of the capacities of the available facilities. They also need not worry utilizationof alternative ways to imprisonment. However the revitalized Case flow management teams also comprising all the criminal justice organs could go a long way in addressing this problem.

The two top officials of the judiciary, the Chief Justice Hon. Mohammed Chande Othman and Principal Judge Hon. Fakih Jundu, have been at the forefront in embracing reforms geared at bringing timely justice for all.

Early in the year 2012, for example, Chief Justice Hon. Chande Othman expressed his concern over the current arrangement in which primary courts are excluded from Alternative Dispute Resolution (ADR)[74] system leading to piling up of cases in the country.

[72]The fifth CESCA conference attended by Heads of Correctional Services from East Central and Southern Africa held in Windhoek Namibia 2001 in one of its resolutions.

[73]Tanzania Human Rights Report 2007 (LHRC)PP 108

[74]The Daily News of 26th May 2012 Judiciary chips in to ease country's prison congestion Kiangiosekazi Wa-Nyoka.

At one time His Excellency President Jakaya Mrisho Kikwete, while addressing the Parliament, also expressed his displeasure on the situation of overcrowded prisons in our country.[75] However this overcrowding of prisons is now being addressed by judiciary after a special training on Community Service Orders was organised by the Penal Reform International in 2012 for all stakeholders including magistrates.

Several African countries are making use of Community Service Orders.[76] In Kenya, for example there were 50,000 offenders under alternative sentences by March 2012. From 2005 to 2011 only 3014 offenders had benefitted from similar scheme in Tanzania an indication of lagging behind.

It shows that Community Service Orders Scheme in this country has so far not been effective. It appears there has been reluctance on the part of magistrates in making use of this sentencing option. The public too has not been well sensitised to embrace community service as a sentencing option. The law on Community Service Orders appears to have been rushed to parliament in 2005 without preparing the ground work; no wonder only 3014 offenders have benefited from the scheme.

4. Rehabilitation and Social Reintegration of Prisoners

Whereas TPS is expected to be custodian of all the UN instruments on the treatment of offenders, there is a large gap between the knowledge and implementation of these international treaties.

The most important aspect of offender's reintegration is missing in the practice of TPS. There is no legal mechanism designed to

[75]Inaugural speech to the parliament seating of 2010.
[76]The Community Service Act 2002, an alternative to imprisonment.

facilitate the gradual controlled release of offenders. Prisoners have extremely limited access to information or individuals outside of prisons. This makes transition extremely difficult, especially without any support or programme that could assist those becoming productive members of society.[77]

Paradigm shift from the old colonial and deterrent incarceration system to a human rights-based approach is absolutely necessary. The fundamental to effective corrections and justice systems is the firm commitment to the belief that offenders are responsible for their own behavior and have the potential to live as law abiding citizens.[78] And this could be achieved through what is known as Offender Risk Management Correctional Strategy.

5. Change Management in Modernization of Prisons

It is undeniable that Tanzania, like other East African countries has very archaic prison laws which were left behind by colonial masters. As pointed out earlier, some of these colonial masters themselves have since changed their prison systems. South Africa and Namibia have already revised their legislative and policy framework to reflect international human rights principles for example contemporary correctional norms.

Unfortunately, many African countries have retained policies and procedures of running prison institutions that were left by the colonial masters. What came steadfastly was the enhancement of the regimental status in their operations in enforcement of prison routine and discipline.

[77]Tanzania Human Rights Report 2007 (LHRC)pg.111
[78]Policy Document and Mission Statement of the Namibian Prison Service, Value 2

Many prison systems appear to overemphasize the creation of staff ranks that are at par with the military ranks such as the Commissioner-Generals with full regalia. Nothing much has changed in terms of treatment of prisoners. They still rely on prison routine, strong disciplinarian code to bothstaff members and prisoners and running their institution in a quasi-military approach.

The Prison routine and procedures of unlock, discharges, admissions, return of prisoners from daily labour, lunch-cum supper, recreational activities, lock up, lights out and sleeping continue as they were during the colonial era.

Some prisoners still sleep on mats; the culture of solitary confinement with penal diet,disciplinary dispensation to both members continues to be arbitrary.

In the spirit of new constitutional review, this should be the right opportunity for the Prison Administration to think aloud on how Prisons could be entrenched in the Constitution. The Constitution of Namibia,[79] dedicates three articles, 121, 122 and 123 on Establishment of the Prison Service, Commissioner of Prisons and Removal of Commissioner of Prisons respectively. South Africa, on the other hand, has similar provisions.

As a prerequisite for paradigm shift for the TPS it is imperative that the following things be considered:

[79]The English version of the Constitution of Namibia, Article 121 there shall be established by Act of parliament a Namibian prison service with prescribed powers, duties and procedures. Article 122 there shall be a Commissioner of Prisons who shall be appointed by the President in terms of Article 32(4)(c) (cc) hereof. The Commissioner of Prisons shall make provision for a balanced structuring of the prison service and shall have the power to make suitable appointments to the prison service, to cause charges of discipline among members of the prison service to be investigated and prosecuted and to ensure the efficient administration of the prison service. Article 123 The President may remove the Commissioner of Prisons from Office for good cause and in the public interest and in accordance with the provisions of any Act of Parliament which may prescribe procedures considered to be expedient for the purpose.

i. Mission Statement
ii. Legal and institutional instruments
iii. Social and Psychological Support with Adequate Professionals
iv. Relevant Curriculum for Correctional Training
v. New correctional philosophy
vi. Wider Community Participation

5.1 Mission Statements:

Some of the African Prisons/Correctional Services have Mission Statements. Perusing through some of them one learns the similarities in the new objectives of correction systems.

While the Namibian Mission Statement is based on its Canadian counterparts in both content and implementation, it emphasizes its contribution to the protection of society by providing reasonable, safe, humane custody of offenders for their rehabilitation, reformation, and their social reintegration. Namibia has translated this policy into thenew Namibian Correctional law, Act No. 9, 2012, Correctional Service Act, 2012.[80]

The TPS Mission Statement declares a course to effectively contribute to public safety through adequate custodial sentence management and supervision of offenders, proper management of custodial remand services, design and implementation of programmes and services which address offenders' rehabilitation needs and the offering of policy advice on crime prevention and treatment of offenders.[81]

[80]Act No. 92012 correctional service Act, 2012 govt. Gazette of August 7, 2012.
[81]Assessment of Tanzania Prisons Service readiness to install polst-incarceration offender development programmes to the Senior Prison Annual Conference June 6 – 8 by Fidelis Mboya.

The proposed National Policy Document for Tanzania Prison appears to have been caught up in bureaucratic channels since 2005. It however declares the country's commitment to the universally accepted philosophical values and principles for Prisons and Correctional Services and explicitly states that ".....opportunities will be provided and offenders actively encouraged to take part in programmes that will reduce the risk they present and facilitate their reintegration to the society".

According to Tanzania's 4th Periodical Report on the International Covenant on Civil and Political Rights (ICCPR) submitted to the United Nations Human Rights Committee in Geneva in 2009, Tanzania Prisons Service was working on a new Prisons National Policy that would focus on a new Correctional Strategy based on Risk Management and Social Reintegration of offenders. Obviously this will be the departure from the archaic Prison Act, 1967 which is not in the spirit of these dynamic changes.[82]

5.2 Legal and institutional instruments

The legal instruments governing corrections particularly the Prison Act should derive from the Constitution as in the case of Namibiaand South Africa. Namibia introduced its first post-independence new Prison Law in 1998, Prison Act 1998 and recently came with a revised Correctional Service Act, 2012 after introducing a new Correctional Policy.

In 1998 South Africa Prison Department revised its legislation to bring it in line with international human rights principles and correctional norms. The Act, which was only properly brought into

[82]From Her Majesties Prison to Tanganyika Prisons with love and Care,The Daily News 24th October 2011 by Kiangiosekazi Wa-Nyoka.

effect in 2004, identifies the purpose of the correctional system as contribution to maintaining and protecting a just, peaceful and safe society, and part of this is "through promoting the social responsibility and human development of all prisoners and persons subject to community corrections"[83] So far only Namibia and South Africa have incorporated current approaches to corrections into their national policies and statutes.

The totality of constitutional provisions, laws passed by parliament, regulations made by different Ministers on the requirement of and authority of various laws and standing orders and guidelines passed by the Commissioner of Prisons constitute what is known as Prison Laws. Based on the old dispensation, they should be reviewed to put prisons operation in line with the pressing local concerns and international standards and best practice.[84] The laws should find a balance between the three central functions of prisons namely,to secure and control inmates (both sentenced and awaiting trial) punishment of offenders declared guilty by courts of law and rehabilitation of prisoners as means to reintegration in society after serving their sentences.[85]

5.3 Social and Psychological Support with Adequate Professionals

Rehabilitation programmes targeting at criminogenic causes of offending often require the services of properly trained professionals. These include programmes which target cognitive-behavioural

[83]Section 2, of Act 111 of 1998

[84]Paper on Tanzania Prison Laws and Administrative Framework, Some tentative thoughts on reform agenda by Prof.Sufian Hemed Bukurura to the Senior Prison Officer Annual Conference Dar es Salaam, 6-8 June 2012

[85]See A. Dissel "Rehabilitation and Reintegration in African prison" pp.155-177

functioning, substance abuse, psycho-social dysfunction and the development of new attitudes. Professionals also needed to facilitate reintegration into the community, particularly through re-establishing contact with the family and dealing with family difficulties. Many African prison regimes are now recognising the importance of qualified professionals, e.g. social workers but scarcity of qualified personnel seems to be endemic.

South Africa, for example, has a commitment to providing needs-based psychological services of prisoners in order to improve their mental health and emotional well being and to promote their rehabilitation and reintegration. However, in 2004, there were only 23 fully qualified psychologists employed in the prisons, with a ratio of 1 psychologist to 8,158 prisoners. There were slightly more social workers (at the ratio of 1:432), who provided a range of programmes to prisoners including, drug and alcohol dependence, trauma, sexual problems, aggression management, life skills, orientation, marriage and family care and support services. Tanzania Prisons Service has over the years trained social workers but these were not geared to needs-based psychological servicesof prisoners. Social workers remained redundant and were merely used for static security as prison guards.

5.4 Relevant Curricula for Correctional Training

The training for emerging Correctional Officers should be relevant to the new Correctional approach. The curriculum should be aimed at specific needs of crime prevention and criminal justice education. It is high time correctional studies were included in tertiary education. For a start, training in criminal justice system should be introduced as part of higher education.

Cognizance of this, countries including Tanzania, Namibia,[86] South Africa and Mauritius have entered into an agreement with their Tertiary Institutions to initiate a degree course on Criminal Justice (Correctional Management).

5.5 New Correctional Philosophy

Deterrence as outlook for punishment has proved unworkable. Crime appears to be on the increase. Any country seeking to address crime should adopt best practices applied elsewhere around the world rather than sticking to the outdated approaches like deterrence.

Prisons can contribute to public safety if serious reforms were introduced. Addressing the overcrowding of prisoners, improvingprison's conditions and conducting rehabilitation programmes require both political will and mindset change of the people to bring about physical reforms of prison structures. The architectural and physical structures of prison's facilities need to be redesigned to adequately separate offenders according to the level of security risks they pose to society and provide an environment that can effectively address their criminogenic needs. This could be a big departure from the traditional assessment of offenders. The finite resource base cannot sustain equal levels of attention to all offenders in their treatment. Risk management with proper assessment of offenders guarantees the prediction of re-offending. Offender Risk Management Strategy is the way to go.

This is a comprehensive and scientifically-based framework structuring the elements of service delivery to offenders and

[86]Paper delivered in Kampala at the ACSA Biennial Conference, Modernizing Prisons Infrastructure with the African experience, from 2 to 5 2012 by J.W. Nyoka, Para 3:4

aligning the roles of staff members to contribute as active team-members of the process.

The elements of the Offender Risk Correctional Strategy include important characteristics of:

(i) Objective security classification and Re-Classification of Offenders
(ii) Unit Management
(iii) Assessment of the Risk/Needs of offenders
(iv) Correctional Program Plan (include re- integration plan)
(v) Case management
(vi) Programme development and delivery.

The Objectives of security classification and reclassification in the process of this concept:

(i) Aims at examining criminal history, institutional behavior and pertinent factors to assess the ongoing risk posed by offenders to staff and other offenders and potential risk posed to public safety
(ii) Security classification is tied to varying levels of access to meaningful privileges, creating motivation to earn these privileges and based on cooperation and participation gradually changing security status predispose.

The common tools in Offender Risk Management Strategy are Case Management, Unit Management and the Offender Management System.

5.5.1 What is Case Management?

Case Management is a personalized interactive approach to the management of offenders in custody. Essential to this concept is

a high degree of positive interaction between prison staff members and inmates. This is designed to develop attitudes and skills needed by inmates for successful reintegration into community. This can be achieved through meticulous assessment of an offender's individual needs and the development of programmes to meet those needs.

5.5.2 How does it work?

Case Management relies on the work of multi-disciplinary Case Management Team which is responsible for planning the management of inmates. Upon reception an inmate participates in the induction and screening exercise known as intake assessment designed to get initial case management information about the inmate and make an assessment of the inmates' risk status.

5.5.3 Unit Management

This is a key method for managing prisoners by improving the mechanisms of how administration, staff and prisoners communicate between each other to ensure that there is consistency in management, delegation of authority and improved communication for all. It clusters offenders into smaller, more manageable groupings within a larger prison setting (100 offenders).

5.5.4 Offender Management System (OMS)

Offender Management System on the other hand is a process whereby the Management of prisons relies on automated records and data derived from specially designed technology for Correctional Services. A set of tailor-made technologies are used for risk assessment and criminogenic needs of inmates for intervention of treatment programmesfor offenders in their rehabilitation process. With the OMS, tools may be developed in respect to the

implementation of an intake assessment, correctional planning and case management.

OMS is a new approach adapted by some countries after experiencing increased crime rate. Through empirical evidence, it has been proved that it works in reducing the rate of recidivism and therefore and ideal tool for promoting public safety.

The task in Risk Management has consequently an added value in predicting with confidence the group to which an offender belongs and the relevant therapy that matches the offenders risk profile. With an appropriate case management regime, criminogenic factors that predispose towards offending behaviour can be addressed.

If Tanzania is seriously seeking ways of addressing crime, its criminal justice systems should get smart by adopting best practices applied elsewhere rather than persisting on harshness that delivers no tangible results.

The architectural and physical structures of prison's facilities need to be redesigned to adequately separate offenders according to the level of security risks they pose to society and provide an environment that can effectively address their criminogenic needs. This constitutes a departure from traditional crude assessment of offenders which is less effective in rehabilitation. Prisons would be able to deliver and contribute to public safety if serious, both legal and infrastructural reforms, could be introduced. The government can help its prisons to move forward and contribute to public safety.

5.6 Wider Community Participation

The role that civil society can play in prisons is important and should be recognised by the government. Access to places of detention

should be encouraged and facilitated. Prisons should understand that working in conjunction with community organisations is important for the development of community-based services to offenders through the implementation of community based programmes.

In order to contribute to the broader goals of the criminal justice system, corrections need to foster good relationship with other components of criminal justice system. This can be achieved through establishing mechanisms for the sharing of information, consulting in the development of key policies, and sensitizing all those involved in the implementation of new initiatives. To this end it is imperative to consult and enlist the involvement of agencies such as the police, courts, probation officers, Welfare Department, legislators, judges and other government officials as well as regional and interregional justice organisations. The development of initiatives such as non-custodial sanctions is a multi-disciplinary effort that enables partners to be effectively involved in the implementation of all its components at all levels.

6. Conclusion

The Minister for Home Affairs, Dr. Emmanuel Nchimbi has recently expressed his concern with the rate of recidivism in Tanzanian Prison Service.[87] Opening the Prisons Senior Officers' Annual Conference Hon. Nchimbi wondered why the recidivism rate is between 30 to 35% while the Prison Service is busy running rehabilitation programmes for inmates.

Crime is a social problem and politicians are responsible to offer solutions. If nothing else is offered, criminal law and the prison system may become the primary shield against crime and violators

[87] Dr. Nchimbi do it now, The Daily News of 9th June 2012

of human rights.

Practically, recidivism is associated with serious crimes such as robbery with aggravating factors, and the kind of crimes which of late have resurfaced in Dar es Salaam. It cannot be said that a quiet spell in criminal activities can be attributed to the success of criminal justice system. It is only a breathing space for criminals. That demands for combined efforts of Community Policing, Prisons, Judiciary and modernizing the rehabilitation process through Risk and Case Management System.

Prisons are capable of becoming training facilities for criminal activities. The most dangerous criminals are those who are repeat offenders and therefore deliberate efforts should be made to fight recidivism at any cost. A well performing criminal justicesystem is one that can reduce the recidivism rate.

The question of fighting crime is the responsibility of everyone at different levels. Citizens have a primary duty of fighting crime by working together with the police as informers or reporting any perceived criminal activity, the concept of Community Policing comes in.

Police and Judiciary have a secondary role in the fight against crime, as they deal with suspects who, in most cases, get through the criminal process declared innocent. Only 25% of the suspects are found guilty and are sent to prisons.

In such a case prisons play only a tertiary role in combating crime as those offenders sent to prisons have been proven guilty. Recidivists are the offenders whose ladder scale of committing crimes progressively goes higher with the second and third crime.

Prisons should critically look at this new role and work to fight recidivism by having effective treatment programmes that will act as a therapy to addressing the criminogenic needs of offenders.

The enactment of the new Prison Laws could facilitate the new reforms by addressing the offending attitudes of prisoners. The primary duty of the new prison will be to contribute to public safety as opposed to the former one of preventing prisoners from escaping.

Basic new things in this law should include the introduction of different kinds of gradual controlled conditional releases (parole), introduction of judicial independent inspectorate, (ombudsman) establishment, administration and control of Correctional and Community based facilities, new definitions of security levels, and involvement of community in the whole process of conditional release. Decision makers should come with one voice in this new way of combating crime through Case Management.

Critical Appraisal of the Miscellaneous Amendments System in Tanzania

By Deusdedit Simbakalia[88]

1. Introduction

Amendment legislation that amalgamates several laws in a single Act by the common title of 'Written Laws (Miscellaneous Amendments) Act' has occasioned problems for legal practitioners, the courts and researchers. There are dozens of such Acts of the same title and any person tracing the full set of amendments cannot be certain whether or not an amendment has been made in one or several of the annual 'miscellaneous amendments Acts'. In the 1970s and 1980s laws were only amended each by a specific amendment Act with the name derived from the original Act. Amendments to the Penal Code were made through a Penal Code (Amendment) Act of the year or years when the amendments were passed.

Two main grounds appear to have prompted Parliament to resort to the 'Miscellaneous Acts' system, namely the shorter legislative preconditions for the tabling of such Bills which are routinely cobbled up in a matter of weeks without the months long approval processes through the Inter Ministerial Technical Committee (IMTC), Cabinet Secretariat, Legislative Committee of the Cabinet, etc. The second ground is that 'minor' amendments which do not affect the policy of the particular law do not deserve the lengthy consultations or the careful scrutiny which is required for original legislation.

The mischief however is the practical difficulties encountered when a research of the law is conducted, in that you can easily skip an

[88] Practising Advocate and Expert on Legislative Drafting

amendment, say of the Penal Code located in one of the dozens of the annual 'Written Laws (Miscellaneous Amendments) Acts. There is a way to continue with the short-cut 'miscellaneous' route, by enacting every amendment law separately as was the practice before the current system. Neighbouring jurisdictions maintained the 'old system' without a problem.

The current Tanzania 'Statute Book' contains laws that fall in three broad categories, namely; the Constitution of the United Republic of Tanzania of 1977, which is the supreme or 'mother' law, principal legislation (the Acts of Parliament or in short form 'the Acts', and subordinate or delegated legislation (passed by the persons or institutions authorised by Parliament to do so by a specific section of an Act).

This paper focuses on the category of principal legislation which includes the sub-category of 'amending Acts'. If for example the Companies Act, the Evidence Act, the Insurance Act are amended this year the typical title of the amending laws will be respectively the Companies (Amendment) Act, 2013, the Evidence (Amendment) Act, 2013 and the Insurance (Amendment)Act, 2013. This is the general manner an Act of Parliament amends an earlier single Act in our jurisdiction.

However, in recent years an 'amending Act' is framed to amend several existing Acts in one instrument, and the obvious concern of the drafters is how to denominate such single Act which amends more than one legislation. For convenience of reference and as a general rule the title of an Act should reflect the general contents of the Act or 'amending Act'. The title 'Evidence Act' and 'Evidence (Amendment) Act' leaves no doubt at all on the general subject

matter, namely that the rules of evidence contained in the Evidence (Amendment) Act modify some of the provisions of the Evidence Act. But what happens where several Acts are amended through a single amending instrument? Surely, if the amending Act includes all the three above laws a neutral title must be used.

2. Pot Pourri Amending Legislation

In the past few decades the legislative history of Tanzania has recorded a series of amending Acts which bear the generic title of Written Laws (Miscellaneous Amendments) Act. Up to four such enactments are passed annually by the National Assembly. At present there are four sessions of the National Assembly every calendar year with the open opportunity for Parliament to enact at each session one 'Written Laws (Miscellaneous Amendments) Act'. But there is no rule that Parliament can enact only one 'Miscellaneous Act'. For the purpose of this paper, for example, if the National Assembly passes a single Miscellaneous Amendments Bill per session, we will end up with the enactment of four 'Written Laws (Miscellaneous Amendments Acts)' per calendar year. Taking the year 2013 as our sample year we will have in the January session the first such Act, which is denominated as the 'Written Laws (Miscellaneous Amendments) Act, 2013'. That will be followed in the next session (April) the 'Written Laws (Miscellaneous Amendments)(No.2) Act, 2013. During the Budget session (June to August 2013) we may see the third in the series, the Written Laws (Miscellaneous Amendments) (No.3) Act, 2013 and the last one in October, namely the Written Laws (Miscellaneous Amendments) (No.4) Act, 2013.

The Parliament is not obliged to produce a Miscellaneous Amendment Act at every session, neither is it precluded from

passing more than one such Miscellaneous Act in any particular session. Parliament is absolutely free to pass or not to pass any law or amendments to the existing laws. The record of our laws contains dozens of laws uniformly labelled as 'Written Laws (Miscellaneous Amendments) Acts' which have been passed by the Parliament over the last four decades.

3. Making of Laws in the Colonial Legislative Assembly ('LegCo')

Right from the period of the British administration (1919 to 9th December 1961) laws were enacted by the name and style of 'Ordinances'. Amending legislation bore the name of the original title but qualified by the year the amendment was passed. Thus the original Land Ordinance of such a year was amended by the Land Ordinance of the amendment year, and later amendments bore the same title of the subsequent years. To be specific if the Land Ordinance of 1923 is amended subsequently in 1928, in 1933 and 1944 the amending laws would be denominated respectively as the Land Ordinance of 1928, Land Ordinance of 1933, the Land Ordinance of 1944, etc. This was borrowed from the practice in UK in respect of English statutes. The problem is that, it is not very easy to identify quickly the original Land Ordinance unless you trace back all the Land Ordinances to arrive at the first or original law that was subsequently amended. You simply must make sure that there is no earlier 'Land Ordinance. This is surely a tedious and time-consuming activity.

The better alternative adopted for citing amendment legislation was to name them as the Land (Amendment) Ordinance of 1928, the Land (Amendment) Ordinance of 1933, the Land (Amendment) Ordinance of 1944, etc. The improvement here is that on its face

the search shows that the particular Ordinances of 1928, 1933 etc are amending legislation. You are certain on the face of the law that it is not the original law or Ordinance. From 1965 the laws passed in Parliament are called 'Acts' instead of 'Ordinances'. The equivalent appellations would be respectively 'Acts' for original legislation and 'Amendment Acts' for the amendments.

4. Current Citation of Amending Laws

Starting from the 1980s todate, a common practice has taken firm roots to amend several laws in a single enactment, called 'the Written Laws (Miscellaneous Amendments) Act' of such and such year. Theoretically, Parliament is asked to pass small amendments of different laws in a single document for convenience. The reason for the consolidation is that there is a long process before a regular 'Bill for an Act' is tabled for debate in the House and passed followed by the usual assent of the President as the last step to become a law. A schedule of the laws amended together in the single Act will specify which laws are amended by that amending Act. At times the list is formidable. A second ground for the purported rationale for 'amalgamating' the minor amendments of several laws is that the amendments are not substantial so as to require a change in the policy of the laws which are amended together through the single amending law.

However, one would ask whether a particular 'Miscellaneous Amending Act' always fulfils the criteria that there are no policy implications in the amendments passed by the use of the Miscellaneous Amendments' device. Examples include the repeal of an entire law such as the Rent Restriction Act which was summarily struck from the Statute Book through a 'Miscellaneous Amendment' (section 50 of Act No. 11 of 2005).

The regular route for passing any law is the formal submission of proposals to the Cabinet for the scrutiny and decision to send the relevant Bill to the House to be passed by the Members of Parliament. Approval by the Cabinet is preceded by a detailed separate and consecutive assessment and recommendations of the IMTC, the Cabinet Secretariat, the Legislative Committee of the Cabinet. Consultations with stakeholders may be arranged at the discretion of the Minister sponsoring the particular Bill. This regular route typically takes months and sometimes years to complete unless the Cabinet considers the particular Bill should be taken as an emergency Bill. To circumvent the cumbersome process the 'miscellaneous' basket legislation was adopted by the Executive and consequently by Parliament. The Attorney General tables such legislation on behalf of the Ministers responsible, in a glaring departure from the gazetted allocation of Ministerial functions (see GNs Nos 1 and 2 of 2006 made respectively under section 55 of the Constitution of 1977 and section 5(1) of the Ministers (Discharges of Ministerial Functions) Act, 1980, Cap. 299 [R.E.2002]. No serious protests however have ever been voiced against the informal practice of allowing the AG to table 'Miscellaneous Bills'.

5. Structure of a Miscellaneous Amendment Bill or Act

The classical structure of the Written Laws (Miscellaneous Amendments) Bill consists of short title, followed by a section which introduces a 'Schedule' of the laws that are intended to be amended. In recent years, there is no Schedule, but the Bill or Act incorporates all the amended laws in separates Parts, e.g. Part II amending the Land Act, Part III amending the Penal Code, Part IV amending the Forests Act, and so on. There may be as many 'Parts' as needed to cover all the laws intended to be amended through

the particular 'Miscellaneous Amendments' Bill or Act. The recent alternative, of arranging the laws amended in Parts, is evidently more user friendly. The Schedule, in the first alternative did not supply a numbering system for ease of reference. If say, fifteen Acts are amended, the Schedule will simply lump them one after the other without a tag. Specific citation of an amendment appearing in the Schedule was not possible, under the alternative structure, it is possible to state the Part and section within that Part, e.g. Part IV and section such and such of the Bill or Act which amends section such and such of a certain Act, for example the Forest Act.

6. Mischief of the Miscellaneous Amendments Bill or Act

The basic problem that prompted this paper is the perilous system of lumping together different laws in a single Bill/Act, with the perennial danger of a possibility to miss out an entire amendment. Many instances of 'accidental' non-citations or omissions of a provision of amendment have occurred simply due to the miscellaneous amendments system.

Take the ongoing case in which a girl called Elizabeth Michael, alias LULU, is charged with causing the death of one actor, Steven Kanumba. It was mistakenly assumed by many legal experts that LULU, who is alleged to have been less than 18 years old at the material time, and thus a child within the meaning of the Law of the Child Act, was in danger of the death penalty if she is convicted of the charge she faces. She therefore should be tried in a Juvenile Court to avoid a possible sentence of death if she is found guilty. It took the intervention by Hon. Justice Makaramba, of the Tanzania High Court, Commercial Division, who notified counsel and the Tanganyika Law Society that in fact the death sentence for children was abolished as long ago as 1997. The abolition was effected

by an amendment of the Penal Code through a Miscellaneous Amendments Act of that year. But low and behold, the current revised text of the Penal Code, made on the authority of the laws Revision Act, does not take account of the amendment. The sad and inevitable observation is that if the office of the Chief Parliamentary Draftsman itself could not locate the amendment in the morass of the 'Miscellaneous laws', for the purpose of preparing and publishing the new revised version of the Penal Code, this Miscellaneous package is a major risk for the law and society at large.

A second example, which occurred before the text of the Penal Code was revised in 2002, was the search for the whereabouts of the offence of 'kite flying'. Only after a long period someone in the office of the Attorney General recalled that the offence of kite flying was inserted in that year's Finance Act instead of the Penal Code. Needless to say, the Finance Acts are a special kind of a Miscellaneous Laws which are conveniently inserted for the purpose of the annual Government budget. The Financial Appropriation Act are passed to allocate the finances, while the adjustments to the financial laws (the VAT Act, Income Tax Act, Customs Act, etc) justify the alterations of the tax rates to raise or increase the public revenues. This submission, however does not intend to question the propriety of the Finance Bills/Acts, which are otherwise in substance, no different from the amendment legislation called 'Written Laws (Miscellaneous Amendments'. The great fear thought is how many wrong decisions, including ruling and judgments have been made *per incuriam*, or may easily be so made because an amendment is 'hidden' in a mass of Miscellaneous Amendments law provisions. This is apart from the unnecessary long research time expended due to this system.

7. Concern for Parliament's Time

The benefits of quickly passing amendments within a few weeks rather than months and years cannot be denied. Shortly before every session of the National Assembly every Ministry has the opportunity to make and send to the Attorney General suggestions to amend any laws administered by it. There are four sessions of the National Assembly every calendar year- January, April, June/ August, and November. In the current practice a Bill must be published at least twenty one days before the start of the session which will debate the Bill concerned. It is possible for the Attorney General to collect, into a Miscellaneous Amendments Bill, proposals from the Ministries within a month before the next session of the National Assembly. There are no lengthy processes of approval by the Cabinet for the Miscellaneous Bill before the same is tabled in the National Assembly.

Whether an enactment was drafted in a hurry or not, many of the laws need to be amended on certain points from time to time without a change in the overall policy that would necessitate lengthy consultations and modification of the basic principles or policy underlying every enactment.

8. The Question of Legislative Policy

The fact is that every Ministry is responsible for the oversight of certain matters as allocated by the President under an instrument which specifies the Ministerial responsibilities for each Ministry usually created after the Parliamentary general elections. Every Ministry, with the approval of the Cabinet, draws up a policy paper to implement its area of responsibilities and proposes the pertinent legislation where implementation requires a law to be passed. Every law suggested by any Ministry must therefore be within

the policy frame, and that is why consultations are made with the IMCT, Cabinet Secretariat, Legislative Committee of the Cabinet, and the full Cabinet itself besides other stakeholders at the option of the Ministry responsible for the proposed new law. However it is clearly unnecessary to involve the lengthy process of consultations and approvals where minor changes to an existing law need to be effected by an amendment which does not involve a substantial departure from the relevant policy paper of the Ministry.

9. Suggested Alternative to the Miscellaneous Laws Amendments System

The 'miscellaneous laws amendments' system did not exist in our legislation until the mid-1980s. During colonial days we emulated the English manner of amending every law separately, even if only one or a few sections of a law are amended. This system still operates in the neighbouring jurisdictions such as Kenya. It is suggested that we could revert back to amending each law separately even if it entails drafting ten separate Bills/Acts instead of a single Miscellaneous Bill/Act in any particular instance. The obvious convenience is that it will be easier to trace all the amendments of any particular Act by perusing the Index of the Laws.

10. Contents of a Miscellaneous Bill

Instead of the Miscellaneous Bill being drafted for a single enactment with a list of amended laws, separate amending laws can be passed under the 'Miscellaneous Bills Supplement' cover. In simple terms, instead of one Bill containing different laws which will be comprised under one serial Act Number, say the Miscellaneous Act No. 1 of 2013, the numbering should cover each law separately under the general reference. If ten laws are intended to fall under the general Miscellaneous Bills Supplements, the individual

amending laws should be allocated a separate Act number within the Miscellaneous cover of the Bill. In the result the Bill will bear the customary annual Bill Supplement reference number, but the resulting amendments of the ten laws will be labelled as Act No. 1, Act No. 2, Act No. 3, and so on up to Act No. 10 of 2013 (assuming that no previous laws have been passed for the year 2013).

11. Recommendations for Change

If the suggestions cited above are implemented, Parliament may have four Miscellaneous Amendment Bills every year, but from which multiple Acts will result. If say one Miscellaneous Bill is passed at each of the four annual sessions, and if each Bill contains four amending laws the result will be sixteen amending laws numbered separately, instead of four Miscellaneous Acts. For the sake of clarity if only four Miscellaneous Amendments are passed that year (obviously a fictitious eventuality), the annual series will be sixteen Acts instead of only four Written Laws (Miscellaneous Amendments) Acts.

Under the current system it is assumed that only four Acts are passed by Parliament in a year, all of them being Miscellaneous Amendment Act, we could have recorded in our Statute Book under the current treatment of multiple-laws Amending Acts the following:

(a) Written Laws (Miscellaneous Amendments) Act, No. 1 of 2013, passed in January 2013;
(b) Written Laws (Miscellaneous Amendments) Act No. 2 of 2013, passed in April 2013,
(c) Written Laws (Miscellaneous Amendments) Act No. 3 of 2013, passed in June/August 2013, and

(d) Written Laws (Miscellaneous Amendments (Act No. 4 of 2013 passed in November 2013.

In the proposed arrangement scenario of the year is that four Bills are also tabled during the year at each session for small amendment of various laws, and we assume that no other Bills are passed by Parliament for the whole of that year. The record of that year's laws would appear as follows-

(a) From the January Bill Supplement:
(i) ABC (Amendment) Act, No. 1of 2013
(ii) DEF (Amendment) Act, No. 2 of 2013
(iii) GHI (Amendment) Act, No. 3 of 2013
(iv) JKL (Amendment) Act, No. 4 of 2013

(b) From the April Bill Supplement:
(v) M… (Amendment) Act, No.5 of 2013
(vi) N…(Amendment) Act, No. 6 of 2013
(vii) O…(Amendment) Act, No. 7 of 2013
(viii) P…(Amendment) Act, No. 8 of 2013

(c) From the June/August Bill Supplement:
(ix) Q…(Amendment) Act, No. 9 of 2013
(x) R…(Amendment) Act, No. 10 of 2013
(xi) S…(Amendment) Act, No. 11 of 2013
(xii) T…(Amendment) Act, No. 12 of 2013
(d) From the November Bill Supplement:
(xiii) U…(Amendment) Act, No. 13 of 2013
(xiv) V...(Amendment) Act, No. 14 of 2013
(xv) W..(Amendment) Act, No. 15 of 2013
(xvi) X…(Amendment) Act, No. 16 of 2013.

As can be gathered from the above illustrations, there will be a list of 16 separate amending Acts in that year instead of only 4 Miscellaneous Amendment Acts. Some of those 16 amending Acts may amend only one or two provisions. The point is that every Act will have a separate Amending Act instead of the omnibus 'miscellaneous' amending Acts. One conspicuous result will be a much higher number of Acts every year, many of which are 'small' amending Acts.

12. Publication of Bills Supplement and Acts Supplements

Those responsible for the compilation of the Bills may wonder how the Miscellaneous Bills will appear, and how the resulting Acts Supplements will be compiled and printed. This is a practical point which must be squarely addressed. The major difference is that there should be a 'Miscellaneous Bills Supplement' separate from the ordinary 'Bills Supplement'. The Miscellaneous Bills Supplement will contain the batch of small amendments of different laws with distinct titles, e.g. the Evidence (Amendment) Bill, the Companies (Amendment) Bill, the Forests (Amendment) Bill, etc. there will be as many 'small' Bills as the number of Acts being sought to be amended. Under the present 'miscellaneous bills' system the small amendments are consolidated and form part of the single.

To illustrate, let us assume that there are two Bills Supplements, namely-

(b) Bills Supplement No. 1 of 2013 containing small amendments to several laws. The contents of the Supplement will be in our illustration: the Evidence (Amendment) Bill, the Companies (Amendment) Bill, and the Forests (Amendment) Bill, etc. These three separate amendments will be printed in three separate folios or sets of folios.

(b) Bills Supplement No. 2 of 2013 containing one or several new laws.

The only reason for not combining Supplement No.1 and Supplement No. 2 is that the first will undergo the fast track route, while the second will be subjected to the normal lengthy legislative route. However, the resulting 'small' Acts from Supplement No. 1 and the Acts derived from Supplement No. 2 (the big Acts) will be numbered in the common annual series under the Acts Supplements of the year.

13. Conclusion

With the abolition of the multiple laws or 'miscellaneous' amending statutes, the number of Acts in our Statute Book will be conspicuously higher than obtain at present. Incidentally the Parliament in the 1960's and 1970's used to pass more than 60, 70 or 80 laws per year. Numbers alone are not a weakness or disadvantage. The more important concern for lawyers, including law students, the courts, academicians and researchers is easy access to the legislation and tracing of all the amendments. It is surely more convenient to trace all the amendments of the Penal Code if the same are denominated separately and by name throughout the years. Amendments to the Code made in the successive years, say in 2000, 2001, 2002, 2005, 2009, and 2010, would be cited as Penal Code (Amendment) Act of 2000, Penal Code (Amendment) Act, 2001 and so on. Any person exercising ordinary vigilance and without undue stress and without spending too much time will be able to follow through the 'Statute Book' all the amendments in the successive years.

A more frequent 'revision' of the laws by those concerned will minimise the significant risk of missing out an amendment made in

the 'miscellaneous' provisions. But in our situation, general revisions are made after a decade or greater time span, and this situation calls for the abolition of the 'miscellaneous amendments' systems. Since the concerns of Parliamentary time can be accommodated as suggested in this paper, the advantages of reverting to the earlier system are, in my opinion overwhelming.

Tanzania Towards New Constitution: Warioba Commission First Draft

By John William Nyoka[89] and Sufian Hemed Bukurura[90]

1. History in the Making?

What looked like a long march towards a home grown constitution is now getting closer to its logical end. The launching of the Draft Constitution by Justice Joseph SindeWarioba, the Chairperson of the Constitution Review Commission (CRC), has once again ignited serious debate on the constitutional future of our country. Although initial discussions appear to be focused on the proposed federal government system, the draft contains other significant and radical proposals. Important things such as the establishment of separate High Courts for each of the participating entities (Articles 143(1) and 145(1)); the Independent Electoral Commission (Article 181), Leadership Ethical Standards and Accountability Commission (Article 188); Human Rights Commission (Article 194); for example, are included in the Draft Constitution.

This is a historic process and event in Tanzania. One might not be completely off the mark in believing that the founders of the nation, responsible for making of our earlier constitutions, knew or might have carefully thought of what they were doing at that time and why they never allowed the populace to discuss those earlier constitutions. It could be supposed that such debates might have opened a can of worms that could have derailed the whole exercise and possibly delay our political independence. Some maybe old enough to remember Lancaster Constitutional Conference,

[89]Retired Deputy Commissioner of Prisons and Columnist, Daily News.
[90]Full Time Commissioner, LRCT.

later reworked at the Karimjee Hall, under the supervision of the Colonial Secretary, Ian Macleod, that brought in *Serikaliya Madaraka* (Responsible Government) and a little later political independence in 1961.

What is so special with this particular exercise?

This constitution making process is so historic that the whole nation is involved and witnessing history in the making. Partly because forces behind the changing world, and internal forces of change, have converged to bring about unprecedented transparency that most African countries are now rewriting their constitutions. While Ghana, Uganda, Kenya, Zimbabwe have done it, Zambia is continuing with the process. Now it is Tanzania's turn.

Unlike Kenya,[91] which had a protracted constitution-making process, that took more than ten years, ours seems to be moving very fast. Tanzania could have a new constitution by April 2014. This would be a fitting present as the country commemorates the Golden Jubilee of the Union. If that was to happen, the next General Elections, scheduled for 2015, could also take place under the new constitution. In view of this draft, everything seems possible.

As may be recall, the need for a new constitution was a long time demand from different quarters and by some emminent people, including Chief Justice Nyalali, Justice Kisanga and several others who, at different times, suggested the need of a new constitution to sustain our fragile union.

[91]Constitutional Review process in Kenya: Report of a fact finding Mission of the Kituo cha Katiba on the progress of the Constitutional Review exercise in Kenya 2001 Chapter 4.

It was November 2011 that the Constitutional Review Bill was tabled in Parliament and ultimately passed in February 2012. After concerted negotiations, at times out of the parliament, an agreement was reached that gave way to the creation of rules and modalities for making process of constitution.

2. The Constitutional Review Law

The Constitutional Review Act, 8 of 2012, set out to do the following (Section 4):

i) to create a Constitutional Review Commission to collect and coordinate public opinions;
ii) to provide for a mechanism by which the public could widely and freely participate in expressing and transmitting their views on matters relating to the constitution;
iii) to create an environment that would encourage mutual understanding in all issues of national interest;
iv) to institute a mechanism for conducting a referendum; to work out the procedure on how the new constitution could be promulgated; et al

The President, in the exercise of powers granted to him under section 6(1), appointed Justice Joseph Sinde Warioba, Chairperson of the Commission, Chief Justice (Rtd) Augustine Ramadhani, as Deputy Chairman, and thirty four Commissioners. The Commission took the oath of office in April 2012.

In carrying out its work the CRC had to be guided by the national values and ethos, and respect and promote the following matters (section 9):

(i) the existence of the Union;
(ii) the existence of the Executive, Parliament and the Judiciary;
(iii) the democratic republic system of government;
(iv) the existence of Revolutionary Government of Zanzibar;
(v) national unity, peace and harmony;
(vi) periodical democratic elections;
(vii) promotion and respect of human rights;
(viii)equality before the law;
(ix) the existence of a republic which respects the right for belief of any religion.

3. The Commission meets the People and collects their views

The Commission traveled widely to many parts of the country. We are told that the Commission held 1,942 meetings that were attended by 1,365,337 people. There were also face to face meetings involving 333,537 people. Views were also received via cellular phones as short messages (sms-es) and by electronic mail - both facilitated by modern technologies[92]**.** Meetings were also held with stakeholders and special interest groups, senior citizens and political parties. In addition to public gatherings, opportunity was afforded to elite groups such as former prime ministers, permanent secretaries, retired officials as well as those who are still in active service. These are groups with a taste of leadership and know pretty well where sweet power is.

The views collected were analyzed by professional researchers and debated by Commissioners. From the analysis and debates a

[92]A speech by Hon. Justice Joseph SindeWarioba, the Chairman of the Constitutional Review Commission at the launch a Draft Constitution on 3rd June, 2013 at Karimjee Hall, Dar es Salaam Tanzania

consensus was arrived at and a draft compiled. It is that first draft, which was launched with funfair on the 3rd June 2013 that is now available for public scrutiny through constitutional *fora*.

4. Commenting on the Draft

The next stage is for elected representatives, constituted as constitutional fora countrywide, to subject the Draft Constitution to critical examination. Initial indications are that there are serious reservations about the proposed federation and the creation of three governments. The ruling party, Chama Cha Mapinduzi, for example, pronounced its position on the federation after convening a special National Executive Committee meeting to deliberate on the matter. Their argument seems to be echoing the original view of the founding father of the nation, the late Mwalimu Julius Nyerere. The federation is not only expensive in human and financial terms but it might also be sowing the seeds for breaking the very Union. Who could have anticipated that while all efforts are being focused on strengthening ties among countries of the East African region, Tanzanians were contemplating of weakening some of the already established bonds! The late MwalimuNyerere once cautioned that if you start dividing the people on the basis of race, ethnicity and regions you are bound to go even further to the smallest segments. Justice Warioba and his Commission are fullyaware of the challenges associated with most, if not all, of their proposals. They have called on the nation, through constitutional *fora*, to consider the proposals contained in the draft constitution carefully so that improvements could be made.

5. Conclusion

In any case this is a first draft. There is definite room for improvements before the Constituent Assembly is convened (under Part IV) and a

referendum is held (under Part V) of the Constitutional Review Act. It could have been surprising if the Draft Constitution was to be accepted outright and without criticism or need for improvements. The Commission probably wants and/or expects more views on the proposals outlined in the draft. Constitutional fora are additional opportunities for the public to make their indelible mark by contributing to the making of history in the process of constitution-making.

There is no doubt that the Draft Constitution contains new and extremely good ideas. These include, and not limited to, national values, matters of openness, public accountability and ethical standards for public leaders, adherence to human rights, among others. Yet, there are also some technical hitches that need to be ironed out in the next stages of the process. These include, but are not limited to, lack of transitional arrangements; non inclusion of prison service among the security forces, clarity of language, et *al.*

TANZANIA - IT CAN BE DONE, PLAY YOUR PART.

Summaries of Law Reform Commission Recent Projects

This part includes summaries of some of the recent projects undertaken by the Law Reform Commission of Tanzania (LRCT). The Projects are: The Review of the Legal Framework governing Settlement of Land Disputes; the Comprehensive Review of the Civil Justice System and the Review of Customary Laws. It outlines the rationale of these studies, methodologies used in undertaking the studies and their status. It is intended to inform stakeholders and the general public on some of the Commission activities in recent years.

A: The Review of the Legal Framework on Land Dispute Settlement in Tanzania

1. Introduction

Land is the critical resource in the development of Tanzania. Its ownership has become a source of prolonged disputes. On its own initiative, with the support of Business Environment Strengthening in Tanzania (BEST), the LRCT, undertook a study on land disputes settlement in 2010. This was partly informed by public outcry that the legal framework had failed to achieve the objectives of the Land Policy of 1995 and the land laws of 1990s. Whereas the policy and new land laws emphasized expeditious settlement of land disputes, the practice was the contrary. This study, therefore, was undertaken to find out the problems associated with the system of settlement of land disputes. It is expected that the study will lead to recommendations regarding the best ways to overcome these problems.

2. Rationale of the Project

One of the underlying principles of the Land Act[93] and Village Land Act[94] is to ensure the establishment of an independent, expeditious and just system for adjudication of land disputes. The Land Disputes Courts Act[95] was specifically enacted to provide for the implementation of expeditious land dispute resolution through Village Land Councils (VLC), Ward Tribunals (WT), Districts and Housing Tribunals (DLHT), High Court (Land Division and Court of Appeal).

Since the enactment of these three laws, namely the Land Act,[96] the Village Land Act[97] and the Land Disputes Court Act,[98] the land courts system has not operated as it was expected. The study is therefore expected to assess how the land courts system has operated, challenges they have encountered and what improvements could be made to make them more efficient and effective.

In addition, the study is considered to be relevant to the implementation of the Kilimo Kwanza pronouncement, which is about transformation of agriculture into a modern and commercial sector. Kilimo Kwanza sets out ten actionable pillars. Relevant to this study is Pillar number 5.3. In its implementations framework, this pillar is about fast tracking of a land delivery system by establishing an expeditious dispute resolution mechanism, allocation ofresources for adjudication in the courts system (personnel and

[93]Cap. 113 [R.E 2002]
[94]Cap. 114 [R.E 2002]
[95]Cap. 216 [R.E 2002]
[96]Cap. 113 [R.E 2002]
[97]Cap. 114 [R.E 2002]
[98]Cap. 216 [R.E. 2002].

funding) and establishment of Ward Tribunals, Village Land Courts and strengthening the existing ones.[99]

3. Stakeholders Consulted

Field research was conducted in eight regions, namely: Arusha (Arusha, Monduli and Arumeru districts), Manyara (Babati and Hanang districts), Kagera (Chato and Bukoba districts), Mwanza (Mwanza and Geita districts), Iringa (Iringa and Njombe districts), Mbeya (Mbeya and Mbarali districts), Morogoro (Morogoro and Kilosa districts) and Dar es Salaam (Ilala and Kinondoni districts). Stakeholders consulted included Regional Commissioners, Members of Parliament, Regional Administrative Secretaries, District Commissioners, District Administrative Secretaries, District Executive Directors, Municipal Directors, Officers of District Councils including Land Officers, Chairmen and Assessors of District Land and Housing Tribunals, members of Ward Tribunals, Magistrates, Practising Advocates, Officers of Non-Governmental Organizations and members of the general public. The Commission conducted validation workshops to verify its findings and test its recommendations.

4. Conclusion

The Report has been prepared and it identifies various problems concerning land disputes and sets out recommendations on the best ways to address them. The Report will soon be submitted to the Minister of Constitutional Affairs and Justice.

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[99]www.kilimo.go.tz, accessed on 25/08/2010

B: The Comprehensive Review of the Civil Justice System in Tanzania

1. Introduction

The civil justice system is part of the broader justice system that enforces, restores, or protects private and personal rights. In other words, civil justice system is about resolution of disputes among private individuals and entities. Civil justice system includes commercial disputes, personal injury claims and disputes between individuals and the government. As such civil justice system is not about criminal conduct.

2. Why a Comprehensive Review of Civil Justice System?

The Law Reform Commission of Tanzania undertook a comprehensive review of the civil justice system partly because it is now clear that, business environment of any country depends on great measure upon an efficient and accessible system of dispute resolution. An efficient and accessible civil justice system will enable more timely and less costly resolution of disputes which will in turn enable greater access to justice for all Tanzanians.

By reviewing the civil justice system, the Law Reform Commission of Tanzania is implementing the commitment of the Government of the United Republic of Tanzania to enhance access to justice to all as spelt out under Article 107A of the Constitution of the United Republic of Tanzania, which outlines the following principles:-

i) Delivery of justice without regard to the litigants' social or economic status;
ii) Delivery of justice in a timely manner or without undue delay;

i) Provision of adequate compensation in case of injuries caused by others;
ii) Facilitating and encouraging amicable settlement and dispute resolutions;
iii) Delivery of justice without undue technicalities.

3. Implementation of the Review of the Civil Justice System in Tanzania

With the support of the Business Environment Strengthening Programme for Tanzania (BEST), civil justice system was implemented in three stages:

Stage 1: Preliminary Research and Preparation of the Concept Paper

The project started with a technical working group identifying areas for reforms. These areas included jurisdiction, procedure and regulation of private legal practice and court administration, with the specific aim of reducing their complexities and unnecessary delay and costs. Seven groups of stakeholders were identified, namely the Judiciary and Tribunals; Attorney General's Chambers; Institutional Stakeholders; Business Community; Auctioneers and Brokers; Government Departments and Agencies; International Agencies and Development Partners and the Informal Sector.

Stage 2: Stakeholder Consultations and Preparation of the Position Paper

In the second stage, a Position Paper, highlighting the policy and legal problems identified by the preliminary research, was prepared. The Paper derived its position from the overriding principles outlined in Article 107A of the Constitution of the United Republic of Tanzania enumerated earlier.

For the review of the civil justice system, the Commission held consultative meetings to solicit their views on the identified areas for reform were carried out in five (5) regions of Arusha, Dar es Salaam, Dodoma, Mbeya and Mwanza. Stakeholders involved were Justices of Appeal, High Court Judges, State Attorneys, Advocates, Academicians, Court Brokers and Non-Governmental Organizations. Issues raised and deliberated in the consultations included:-

i) pre-action protocols;
ii) alternative dispute resolution;
iii) making litigation less adversarial;
iv) making litigation less complex;
v) need to shorten the timescale of litigation;
vi) code of conduct and ethics for advocates; and reform of the management and structure of the court system.

Stage 3: Comprehensive Review and Preparation of the Final Report

In 2012, consultants were engaged to undertake a comprehensive review of the laws relating to the civil justice system identified earlier. The consultants were required to produce recommendationsfor reform of the civil justice system taking into account the observations and recommendations made in the position paper and regional workshops. The consultants were also tasked to identify areas of laws that needed reforms and produce draft Bills and Rules. The reports were produced containing necessary recommendations and proposed Bills and Rules on the comprehensive reform of civil justice system in Tanzania.

4. Conclusion

The Commission produced the final report containing recommendations for reform of the civil justice system, Draft Bills and Rules. The report was submitted to the Minister for Constitutional and Legal Affairs.

C: The Review of Customary Laws Project

1. Introduction

Customary law was formally recognized as a source of law in 1961 by the Judicature and Application of Laws Ordinance (JALO)[100]. The law recognizes customary laws to be one of the sources of laws to be applied by the courts of Mainland Tanzania.

Customary law may be applied by courts only in matters of civil nature in the following circumstance:

(i) between members of a community in which rules of customary law relevant to the matter are established and accepted, or

(ii) between a member of one community and a member of another community if the rules of customary law of both communities make similar provision on the matter in question.

Where the courts find that customary law may be applied to any matter before them, the court is required to apply the customary law prevailing within the area of the local jurisdiction of the court, or if there is more than one such law, the court will apply the customary law applicable in the area in which the act, transaction or matter occurred or arose. District Councils are given the task of

[100]Currently known as the Judicature and Application of Laws Act, Cap.358 [RE 2002]

identifying customary laws prevalent in their areas of jurisdiction and recommending to the Government which of those laws should be declared as laws to be applied by courts within areas of District Councils.

2. Customary Laws are flexible and could be ascertained

The customary laws of any community in Tanzania are built upon experience of communities and naturally change to meet new circumstances. Changes taking place within Tanzania and beyond it affect customary laws with time changes in local practices become crystallized into law by reason of acceptability while old rules are tacitly and explicitly abandoned. JALO was designed to allow changes taking place in the society to be accommodated within customary laws. Changes may also arise from the modification of a basic principle, owing to modern influences for example of Bill of Rights, gender equality and equality before the law, *et al*.

JALO empowers District Councils to carry out periodic reviews of customary laws and to declare what in the opinions of District Councils are their local customary laws. None of the District Councils of Tanzania have recorded what constitute customary laws of their respective areas. This uncertainty permeates all aspects that are still governed by the customary law. Judicature and Application of Laws Ordinance, 1961 envisages a situation where District Councils identify and codify applicable rules of customary law to give it some degree of certainty.

3. Why a Review of Customary Laws?

Many changes have taken place in Tanzania since Customary Law Declaration Orders were made way back in 1963. Apartfrom many pieces of legislation that have been enacted, Tanzania has a Constitution which has Bill of Rights. All these societal changes

have impacted on customary laws. Despite these changes, customary laws remain the only law that affects the majority in rural Tanzania. In addition, mainstream statutory law has many things to emulate from customary laws.

The Commission on its own initiative undertook a review of customary laws in 2008. The main purpose of the project was to identify limitations and shortcomings that could lead to injustice and infringement of human rights. The purpose was to identifysuch areas and consequently to propose amendments to the existing law and restate customary laws of matrilineal societies. This project was divided into two phases.

First phase which started in 2008, reviewed the Customary Law (Declaration) Orders GN. No. 279 of 1963.This was completed in March, 2009.The Commission recommended that all customary law that are repugnant to the Constitution, Bill of Rights and Natural Justice be removed from the Orders.

In the second phase the Commission studied customary laws of the matrilineal societies who were not covered by the Customary Law (Declaration Orders) and gauge their compatibility with the Constitution, Bill of Rights, writtenlaws and policy guidelines. In this phase field research was conduct in the following Regions; Lindi (Nachingwea and Ruangwa districts), Mtwara (Masasi and Nanyumbu districts), Morogoro (Kilosa, Mvomero, Kilombero and Ulanga districts) and Ruvuma (Namtumbo and Tunduru districts).

4. Conclusion

The Commission compiled a report on matrilineal customary laws that was later presented to and discussed by stakeholders in the respective regions. The task was completed in November, 2012. The report has been submitted to the Minister for Constitutional and Legal Affairs.

Call for Subscription of Articles for Publication in the Journal

The Law Reform Commission is pleased to invite for subscription of Articles in the form of original essays and commentaries on issues more tailored to legal practitioners, as well as responses to earlier Articles published in its first, second and thirdeditions of the Journal, in June 2007, March 2009 and April 2012 respectively. Incoming subscriptions are intended for the fifth publication due in **December, 2013**.

Persons from whom Subscriptions are invited, Themes and Selected Topicsfor Coverage

Articles are invited from members of the legal community, Judges, Magistrates, practitioners, law professors, legislators, law students, human rights and other social activists, politicians as well as members of the general public on legal or social issues of public interest:- (i) which might have a bearing directly on current events unfolding in society; (ii) which might seek to influence legislators and policy makers outside of academia; and (iii) which seek to set forth observations that are new and useful in the community and for the wellbeing of Tanzania's society. The Journal also accepts essays on particular issues that are thematically appropriate and contribute a unique and useful perspective.

The Mandate of the Commission Publishing the Journal

The Law Reform Commission publishing the Law Reformer Journal is an independent Department of the Government, established by the Law Reform Commission of Tanzania Act, 1980 [Cap. 171, R.E. 2002], with the mandate of taking and keeping under constant review, all the law of Tanzania for the purpose of its development and reform.

Aims and Objectives of the Journal

For more effective performance of its functions, the Commission is required to establish and maintain a system of collaboration, consultation and cooperation 116 with any person or body of persons in carrying out its law reform activities. In that regard, the Commission has considered it appropriate to establish a system for obtaining views and opinions from experts and the general public, on a variety of issues, especially on laws that the Commission is examining, with a view to obtaining information, views and opinions relating to the laws of the country in general and on the legal systems of other countries, to facilitate better understanding of the laws of the country and of law reform activities in other countries.

The Law Reformer Journal is one such platform that the Commission uses to disseminate information on different aspects of the law and to solicit the views of legal practitioners and of the general public, on what improvements that need to be made to our laws so that they respond to the current needs of the society andare at the same time in line with international best practices. Thus, the Journal focuses its attention on raising public awareness of contemporary legal issues and aspires to act as a forum for high-quality debate on issues of law reform in aneasy-to read format.

Subject Matter of Articles to be Submitted and Deadline for Submission

Articles for the Journal may be written on any branch of law; specific legislation; legal concept or system; administration of civil or criminal justice; environmental laws; human rights laws; constitutional law; electoral laws and or laws relating to leadership code of ethics. In order to meet publication deadlines, we would

appreciate to receive Article for publication by **30/12/2013**and the Article should preferably be submitted in electronic form.

Length of Subscriptions

The number of words in Articles submitted for publication should be between 1000 – 5000. If a submission goes beyond this upper limit, each word over 5000 must be integral to the submission's central argument in order for the Article to be accepted. As indicated above, we would prefer Articles to be written in a style accessible to a general audience of citizens, practitioners and policy makers.

Style Guide

We prefer that Manuscripts are written in single space using Times New Roman font and in electronic form. We would further suggest that, Articles should be written in a conversational tone and the thesis of Articles should be stated promptly, clearly and briefly. References if any should be cited as foot-notes. All submissions will be assessed by an editorial committee and be formatted accordingly. Subscribers will be informed within 3-6 weeks of receipt of their submissions, on various factors of the review, and whether their Articles have been accepted for publication. This timeframe is however indicative only as the actual time for response may vary depending on other factors.

Early Indication of Intention to Subscribe

Persons who intend to subscribe to the forth coming edition of the Journal are kindly requested to indicate their responses to this invitation within one month of the circulation of this Edition and announcement/ invitation, indicating briefly the areas/subjects they intend to cover in their submissions, also giving indication as to when the Secretary of the Editorial Committee should expect to receive their Articles.

Contact Address

Responses to this invitation should be communicated to the Secretary of the Editorial Committee at the address given below:

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