

THE UNITED REPUBLIC OF TANZANIA
THE LAW REFORM COMMISSION OF TANZANIA

REPORT ON
EXCHANGE CONTROL ORDINANCE,
(CAP, 294)

PRESENTED TO THE MINISTER FOR JUSTICE
AND CONSTITUTIONAL AFFAIRS
DAR ES SALAAM

APRIL, 1994

The Law Reform Commission of Tanzania was established by the Law Reform Commission of Tanzania Act. 1980 and began functioning on 21st October, 1983.

THE COMMISSIONERS ARE:

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| Hon. Mr. Justice Hamisi A. Msumi | - | Judge of the High Court of Tanzania and the High Court of Zanzibar, Chairman. |
| Mr. George B. Liundi | - | Advocate of the High Court and Court of Appeal of Tanzania, Full-Time Commissioner. |
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THE LAW REFORM COMMISSION OF TANZANIA

June, 1990

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REPORT ON EXCHANGE CONTROL ORDINANCE CAP. 294:

Pursuant to Section 9(1) of the Law Reform Commission of Tanzania Act, 1980 the Commission, acting on the public concern on the anomaly in the law and practice of Exchange Control currently obtained in the country taking into account the proclaimed trade liberalisation policy, the Commission made a study of the problem with the view of advising the Government on changes, if any, which could be made in the law as to cure the said anomaly so as to harmonise law and practice of exchange control.

In our investigation all statutory instruments relevant to this problem, in particular the Exchange Control Ordinance, Cap.294 were critically examined. Also officials from various institutions responsible for the administration of the Exchange Control Ordinance, Cap.294 were consulted from both sides of the Union; these institutions were: the Bank of Tanzania Headquarters and its branch in Zanzibar, the Attorney General's Chambers, Dar es Salaam and Zanzibar, the Treasury, Dar es Salaam and Zanzibar, the People's Bank of Zanzibar and the Law Review Commission of Zanzibar.

In accordance with section 14(1) of the Law Reform Commission of Tanzania Act, 1980, we submit our Report on Exchange Control Ordinance, Cap. 294.

Justice Hamisi A. Msumi
CHAIRMAN

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REPORT ON EXCHANGE CONTROL ORDINANCE (CAP. 294)

1:0 INTRODUCTION:

1. Background to the reference:

At its 13th meeting, the Law Reform Commission of Tanzania expressed the need to examine the provisions of the Exchange Control Ordinance (ECO) with the view to harmonise law and practice as currently obtained in the country after the introduction of the trade liberalisation policy.

First, the Commission set out to find out the following information from other institutions responsible for the administration of the Exchange Control Ordinance:

- (a) whether or not the Government or the Central Bank has established any Commission, Committee or a task force charged into looking at the Exchange Control Ordinance, with the view to harmonise law and practice or Exchange Control for the purpose of bringing the law into accord with current circumstances of Tanzania;
- (b) The terms of reference of such commission, committee or task force;
- (c) whether or not terms of reference of such commission, committee or task force were consistent with the Commission's resolve into the examination of the Exchange Control legislation with the view of bringing into harmony law and practice.

2. TERMS OF REFERENCE:

In accordance with section 9 of the Law Reform Commission Act, 1980, the Commission drew up the following terms of reference:

"the foreign exchange control legislation should be examined by the Commission, as what is happening in practice is not in conformity with the legislation; for example one is required to surrender foreign currency on returning to the country from abroad while at the same time he is allowed to shop using the same currency."

Nevertheless the examination was confined to law and practice of exchange control, taking into account the prevailing trade liberalisation policy.

2:0 CONDUCT OF THE REFERENCE:'

Research into the subject was conducted in two stages:

1. LIBRARY WORK:

Library work was conducted in Dar es Salaam and a number of useful literature (see Appendix "A") was reviewed. We would like especially to thank the Dean, Faculty of Law, University of Dar es Salaam for giving us access to the use of Faculty's unpublished material on the subject.

The Exchange Control Ordinance, Cap. 294 has been thoroughly studied and reviewed.

In the course of investigation the following problems in the Exchange Control Ordinance were identified:

- (a) While the TREASURY and the Bank of Tanzania and the People's Bank of Zanzibar were well prepared with the mechanics of implementing the Trade Liberalisation Policy, the Exchange Control Ordinance and the Bank of Tanzania Exchange Control Manual were left lagging behind causing a lot of technical inconveniences on the way;
- (b) On the other hand, even before the Trade Liberalization Policy was adopted the present law on Exchange Control is riddled with a number of shortcomings, mainly stemming from the provisions of Section 2(2) of the Ordinance;
- (c) The Ordinance restricts foreign exchange transactions by "residents" of the United Republic of Tanzania. The term "resident" is not defined in the body of the Ordinance, save in the Orders made under the Ordinance, such as Designated Currencies Order, GN. No.5 of 1974 where it is defined as: "a person in the United Republic of Tanzania other than a temporary visitor";
- (d) With continuing emphasis on promotion of tourism a large number of foreign tourists visit the country. It has been argued that, for the Convenience of these foreign tourists, there is a need for grant of "money-changers" licence liberally to hotels, shops, travel agents, tour operators, etc. To facilitate this the law must clearly empower the Bank of Tanzania to grant authorisation to non-banking institutions to accept and change foreign currency notes, coins, travellers cheques, and credit cards for goods sold or services rendered;
- (c) There is no provision in the Ordinance to regulate acquisition, holding and

disposal of immovable property in Tanzania by non-residents. This may be a loop-hole enough for transfer of funds from the country by non-residents in a clandestine manner. The law should empower the Bank of Tanzania to exercise adequate control on acquisition, holding or disposal of such properties in Tanzania by non-residents.

2. CONSULTATIONS AND INTERVIEWS:

It was the intention of the Commission to have this subject worked out jointly with the Law Review Commission of Zanzibar, as foreign exchange is a union matter and the Exchange Control Ordinance does extend to Zanzibar, Section 50(1), Cap. 294. Unfortunately, for policy considerations this could not be achieved.

Nevertheless the Commission was accorded maximum co-operation by the Government of Zanzibar on the subject affecting Zanzibar.

Officials from the following institutions were consulted on the subject: the Attorney-General's Chambers, Dar es Salaam and Zanzibar, the Bank of Tanzania, Dar es Salaam and Zanzibar Branch, the People's Bank of Zanzibar, Chairman of the Law Review Commission of Zanzibar and the Commissioner of Investments, Zanzibar.

During these consultations the following issues were raised:

- (a) In some quarters it has been argued that the trade liberalization policy is a temporary economic measure and so there is no need to change the law to accommodate measures which are temporary. Many of those consulted have strongly objected to this view. They argue that; firstly, it is a gross misdirection on the part of those who hold the view that trade liberalization policy is a temporary economic measure and secondly, they submitted that the trade liberalization policy should be considered to be a permanent measure and the law should be formulated to support the same.
- (b) The Exchange Control Ordinance is an outdated piece of legislation. Its strict provisions are a nuisance and highly technical. There is a need to re-formulate the provisions of the Exchange Control legislation to accommodate the socio-economic conditions currently obtained in our environment. The ideal Exchange Control legislation should be able to address itself into the current economic problems of our society and not those of the Post-World War II of the UK.
- (c) The People's Bank of Zanzibar is the defect Central Bank of Zanzibar, but does not enjoy any legal relationship with the Bank of Tanzania. This state of affairs of the two institutions must be stream-lined for better results.

- (d) In practice Zanzibar do not strictly observe the provisions of the Exchange Control Ordinance, Cap. 294 and they are now seeking relief from those provisions. It has been argued, rather strongly that observance of the strict provisions of the Exchange Control Ordinance at the moment is unhealthy for Zanzibar economic well-being.
- (e) It has been also submitted that the Attorney-General of Zanzibar should given powers to exercise under the Exchange Control Ordinance, Cap. 294. In that, he should be given powers under the Ordinance to give consent for prosecution of Exchange Control offences originating from Zanzibar.

3:0 FINDINGS AND RECOMMENDATIONS:

1. TRADE LIBERALISATION POLICY AND EXCHANGE CONTROL ORDINANCE

The trade liberalisation policy began in early 1984 where individuals with foreign exchange abilities were allowed to use such money freely to import goods to be sold in the country to alleviate shortages of those goods. This policy was concretised in 1986 by introducing a revised import/export policy whereby exporters were allowed to retain 50 % of export proceeds and apply the same to import specified items of goods for sale in the country.

When this strategy was introduced the restrictive provisions of the Exchange Control Ordinance have never been taken into account.

According to the terms of the 50 % retention scheme of the trade liberalisation policy, a producer-exporter as well as trader-exporter after meeting of their respective obligations under the scheme may use the balance of their proceeds to import goods specified in the import list for sale in the local market. That is an option which producer or trader-exporter has on the use of his money which may be lying in a bank abroad.

On the other hand the Exchange Control Ordinance Section 1(4) (a) and (b) provides that "foreign currency" includes any "credit or balance at a bank" which means that any use of such balances must be regulated by the Bank of Tanzania.

It is recommended that implementation of the trade liberalisation policy should closely be backed up with suitable amendments in the Exchange Control Ordinance for certainty and predictability.

2. AMENDMENTS TO THE EXCHANGE CONTROL ORDINANCE:

(a) Jurisdiction of the ECO:

Jurisdiction of the Ordinance extends to the whole of the United Republic of Tanzania, branches and agencies outside the territory of all organizations registered or incorporated in the territory. The ECO Section 50 does not specifically say so, it only says that the Ordinance extends to "Zanzibar as well as to Tanganyika." It is therefore recommended that the Exchange Control Ordinance be amended to specify that the jurisdiction of the Ordinance does extend to the whole of the United Republic of Tanzania and its citizens, as well as branches and agencies outside the territory and all organisations registered or incorporated in the United Republic of Tanzania.

(b) Resident:

The connecting factor to the jurisdiction of the ECO is residence. It is unfortunate that this word has no proper definition within the body of the ECO itself.

A working definition of "resident" is borrowed from the Designated Currencies Order, GN. No.5 of 1974 which provides that a resident is "a person in the United Republic of Tanzania other than a temporary visitor."

There have been arguments from some quarters against this definition. It has been argued that the definition is outdated as it refers to foreigners who were coming into the territory when those foreigners were coming in as temporary visitors and not as expatriates, employees or businessmen as many of them do now. They call for a new definition of "residents" to be introduced in the ECO.

After thorough evaluation of the arguments for change, the commission now recommends that the present definition should be maintained but incorporated in the body of the principal legislation, the Exchange Control Ordinance, Cap. 294 For ease of reference.

- (c) Money-Changers Licences:** It has been argued that in order to ease money changing activities of the foreign tourists in the territory, there is a need for grant of "money-changers" licences liberally to hotels, shops, travel agents, tour operators, etc. In terms of Section 1(1) of the ECO the Bank of Tanzania has ample powers to deal with this problem and in practice the Bank of Tanzania does issue licences to hotels, shops, travel agents to at as money-changers to accept foreign currencies for services rendered to the tourists but with no explicit' authorisation to change foreign currency, except where change is refunded to the tourist. And within 24 hours such holders of the foreign currency are required to surrender the same to the authorised dealer, such as the National Bank of Commerce or the Bank of Tanzania.

It is recommended that the powers of the Bank of Tanzania to issue money-changer's licences under Section 1(1) of the ECO should be exercised liberally to promote money changing business.

- (d) Powers of the Bank of Tanzania to control holding of immovable properties abroad and in the territory:**
At present, the Exchange Control Ordinance or any other law do not provide for regulation to acquisition, holding and disposal of

immovable properties in Tanzania by non-resident individuals or organizations.

On the other hand there is no specific provision to the effect that all Tanzania nationals or companies, firms or other organisations registered or incorporated in Tanzania, resident or on-resident should obtain written permission of the Bank of Tanzania to acquire, hold or dispose of any immovable property outside the country.

It is recommended that it is desirable for the Bank of Tanzania to be specifically vested with powers to control holding and disposition, as the case may be, of immovable properties in the territory and outside. This may be generally effected by introducing a provision to that effect in the Land Registration Ordinance, Cap. 334.

(e) Consent Powers of Attorney-General of Zanzibar:

In terms of paragraph 5 of Part II of the 5th Schedule to Exchange Control Ordinance, no person is to be prosecuted for any offence under the Ordinance without the consent of the Director of Public Prosecutions (DPP).

It has been strongly argued that normally powers of the DPP to prosecute offences do not extend to offences committed in Zanzibar and it has been submitted that it is better for that position to be extended to offences committed under the Ordinance as well.

It is recommended that the Attorney-General of Zanzibar be given powers to give consent for prosecution of offences under the Exchange Control Ordinance Committed or whose origin is Zanzibar.

(f) Up-dating of the Exchange Control Ordinance:

Generally this Ordinance has been considered to be out-dated and requires a total over-hauling and replacement by better and simple provisions.

- (i) It is recommended that the Exchange Control Ordinance should be up-dated and simplified for the common man to understand.
- (ii) It is also recommended that the Exchange Control Ordinance be changed to take into account the currently obtained socio-economic goals.

3. THE RELATIONSHIP BETWEEN THE BANK OF TANZANIA AND THE PEOPLE'S BANK OF ZANZIBAR:

When the People's Bank of Zanzibar was formed it was formed as a private bank and it was never contemplated that one day it will be the banker for the Government of Zanzibar. The People's Bank of Zanzibar is now a fully fledged Central Bank of Zanzibar, carrying on all activities of the Central Bank save issuing of currency, a function which is still in the hands of the Bank of Tanzania. The People's Bank of Zanzibar does not have any known legal relationship with the Bank of Tanzania. The relationship which now exist is purely "accommodation of each other."

It is recommended that as the Bank of Tanzania is the sole authority responsible for foreign exchange reserves in Tanzania its relationship with the People's Bank of Bank of Zanzibar should be streamlined and backed up by law after consultations between authorities from both sides of the Union.

4. EXEMPTION OF ZANZIBAR FROM THE PROVISIONS OF EXCHANGE CONTROL ORDINANCE:

It has been argued, rather strongly that the provisions of Exchange Control Ordinance be exempted from extending to Zanzibar on grounds that:

- (a) the Zanzibar economic realities do not allow smooth operation of Exchange Control legislation,
- (b) the Zanzibar trade liberalisation practice is more advanced than that in the mainland, and,
- (c) in fact the Exchange Control legislation as it is has ceased to be applied in Zanzibar long time ago.

It is recommended that the Exchange Control Ordinance be amended to give powers to the Minister responsible for Financial affairs to waive the application of certain provisions of the Exchange Control Ordinance to any part of Tanzania.

APPENDIX "A"

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