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The Law Reformer Journal

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The Law Reform Commision of Tanzania

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Law Reformer Journal is a biannual publication of the Law Reform Commission of Tanzania (LRCT). The Journal welcomes submissions of articles, papers, essays and other forms of contributions for consideration of publication by the Editorial Board. The Editorial Board reserves the right to accept, reject, edit or shorten any article submitted for publication. All contributions, correspondence, and other communications should preferably be submitted to the LRCT at the address shown on the rear cover page. For details on calls for subscription, please see Notice of invitation at the end of the Journal.

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

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Commission Chairman's Statement

It is my pleasure to once again draw you to yet another edition of our Law Reformer Journal. This journal is published biannually. In the complex and changeable world of today, Law Reform Commission of Tanzania must constantly keep abreast topical issues that impact on the laws of Tanzania. Access to information, information communication technology, intellectual property rights are all topical issues with immense law reform implications. This journal is therefore dedicated to promoting the improvement of the law taking into account phenomenal changes taking place within and outside Tanzania.

This edition of the journal reserves some space for discussing the right to access information. Strengths and weaknesses of the laws governing access to information in Tanzania are highlighted. There is also detailed discussion on the law regulating intelligent electronic agents and challenges unleashed by such electronic agents as Automated Teller Machines (ATMs). Discussion ends with suggestions on how best electronic agents can be legally regulated. Information and Communication Technologies (ICT) law is another area of topical relevance. Critical key legal issues arising from the impact of digital media is also subject of this edition. Combating terrorism is a problem which laws and law reform must inevitably address.

This edition has devoted several pages to discuss how emergence of anti-terrorism legislation impact on privacy of individuals. With advent of dangers of terrorism, banks are increasingly compelled to disclose matters like their customers' accounts, abrogating hitherto bankers' duty of confidentiality towards its customer. Debate on the financing of political activities is on-going in Tanzania. This journal surveys how political financing or lack of such financing may be seen to undermine democracy in Tanzania. The article examines the legal framework governing raising, spending and regulation of finances of the political parties in ensuring that principles of free and fair election are not compromised. Lastly the issue of the role of the appellate court in assessing the credibility of the witness is discussed at length.

It is my hope you will all find this edition of the Journal educative, evocative and amusing at the same time.

Prof. Ibrahim H. Juma
Chairman
Law Reform Commission of Tanzania

Editorial Note

While the Law Reformer Journal is a biannual publication of the Law Reform Commission of Tanzania, the Editorial Board regrets that for logistical reasons, it has not been possible to publish the third Volume in time. The Board wishes to apologize to its esteem readers on account of this lapse.

As always, the Law Reformer Journal is grateful to its patrons, readers and contributors of articles as well as other sponsors for the ongoing encouragement, support and assistance it has thus far received. The Journal has always been overwhelmed by many thought provoking articles which it could not publish because of the limited space. The Editorial Board values efforts and enthusiasm and hopes that many more subscribers will come forward with even more interesting articles for publication in future editions of the Journal.

In keeping with its mandate of consulting widely on law reform issues, the Journal seeks to provide a forum to engage a broad section of the community in constructive, high quality debate on issues of national and international law reform. The Journal aims to highlight on shortcomings in the current laws of the country, facilitate discussion on opportunities for uniformity and reform and recognize the significant innovation in laws and legal practice. It also provides a comparative analysis of local, regional and international law reform initiatives as demonstrated in a number of articles published in this edition.

This time around, the Journal has taken up four important themes focusing on (i) enhancement of the democratic process through the right of access to information and regulation of political and election financing; (ii) adoption of appropriate legal framework for the application of information and communication technologies in two articles; (iii) whether confronting international terrorism through anti terrorism finance regulation does not undermine the integrity and confidentiality of customers' information in accounts held with banks and (iv) whether finality of trial Courts' assessment on the credibility of witnesses is not a source of injustice, given that appellate Courts are presently debarred from delving into the credibility and demeanour of witnesses while giving testimonies at trial and (v) challenges of legislative

implementation of the provisions of the Convention for recognition of the Rights of Persons with Disabilities.

The month of October this year (2010) has been characterized by numerous elections across the globe ranging from the Mid Term Elections in the USA, the run-off elections in Brazil, the Presidential election in Cote d'Ivoire and here at home, the General Election which has just been concluded. It is only fitting that, the Law Reformer Journal addresses this important subject, especially when attempts to reform the democratic process in Tanzania have just been made to regulate political and electoral financing. It remains to be seen whether the new piece of legislation has adequately addressed the problem of corruption in elections to make them more free and fair.

Also, Information and Communication Technologies (ICTs) have taken central stage in the way business, commerce, banking and investment transactions are initiated and concluded which makes it imperative that Tanzania has to seriously consider establishment of a comprehensive legal framework for the application of ICTs if it is to benefit from international trade and investment without the risk of not having an appropriate legal framework in place.

These technologies are already in use in the country and some cyber crimes have reportedly been committed, which suggests that a piece meal approach of legislating for adoption of limited aspects of the technologies such as electronic signature is not good enough. The two articles in this edition point out to a host of other problems which need to be addressed in legislating for a functioning legal framework for proper governance of the cyberspace.

The scourge of international terrorism has given rise to individual and collective efforts in fighting that scourge. One such mechanism which has been devised to facilitate the war against terror is legislating against free and inviolable flow of financial resources which could otherwise be utilized to finance terrorist activities. Regrettably this has been at a cost in that one of the core principles of protection of the privacy of customers of banks has been severely dented. This unfortunate outcome is discussed at length in the article "Anti-Terrorist's Financing: Does it Undermine Privacy of Customers of Banks.

People with disabilities continue to be marginalised worldwide. It is heartening to note that considerable efforts have been made in recent years to address their plight. Here at home, the Government has recently ratified one of the important international Conventions aimed at recognising the rights of persons with disabilities and went further in legislating for the introduction of practical measures to alleviate their plight. As it is important that the public is sensitized about developments in recognising the rights of persons with disabilities, an article on this subject has been included in this edition.

In order to blend serious reading with humour, extracts of court room humour have been compiled at the end of the Journal for enlightened reading and we hope that readers will find this edition both informative and fascinating at the same time.

William J.M. Mdundo
Chairperson
Editorial Board
Law Reformer Journal of LRCT.

The Right of Access to Information as a Human Right: Tanzanian Perspective

J. C. Jesse[1]

1.0 Introduction

This article examines the rights of the beneficiaries of the Right to Information (RTI) and particularly their right to access official information controlled or disposed of by public bodies. The RTI is part of the right to free speech and expression. The RTI is a crucial human right. A number of different terms are used to describe the same right viz., freedom of information, right to information, right to know and right of access to information.

The discussion in this article is focused in examining the extent to which the right of access to information in Tanzania is actually enjoyed and the nature of legal regime pertaining to this right. The article assesses whether the existing legal framework is adequate to support access to information. It also examines specific legal restrictions that threaten or inhibit access to official information. This analysis is inspired by the statement of the former UN Secretary General, Kofi Annan, who said:

> [A]nd of course, the information society's very life blood is freedom. It is freedom that enables citizens everywhere to benefit from knowledge, journalists to do their essential work, and citizens to hold government accountable. Without openness, without the right to seek, receive and impart information and ideas through any media and regardless of frontiers, the information revolution will stall, and the information society we hope to build will be stillborn.[2]

Before discussing the legal environment on the right of access to information in Tanzania, it is important to begin by understanding the theoretical framework within which this right is premised.

2.0 Theoretical Overview of the Right to Information

2.1 The Main Instruments

The RTI or the right to freedom of information (known as the 'right to know') including the right of access to information held by public authorities forms the basic fundamental rights in any democratic state. If people do not know what is happening in their society; if actions and decisions of government officials are made secret,

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[2] Quoted from Amnesty International, *Undermining Freedom of Expression in China; The Roles of Yahoo!, Microsoft and Google*, The Human Rights Action Centre, London, 2006.

then, people cannot meaningfully participate in the affairs of that society or make informed decisions. Freedom of information which is an important component of freedom of expression is an essential principle of democracy. The right to freedom of expression has long been regarded as "a fundamental human right and an essential foundation of a democratic society. It is a right whose existence allows other rights and democratic freedoms to be guaranteed."[3] Access to information has a wide variety of practical uses: (i) It can expose corruption, making government and the economy more efficient; (ii) It can reduce the danger of human rights violations; (iii) It can improve the quality of decision-making by government agencies in both policy and administrative matters by removing unnecessary secrecy surrounding the decision-making process; (iv) It can increase popular participation in government and development; (v) It can uncover mismanagement of food supplies and other supplies like medicines , making shortages less likely and; (vi) It can expose environmental hazards that threaten health and livelihoods, to mention just a few.

The RTI is recognized by the main international human rights instruments. Starting with the Universal Declaration of Human Rights (UDHR) of 1948, this right is recognized as an important component of the international guarantee of the freedom of expression. Article 19 thereof states that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Before UDHR was adopted, the United Nations General Assembly at its opening session in 1946 had declared that, "Freedom of information is a fundamental human right and… the touchstone of all the freedoms to which the United Nations is consecrated."[4] Furthermore, in 1966 the right to freedom of expression which includes the RTI was enshrined in a legally binding treaty, namely, the International Covenant on Civil and Political Rights[5] (ICCPR) in the terms similar to what is provided in the UDHR.[6] Similarly, the freedom of expression is also recognized in the African, European and Inter-American human rights treaties.[7]

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[3] Commonwealth Secretariat, *Freedom of Expression, Assembly and Association: Best Practice*, Marlborough House, Paul Mall, London, 2002 p. 15.

[4] The Declaration was made on 14 December 1946.

[5] United Nations General Assembly resolution 2200A (XXI), UN Doc. A/6316 of 1966 entered into force on 23 March 1976.

[6] *See* Article 19 of the ICCPR.

[7] Article 9 of the *African Charter on Human and Peoples' Rights*,1981; Article 13 of the *American Convention on Human Rights*,1969 and Article 10 of the *European Convention on Human Rights*, 1950.

Freedom of expression to which the right of access to information is a component includes, inter alia, the right to seek, to receive as well as the right to impart information and ideas of all kinds, regardless of frontiers. In order to enjoy the right to freedom of expression, a right holder is entitled to be guaranteed not only the freedom of speech which is the right of being able to speak freely but also the right to seek, receive and impart information and ideas. The rationale here is that, the right to communicate depends on a free flow of information, both to and from the communicant. The exercise of democratic rights requires that everyone should have access, subject only to narrowly defined exceptions, to information held by public bodies.[8] As noted, freedom of information enhances the accountability of government, improves decision-making, provides better information to elected representatives and to their constituencies, enhances government credibility with its citizens and provides powerful aid in the fight against corruption. It is also a key livelihood and development issue especially in situations of poverty and powerlessness.[9]

2.2 Principles Governing the Right of Access to Information

The right of access to information in general and particularly the right of access to information held by public authorities has recently attracted global attention. For example, The Declaration of Principles on Freedom of Expression in Africa of 2002 states *inter alia* that, "Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law."[10] Many countries all over the world have either local pieces of legislation which provide for and guarantee the right to information or are working towards introducing such laws. Over 85 countries around the world have already implemented some forms of such legislation.[11] The Government of Tanzania tried it but failed to reach into agreement about its contents with the media stakeholders as it is discussed later in this article.

In order to have common or universal understanding on what the right of access to information entails, it is important to have some basic principles which guide the states. In June 1999 ARTICLE 19, an independent Freedom of Expression advocacy organization based in the United Kingdom (UK), attempted to put flesh on the bones of this right by publishing nine important principles on freedom of information

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[8] *See* World Summit on the Information Society, *Statement on the Right to Communicate* by ARTICLE 19 Global Campaign for Free Expression, London February 2003, p. 9.

[9] The benefit of the freedom of information as stated by the Commonwealth Expert Group meeting on "Right to Know and Promotion of Democracy and Development", Marlborough House, London on 1st March 1999.

[10] *Declaration of Principles on Freedom of Expression in Africa*, made by the African Commission on Human and Peoples' Rights, at its 32nd Session, 17-23 October 2002 : Banjul, The Gambia.

[11] Visit http://en.wikipedia.org/wiki/Freedom_of_information_legislation.

legislation.[12] According to this organization, these principles have been endorsed by the United Nations Special Rapporteur on Freedom of Opinion and Expression, Mr. Abid Hussain, in his report to the 2000 session of the United Nations Commission on Human Rights, and referred to by the Commission in its 2000 resolution on freedom of expression.[13] Indeed, these principles have received wide and perhaps universal recognition.

1.1.1 Maximum Disclosure

States should understand that, access to information is a right of everyone and all information held by their governments is in principle public, and may only be withheld if there are legitimate reasons for not disclosing it. The information to which this principle refers includes that generated by public authorities and/or received by them, without being limited to the administrative decisions. The principle of maximum disclosure or openness establishes a presumption that, all information held by public bodies should be subject to disclosure except only in very limited and genuine circumstances usually set forth in international law and codified in the national law. Thus, the overriding goal of a national legislation which spells this right should be to implement maximum disclosure in practice.[14]

Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive it. The right to information of a citizen is not a privilege. It has democratic, logical and constitutional basis. In Tanzania, the Constitution declares that, "sovereignty resides in the people and it is from the people that the Government through this Constitution shall derive all its power and authority.[15]" If the government's power and authority flows from the people and all public servants exercise power only on behalf of the people, it would be an anathema if the same people are hidden information held by the public bodies. Public bodies should broadly be defined to include institutions funded by the government and private bodies performing public functions such as water and electricity providers.[16]

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[12] ARTICLE 19, *The Public's Right to Know: Principles on Freedom of Information Legislation*, International Standards Series, June 1999.

[13] Similarly, they were endorsed by Mr. Santiago Canton, the Special Rapporteur on Freedom of Expression for the Organization of American States (OAS), in his 1999 Report, Volume II of the Report of the Inter-American Commission on Human Rights to the OAS.

[14] ARTICLE 19 op cit.

[15] Article 8(1)(a) of the *Constitution of the United Republic of Tanzania of 1977*.

[16] *See* the broad interpretation of 'public bodies' at ARTICLE 19 *op cit*. Examples include any body which is established by or under the Constitution, statute, or which forms part of any level or branch of government, a body which is owned, controlled or significantly financed by public funds; or carries out statutory or public functions.

1.1.2 Obligation to Publish

Public bodies should proactively publish core information and make them available to the public. It is not only enough for public bodies to accede to requests for information but also they should take proactive role to publish them and disseminate widely documents of significant public interest even in the absence of a request. What can amount to core or significant information will depend on the public body concerned. But essentially, every public body should make readily available information about its structure, functions, powers and responsibilities, finances, services, rules and regulations, decisions and policies, as well as a guide to the information it holds and mechanisms for public participation.[17] This information should always be current, clear and in plain language to be easily understood by an average person. In Tanzania, the information should preferably be both in Kiswahili and English languages. It is quite unrealistic, for example, to say that 'ignorance of law is no defence' while almost all laws in the country are written in English. It is high time that Parliament and other law making bodies should enact laws written in English and Kiswahili languages. It is commonly acknowledged that 'information is power.' Information is the lifeblood of democracy. The practice of withholding information by many government authorities weakens the position of public, whereas disclosure empowers them.[18]

1.1.3 Promotion of Open Government

No government can assert to be democratic without accountability and transparency. A basic postulate for accountability and transparency is information flow. People should have information about the functioning of public bodies. Informing the public of what is happening and what their rights are, promotes a culture of openness within the government. Government information must therefore, be available to serve as a useful resource that contributes to an open and participatory democracy which in turn improves government performance. Public bodies should be encouraged to adopt internal codes on access, openness and public promotion of information within their preserve. Promotional activities, through public education are therefore, an essential component of a freedom of information regime.[19]

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[17] World Bank PREM Notes No. 93 for Public Sector, *Legislation on Freedom of Information: Trends and Standards,* October 2004.

[18] *See* generally Jesse, J.E.C, *Freedom of Speech for Members of Parliament in Tanzania: An Appraisal of Law and Practice in the Light of International Human Rights Law and Best Practices*, Law Africa Publishing (K) Ltd, Nairobi, 2009 p. 89.

[19] ARTICLE 19 Organization argues that, "[A]s minimum, the law should make provision for public education and the dissemination of information regarding the rights to access information, the scope of information which is available and the manner in which such rights may be exercised. In countries where newspaper distribution or literacy levels are low, the broadcast media are a particularly important vehicle for such dissemination and education. *See* ARTICLE 19-London, *op cit*.

2.2.2 Limited Scope of Exceptions

Arguably, the guiding rule in the right to information can be found in Principle 13 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information of 1955.[20] This principle provides that, "[I]n all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration." This translates to a principle that, access to information should be the rule and refusal the exception. In this regard, all individual requests for information from public bodies should be met unless the public body can show that the information falls within the scope of the limited regime of exceptions. This also means that public bodies are duty bound to provide correct information to the public as a norm and refuse information only in defined, narrow and exceptional circumstances.

Under international human rights standards, a refusal to provide information to the requester or the public in general, is not justified unless such refusal complies with the principles of legality and proportionality. These principles can be met only if the public authority can show that the information meets a strict three-part test: First, that the information must relate to a legitimate aim listed in the law; secondly, that disclosure must threaten to cause substantial harm to that aim and; thirdly, that the harm to the aim must be greater than the public interest in having the information.[21]

1.1.1.1 Legitimate Aim

All legitimate aims for refusing to disclose information should be enumerated, defined clearly and narrowly in the law on access to information. However, the list of legitimate aims should be consistent with those outlined in international law and no other grounds should be permitted.

1.1.1.2 The Harm Test

It is not sufficient that information requested for disclosure simply falls within the scope of legitimate aim listed in the law. If the information is requested and refused, the public body must also show that the disclosure of information would cause substantial harm to that legitimate aim listed in the law. In some cases, disclosure may benefit as well as harm the aim. For example, the exposure of corruption in the military may at first sight appear to weaken national defence but actually, over time, help to eliminate the corruption and strengthen the armed forces. In this scenario the third test is invoked.

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[20] Principles adopted on 1st October 1995 by a group of experts in International Law, National Security, and Human Rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, Johannesburg.

[21] ARTICLE 19, *supra* note 11 p. 5.

1.1.1.3 Overriding Public Interest

It has been shown above that for non disclosure to be legitimate the net effect of disclosure must be to cause substantial harm to the aim. Even if it can be shown that disclosure of the information would cause substantial harm to the legitimate aim, the information should still be disclosed if the public interest benefits of disclosure outweigh the harm. In such cases, the harm of the legitimate aim must be weighed against the public interest in having the information made public.[22] There is a strong presumption that information about threats to the environment, health, or human rights, and information revealing corruption, should be released, given the high public interest in knowing such information.

1.1.3 Measures to Facilitate Access to Information

Availability of measures to facilitate access to information is another principle. The law should impose an obligation on public authorities to facilitate access to information, for example, by ensuring that it is available in published form, or through the internet, or when requested. On ways to facilitate access to information to a requester the World Bank is of the view that, a freedom of information law should meet several international standards, including the following guarantees: Firstly, the right to make a request either orally or in writing; secondly, there is an information officer(s) to assist requesters; thirdly, there is an obligation to provide information as soon as possible within a strict time limit; fourthly, there should be a right to specify the form of access preferred, such as inspection of document requested, an electronic copy, or a photocopy and, fifthly, there should be the right to written notice, with reasons, for any refusal of access.[23]

Public bodies should also be required to assist applicants whose requests are unclear, excessively broad or otherwise in need of reformulation. Requests which are unclear or excessively broad should be returned to the applicant with an explanation and, where appropriate, with instructions as to how to re-draft the request so as to ensure proper processing. For information which is already published, requests may be denied but in such cases applicants should be informed about how to obtain the publication.

A process of deciding upon requests for information should be specified at three different levels, namely, within the requested public body; appeals to an independent administrative body and; appeals to the court.[24] Thus, the law should establish an appellate mechanism in order that the right to information is guaranteed by an independent body. There should be free and independent administrative body, such as an Information Commissioner, with the power to deal with complaints about refusals

[22] *See* ARTICLE 19, *Memorandum on the Draft of the Law on Access to Information of Public Interest in the Republic of Romania*, August 2000.

[23] World Bank PREM Notes *op cit*.

[24] ARTICLE 19 *op cit*.

of requests for information or about a failure to publish material by public bodies; this body should review original decision of the public body and decide on such complaints quickly and at little or no cost to the complainant; this body should have the power to order disclosure of any document, to access any records held by public authorities, to review and adjust charges, to order public authorities to publish certain categories of information and to fine public authorities for wilfully failing to comply with the law. The director or senior manager of this body should be appointed in a fashion which ensures independence, community trust and competence.[25]

2.2.4 Costs for Accessing Information

The cost of gaining access to information held by public bodies should not be so high as to dissuade potential applicants. Generally, the cost should not be greater than the reproduction of documents. Experience in some countries suggests that it can be legitimate to charge more for commercial requests, but public authorities should be under an obligation to waive all charges where this would be in the public interest; a public interest in disclosure should be presumed where the information is sought by the media for reasons of publication.[26]

2.2.5 Open Meetings

The law should provide for promoting a culture of openness within meetings of public bodies. Freedom of information includes the public's right to know what the government is doing on its behalf and to participate in the decision making processes. As such, the law should establish a presumption that all meetings of "governing bodies" are open to the public.[27] Open meetings are usually required to be meetings whose decisions affect the public.

1.1.6 Primacy of Freedom of Information Legislation in which Disclosure Takes Precedence

In many countries, if not all, there are state-secrets laws which create a broad authority to the public bodies to withhold information that are classified as sensitive. While the legitimacy of secrecy law is acknowledged, an 'overly broad' restriction in the law that could 'substantially undermine' the right to information should not be accepted. Unnecessary secrecy in government leads to arrogance in governance and sometimes results in defective decision-making. To have justification under the eyes of the right

[25] *See* Mendel, Toby; *Freedom of Information: Guiding Principles for Access to Information Law,* Available athttp://www.fxi.org.za/pages/Publications/Medialaw/freedom.htm,retrieved on August 25, 2009).

[26] *Ibid.*

[27] "Governing bodies" refers to bodies which exercise decision-making powers, such as local government committees, education authorities, and elected bodies performing public services. Bodies which only have advisory powers and political committees, including meetings of members of the same political party are not governing bodies.

to know legislation, a secrecy law should maintain an appropriate balance between legitimate secrecy interests and the right to information. Thus, another principle of the right to know is that disclosure should take precedence. The freedom of information law should clearly state that, in matters relating to disclosure of information, it takes precedence over all other legislation, and other legislation must be interpreted, as far as possible, in a manner consistent with its provisions.[28]

Some countries, especially those that had been under colonial domination, not only continued with the colonial laws that controlled the flow of information, but also have enacted other laws aimed at achieving the same end. A common practice learnt through colonial legacy is shrouded by a culture of secrecy. These countries have not succeeded to replace 'the ruler and the ruled' relationship between an official and the common man with the relationship based on 'the public servant and the citizen.' The African Commission on Human and People's Rights urges African states to amend their laws to bring them into line with the principles underpinning the freedom of information,[29] where the scales should be weighted decisively in favour of openness than confidentiality.

1.1.7 Protection for Whistleblowers

The RTI law should contain protection for individuals who release information on wrongdoing (whistleblowers), even if the information is exempted, where it is necessary to do so in overwhelming public interest. Such disclosure may include information for the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or any other serious maladministration regarding a public body. Whistleblowers, who usually are civil servants and other individuals, sometimes have access to information which may expose wrongdoing, but they are afraid to release it for fear of retaliation or legal sanctions. They should therefore benefit from protection as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed wrongdoing. This gives honest and alert officers to safety and assurance from fear of reprisal to come out with information which discloses wrongdoing. "Such protection should apply even where disclosure would otherwise be in breach of a legal or employment obligation."[30]

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[28] ARTICLE 19, The Public's Right to Know *supra* note 11 p. 10.

[29] *See* Principle IV (2) of the *Declaration of Principles on Freedom of Expression in Africa*, made by the African Commission on Human and Peoples' Rights, at its 32nd Session, 17-23 October 2002 : Banjul, The Gambia.

[30] ARTICLE 19, Memorandum *op cit*.

3.0 Access to Public Information in Tanzania

3.1 The Constitutional Regime

There are mainly two constitutional approaches with regard to the RTI. Some states recognize explicitly in their constitutions the right of access to information as one of the fundamental human rights separately from freedom of expression,[31] while others follow international jurisprudence of interpreting judicially the right to freedom of speech and expression to include the RTI. The Constitution of the United Republic of Tanzania of 1977 while seems to contain a provision on the right to be informed, arguably follows the latter approach. Article 18 reads as follows:

> Every person:
>
> (a) has the right to freedom of opinion and expression;
> (b) has the right to seek, receive and impart information regardless of national frontiers;
> (c) has the right to freedom of communication without interference;
> (d) has the right to be informed at all times of various events in the country and in the world at large which are of importance to the lives and activities of the people and also of issues of importance to society.

It can be argued that paragraph (d) guarantees the right to information in Tanzania since the language used seems to be favorable to this right. However, this clause does not explicitly state that individuals have the right of access to information held by the government or other public bodies. What it says is that there is a right to be informed. It needs judicial interpretation to make it clear that individuals have right of access to information held by public bodies in Tanzania. This is different from South African and Ugandan constitutions for instance.

By contrast, the Constitution of South Africa of 1996 contains a specific Article dealing with freedom of expression generally,[32] and another Article for the right of access to information.[33] Article 16(1) provides for freedom of expression generally. It states, "Everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research." The same Article under sub-article (2) contains the following limitations to freedom of expression, "[T]he right in sub-article (1) does not extend to propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm." On the other hand, Article 32 states that, "Everyone has the right of access to any

[31] Classic examples are South Africa, Ghana and Nepal.

[32] Article 16 of the South African Constitution.

[33] *Ibid, Article* 32.

information held by the state; and any information that is held by another person and that is required for the exercise or protection of any rights."

As it can be noted, Article 32 not only provides for access to information held by the state, but also from a third party if it is required to exercise or protect any right. This makes this provision unique, even among freedom of information legislation, which commonly only applies to public bodies. Article 32 applies to public bodies, as well as private bodies, including companies.[34]

In spite of these observations, one can still argue that, the Constitution of the United Republic of Tanzania of 1977 guarantees all related rights traditionally found under the freedom of opinion and expression subject to the limitations stipulated under Article 30, which arguably are overly broad.[35] These rights include unfettered rights to hold opinions, a right to express and disseminate information or ideas, a right to seek and receive or have access to information, and the right to freedom of the press.

As it is usually the case in many jurisdictions, the Constitutional provisions themselves may not fully act as an assurance to the citizens of their basic rights if the same rights are not translated into legislation. In addition to recognizing that certain rights are fundamental guarantee, it is necessary to enact some enabling laws which will put a mechanism to operationalize those rights. Tanzania does not have a legislation to operationalize the right of access to information, although there has been growing demand for a law. In 2007 the government published an umbrella Draft Bill, the Freedom of Information Bill, 2006 which sought to enforce the RTI and which proposes to regulate media standards and licensing of media institutions; by setting up a registration mechanism for both individual journalists and print media outlets and; establishing a Media Standards Board responsible for regulating the print media among other things.

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[34] Please visit http://www.freedominfo.org/features/20020717.htm/

[35] Although limitations on freedom of expression or some other rights are allowed under international law, they are simply exceptions. The limitations set out under Article 30 of Constitution of the United Republic of Tanzania are couched in vague, elastic and very broad thus creating an opportunity for abuse. Most democracies recognize that in order for any limitation of freedom of speech and expression to be accepted as legitimate it must be clearly defined, narrow, and with clear and legitimate purpose or objectives. *See,* for example, elaborate discussion in Jesse, J.E.C, *Freedom of Speech for Members of Parliament in Tanzania: An Appraisal of Law and Practice in Light of International Human Rights Law and Best Practices*, Law Africa Publishing (K) Ltd, Nairobi, 2009 pp. 5-18.

The Media stakeholders[36] conducted a review session called "one day encounter," at the Sea Cliff Hotel in Dar es Salaam on 13th December 2006 to discuss the proposed Bill. Finally, they rejected the Draft Bill on the grounds that the Bill would have the adverse consequences on the freedoms of expression, information, the press as well as the operation of reporters and editors. For example, they argued that, the proposed statutorily established Media Standard Board would take over from the hitherto non-statutory Media Council of Tanzania (MCT)[37] and seriously undermine the freedom of the media which is contrary to the well established principle that "effective self -regulation is the best system for promoting high standards in the media."[38] The government withdrew the Draft Bill and subsequently published two separate Bills one on Freedom of Information and another one for Media Services which, however, were also rejected.

In response to the government proposed Bills, the media stakeholders resolved to form the Freedom of Information Campaign Coalition in Tanzania to push for a democratic media law.[39] The coalition was formed by three media organizations namely, MISA- TAN, MCT and TAMWA although nine other organizations joined it. Consequently, two stakeholders proposed Bills were developed as alternative to the government Bills bearing the names of the 'Right to Information Bill, 2007' submitted to the Government in August 2007 and the 'Media Service Bill, 2008'submitted later for consideration in the redrafting of the two Bills.[40] To date no new Bill has been published. The Minister for Information, Culture and Sports, informed the National Assembly on July 15, 2009 when he was tabling his Ministry's annual budget that the Government will soon present a Cabinet paper on a proposed Bill for supervision of media organizations (i.e. Media Service Bill) but no mention was made for the Right to Information Bill.

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[36] The stakeholders included the Media Council of Tanzania (MCT), Tanzania Chapter of the Media Institute of Southern Africa (MISA-TAN), Tanzania Media Women Association (TAMWA) and Tanganyika Law Society (TLS). Others were Tanzania Gender Networking Programme (TGNP), Media Owners Association of Tanzania (MOAT), Tanzania Legal Education Trust (TANLET) Legal and Human Rights Center (LHRC) and the National Organization for Legal Assistance (NOLA).

[37] The Daily News of 14/12/2006 quoted Dr. Sengondo Mvungi, a Legal and Constitutional expert as saying so.

[38] *See* Principle IX of the *Declaration of Principles on Freedom of Expression in Africa*, made by the African Commission on Human and Peoples' Rights, at its 32nd Session, 17-23 October 2002.

[39] *See* Tibanyendera, M., *The Legal Framework and Limitations of Freedom of Expression in Tanzania*, A paper presented to the Council for Legal Education (CLE) Conference of the TLS on the Freedom of Information held at Blue Pearl Hotel, Ubungo Plaza, Dar es Salaam on 29th May 2009 p. 18.

[40] *Ibid.*

3.2 Practical Assessment of Access to Information in Tanzania

On the positive side, while Tanzania does not have legislation for right to information, the public has and enjoy to a large extent freedom of expression and the freedom of information from the print and electronic media. Since the advent of multi-party era in 1992 the country has experienced an unprecedented proliferation of media houses. There are dozens of private FM radio stations, television stations, and daily and weekly newspapers.[41] The country was ranked as number seven among the Africa's ten most press friendly countries in 2007 and number fifty five globally.[42] Obviously, access to information in Tanzania is largely provided by mass media. On its part, the Government has undertaken Public Service Reform Program which is a part of the broader process of public sector reforms that the Government of Tanzania launched since the year 2000[43]. Within this framework a number of legal and institutional reforms have been undertaken aiming at improving government performance and service delivery, strengthening linkages between government and citizens, public participation and government accountability. Client service charters have been developed by government ministries and agencies aimed at promoting principles of democracy, transparency and accountability.[44]

There has been government initiative to ensure that information from the public bodies is communicated to the public. For instance between 2000 and 2005 the Government website was created to offer information to the public. A Directorate of Communication has been established in the President's Office and every ministry is required to have communication unit staffed by at least two professionals including an information officer. However, the biggest challenge to date is to convince ministries and government departments about the importance of communication and ensure people have access to information.

Thus, although there are improvements, quite often Tanzanians have had difficulty in finding timely information not only from government bodies but also from other institutions. A study conducted in 2005 noted that access to information in Tanzania is still a challenge.[45]In spite of various government reforms in public sectors the right of access to information is still poor.[46] The findings revealed that a culture of secrecy among public institutions has continued to govern their behavior in information

[41] The Media sustainability index 2006-2007 shows that up to that time there were 38 radio stations, eight television stations, 13 cable television providers, 18 daily newspapers, and 53 weekly papers.

[42] *See* the *Magazine* at http://www.clickafrique.com/Magazine/ST014/CP0000002795.aspx

[43] *See* the United Republic of Tanzania, President's Office, and Public Service Management: *Public Service Reform Programme*, A report of 27th June 2008.

[44] Visit the following website http://www.utumishi.go.tz/index.php?option=com.

[45] HakiElimu, LHRC, REPOA. *Access to Information in Tanzania: Still a Challenge*, a Research Report August 2005.

[46] *Ibid* p. 9.

delivery. The study unfolds how poorly various public and private organizations in Tanzania responded to requests submitted to them seeking for information. In general, the overall rates of responsiveness were very low. It is shocking to note that, local government and central government were among the least responsive with 15% and 28% respectively. At least donors (56%) and private business (50%) were more willing to respond to request for information much higher than other organizations. It is also regrettable to notice that, NGOs which are expected to be more open and responsive to people's requests for information responded to only one request among eight submitted to them. Similarly like public utility companies which are also expected to be more customers responsive, responded to only one request among the seven requests submitted to them. It is noted, therefore, that access to information is a national challenge not only to government institutions but also to other non-government public organizations.[47] An ordinary citizen, requesting information from the government ministry was quoted narrating the following experience:

> Here they asked me a lot of questions before they allowed me to get in. I was asked these questions by a certain man but I didn't know who he was but appears that he was a worker there at the Ministry. After answering these questions at the gate I was directed to a certain lady by the name of Winfrida. She asked me a lot of questions and I could sense that they were somehow worried because of the kind of question I was asking. They angrily asked me these kinds of questions: "Who are you?"; "Where are you coming from"; "What do you want?" "Why are you asking those kinds of questions?"; "What do you want to use them for?"[48]

These are typical questions which an ordinary citizen is likely to face when visiting a public body for information.

3.3 A Critique of Legislative Regime

Like many other human rights, freedom of expression and its attendant right, the right of access to information, are not absolute. All the major legal systems of the world recognize the importance of other public values. The International Covenant on Civil and Political Rights, 1966, for instance, allows the exercise of this right to be subject to certain legitimate restrictions or exceptions which should be provided by law and which are necessary for the protection of other public values like: (i) reputation of other people; (ii) national security; (iii) public order; and (iv) public health or morals. Nevertheless, it is not just enough for the state to pass the law that curtails these rights on the banner of national security, public order and so forth. Any refusal for information should relate to: legitimate aims listed in the law; disclosure

[47] *Ibid*. p. 4.

[48] *Ibid.* Quoted from pp. 5-6.

must threaten to cause substantial harm to that aim; and the harm to the aim must be greater than the public interest in having the information.

Although Tanzania is a party to the International Covenant on Civil and Political Rights as well as the African Charter on Human and People's Rights; and having a provision of Bill of Human Rights in its Constitution which guarantee, among other rights, the freedom of expression, there are laws in place which are used by government authorities to inhibit this right to flourish. Some criticisms on the various laws which overly restrict the freedom of expression and access to information in particular have been documented.[49] These laws are such as the Newspapers Act[50], the National Security Act,[51] the Broadcasting Services Act,[52] the Public Service Act,[53]the Public Leadership Code of Ethics Act[54], and the Films and Stage Plays Act.[55] We shall attempt to examine a few of them which have a significant impact to the right of access to information.

3.3.1 The National Security Act, 1970.

The National Security Act is one of the forty draconian pieces of legislation singled out by the Presidential Commission on Single Party or Multi Party Systems in Tanzania (known as "Nyalali Commission)"[56] which should be completely repealed and replaced by a legislation which is in conformity with international human rights standards. It is a legislation which gives the government absolute power to determine what should be disclosed to or withheld from the public (classified matter or information). It makes it a punishable offence to investigate, obtain, possess,

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[49] *See*, for instance, Mbunda, L.X., 'Taking Stock of Media Laws in Tanzania: Do They Promote Media Freedom or are They Repressive?' in *Eastern Africa Law Review*, Vol. 31-34, 2004: 174-194; Legal and Human Rights Centre (LHRC)., *Freedom of Expression, Human Rights Repression* Report No. 6 2001; Mwakyembe, H.G., 'Media Boom, Freedom and the Legal Environment in Mainland Tanzania' in *Eastern Africa Law Review*, Vol. 20-27, 2000: 32-48; Legal and Human Rights Centre (LHRC)., *Tanzania Human Rights Report 2007: Incorporating Specific Part on Zanzibar*, LHRC 2008. Tibanyendera, M., *The Legal Framework and Limitations of Freedom of Expression in Tanzania*, A paper presented to the Council for Legal Education (CLE) Conference of the TLS on the Freedom of Information held at Blue Pearl Hotel, Ubungo Plaza, Dar es Salaam on 29th May 2009 p. 18.

[50] Cap. 229, [R.E 2002].

[51] Cap 47, [R.E 2002].

[52] Cap. 306, [R.E. 2002].

[53] Cap. 298, [R.E. 2002].

[54] Cap 398, [R.E. 2002].

[55] Cap 230, [R.E. 2002].

[56] The Nyalali Commission of February 1991 was a Presidential Commission set up under the leadership of the then-Chief Justice Francis Nyalali ofTanzania to collect the views of citizensand make appropriate recommendations on whether the country should adopt a multiparty or single party system. It sat during the term of PresidentAli Hasan Mwinyi.

comment on, pass on, or publish any document or information which the government considers classified. This includes documents or information relating to any local authority, parastatal organization, company, or body corporate connected with the government in any way, including the ruling party.

The definition of what are classified matters is given under the National Security (Classified Matters) Notice, Government Notice Number 133 of 1970 (G.N No. 133/1970. In fact, the definition given is too broad. Classified matters include all documents and letters prepared or addressed by or to or on behalf of the Government of the United Republic of Tanzania or any specified authority and which are marked or stamped "confidential" or "secret" or "top secret." This discretion given to government authorities can be abused and in fact has been abused to make almost every information to be sensitive information hence classified matter. There are no criteria to determine which document should be stamped and which should not.

As a general human right standard, information may be classified if its disclosure is reasonably likely to cause damage to the national security.[57] In practice, large quantities of information requested by citizens that should not be classified are classified on the pretext of guarding national security in Tanzania.[58]Arguably, the provisions of the National Security Act and its regulation violate the basic principles of the right to information such as maximum disclosure, open government, limited scope of exceptions, and the principle that disclosure should take precedence over secrecy.

3.3.2 The Public Service Act, 2002.

The Public Service Act is another barrier to information disclosure by public servants. The Act prohibits any member or officer of the Public Service Commission or any 'other person' (this can be interpreted to mean any public servant) from publishing or disclosing to any "unauthorized person" without the written permission of the President, the contents of any document, communication or information of any kind which has come to his knowledge in the course of the performance of his duties.[59] Similarly, any person who knows that any information has been disclosed

[57] *See* The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Nov. 1996. These principles were adopted on 1st October 1995 by a group of experts in International law, National Security, and Human Rights convened by ARTICLE 19. The principles were endorsed by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and recognized by the UN Commission on Human Rights.

[58] *See,* for example, observation by LEAT., *Legal Barriers to Access*, available at, http://www.leat.or.tz/publications/access.to.information/legal.barriers.php.

[59] Section 18(1) of the *Public Service Act*, Cap 298.

in contravention of this Act and publishes or communicates it to any other person, is guilty of an offence. So, both the giver and receiver of information commit an offence under the Act and consequently section 18(3) thereof provides that the provisions of the National Security Act shall apply in relation to the offence committed. Public servants are also prohibited under the Code of Ethics and Conduct for the Public Service in Tanzania to communicate or disclose information obtained in the course of employment without permission.[60] This prohibition is also pronounced loudly in some regulations governing local government officials. For example, the Local Government Service (Staff Code of Conduct) Regulations (G.N No. 279 of 2000) and the Local Government District Authorities (Councilors Code of Conduct) Regulations (G.N No. 280 of 2000) contain identical provisions which prevent in a broad manner disclosure of information.[61]

The net effect of these kinds of prohibition is to make civil and local government officials timid of disclosing any kind of information to the public even where the disclosure is made in good faith. Similarly, under this circumstance whistle blowers are not protected either. Arguably, the practice in Tanzania seems to be 'secrecy and disclosure of information an exception'. The colonial culture of secrecy continues to be the ethos of the Tanzania administration. This goes contrary to one of the principles of the right to know that no person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweigh the harm from disclosure.[62]

3.3.3 The Public Leadership Code of Ethics Act, 1995.

Citizens do expect public leaders to serve the public interest with impartiality, legality, integrity and transparency on a daily basis. To foster these values and essentially to curb corruption among public leaders, Tanzania enacted in 1995 the Public Leadership Code of Ethics Act, 1995 which establish a code of ethics and the Ethics Secretariat. According to the code of ethics, every public leader is required to submit to the Ethics Commissioner a written declaration of all his or her property or assets owned or liabilities owed and those of his or her spouse and unmarried minor children. Such declaration must be submitted within thirty days after taking office,

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[60] Regulation 4 on "Discipline and Diligence" it states that "A public servant shall not disclose secrecy and confidential or official information which has confidentially been communicated to or has been availed while discharging official duties without due permission. An employee shall continue to maintain secrecy or confidentiality of official information even after one has left the Public service."

[61] *See* Regulations 17 and 29 of the G.N Nos. 279 and 280 of 2000.

[62] *See* principle 16 of the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information,* Nov. 1996.

at the end of each year, and at the end of his/her term of office.[63] This means that subsequent declarations should disclose any increase or decrease of assets.

It is the responsibility of the Ethics Secretariat to maintain a register in which particulars of declarations made by public leaders shall be recorded. The Minister responsible has been mandated to make regulations prescribing the manner in which members of the public may inspect the register.[64] The conditions attached before one gets access to the register are quite novel and thus violative of the right of access to information. According to the Public Leadership Code of Ethics (Declaration of Interests, Assets and Liabilities) Regulations (G.N Nos. 108 of 1996 and 261 of 2001), any member of the public may inspect the Register upon complying with three conditions. First, he must have lodged a complaint with the Secretariat Commissioner against the public leader. Secondly, after his assessment, the Commissioner must be satisfied that the complaint is genuine, relevant and was made in good faith. Thirdly, pay an inspection fee of one thousand shillings. One commentator asked the following question, "how can one institute a case against [a public] leader and allege corruption or any other issue relating to properties or assets while that person is restricted to know the leader's properties at first instance"?[65] To add a further question, how many of our people would be able to lodge such complaints?

To create further restriction, even if the applicant would be successful to get permission to inspect the Register after meeting the perusal conditions, regulation 7 prohibits any disclosure of information obtained from the register to another person. Any person who after perusing the Register, publishes or broadcasts or communicates the information obtained to the public, commits an offence. As correctly argued by Mbunda, this law makes it completely impossible for details of assets of public leaders to be made available to the general public through the media because it amounts to criminal offence.[66]

This kind of immunization of leaders from public disclosure of their assets which constitutes an indirect method or means of restricting information useful to the public to make an informed decision over their leaders violates the fundamental right to know. An argument that, making public leaders' assets open to the public will interfere with their right of individual privacy is wrong. Although issues of privacy and public interest, there is often no clear-cut distinction between right and wrong and hence decision has to be made on case-by-case basis, taking into account that the public and the media are entitled to constantly examine the lives of public figures with responsibility for public funds and other assets. Politicians who have the power to

[63] Section 8 of the *Public Leadership Code of Ethics Act*, Cap. 398.
[64] *Ibid.* section 20.
[65] Tibanyendera, M., *op cit*.
[66] Mbunda, L.X*, op cit,* p. 193.

influence the awarding of contracts should accept that their individual property both movable and immovable should be open to public view. After all, it is the taxpayers' money they could be giving away illegally.

Declaration of personal assets is a bid to hold leaders accountable and a way of monitoring corruption and achieving "highest possible ethical standards so that public confidence and trust in the integrity, objectivity and impartiality of Government are conserved and enhanced."[67] If this is one of the core principles of the Code of Ethics for public leaders in Tanzania, then why the public is restricted to exercise their right to know any facts which reveal ethical behaviour of public leaders? In a decision of the Inter- American Court of Human Rights in Herrera-Ulloa v. Costa Rica[68]it was held that:

> The state must refrain from censoring news of public interest that concerns the conduct of public officials or private citizens voluntarily engaged in public affairs, and must provide that information to its citizens; because of the nature of their functions, public officials are subject to public scrutiny and must be more tolerant of criticism which means that the degree of protection of privacy and reputation that they enjoy is different from that enjoyed by private citizens.[69]

4. Concluding Remarks

The above discussion concludes that, access to information in Tanzania is still a challenge. To the extent that Tanzania has the Constitution which provides for the Bill of Rights and more importantly the protection of fundamental rights to freedom of expression which exist even in other democratic systems, it may be claimed that, the country embraces human rights. But as noted, it is not sufficient that the Constitution provides for these rights if the same are not translated into legislation. Lack of specific legislation on the RTI, existence in the statute books of pieces of legislation which drastically erodes the freedom of information and; the continuing culture of secrecy among public bodies whittles down any efforts to make freedom of expression and information a reality in Tanzania and this breeds arrogance, corruption and maladministration.

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67 *See*, the principles to be invoked in the Codes of Ethics for Public Leaders, section 6 of Cap. 398.

68 Inter- American Court of Human Rights, Judgment of July 2004.

69 *Ibid*. paragraph 102(2).

Regulating "Intelligent" Electronic Agents: A Challenge to Lawyers and Legislators

By Ntemi Nimilwa Kilekamajenga[70]

1. Introduction

The challenges of the cyberspace are numerous and it is hard to harmonize them into a single law. One of the challenges brought about by the use of internet in e-commerce is the application of electronic agents. Obviously, ordinary laws face a big challenge. This paper discusses the concept of automated message system (electronic agents).[71] The author argues that, electronic agents have advanced into "intelligent agents." He argues further that, neither Law of Agency nor legal personality is appropriate in governing such agents. Instead, the law should incorporate special provisions to recognise, and treat them as "autonomous communication tools." However, further research is required on this area of law. The discussion of this paper is centred on the United Nations Convention on the Use of Electronic Communications in International Contracts (CUECIC),[72] and limited to business contracts; since the Convention neither covers domestic contracts nor contracts for personal, family or household purposes.[73] The recurring question is how best can electronic agents be legally regulated?

2. The Concept of Automated Message System of Electronic Agents

Automated message system is not new in international legislation. The UNCITRAL Model Law on E-commerce throws light on it by providing for attribution principle.[74] Under attribution theory, the message belongs to the originator if it is automatically sent by an information system programmed by or on behalf of him.[75] The word

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[70] LL.B (Hons) UDSM; LL.M in Law and IT, Stockholm University; LL.M in International Economic and Business Law, Kyushu University- Japan; Lecturer, Institute of Judicial Administration – Lushoto.

[71] Automated message system or sometimes referred as Electronic agent, intelligent agent or intelligent electronic agent is a programmed computer which performs functions automatically and can negotiate contract without human interventions or it can be software uploaded over the internet to search for customers and report back to the user. The main characteristic of electronic agent is its ability to function or respond without human intervention.

[72] United Nations Convention on the Use of Electronic Communications in International Contract (CUECIC) of 2005 available at http://www.uncitral.org/pdf/english/texts/electcom/ch_X_18.pdf last accessed on 28th of May 2007. The Convention was endorsed in 2005 and is open for signature by UN member states until 26 January 2008.

[73] *Ibid*, Article 2(1) (a).

[74] Article 13 of the UNCITRAL Model Law on Electronic Commerce with Guide to Enactment of 1996, available at http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf last accessed on 28th of May 2007.

[75] *Ibid*.

"information system" is defined to mean "a system for generating, sending, receiving, storing or otherwise processing data message".[76] A question remains, as to what exactly is meant by automated message system? Does it mean a programmed computer which performs functions automatically and can negotiate contract without human interventions? Is it software uploaded over the internet to search for customers?

The CUECIC is the first Convention to legislate on and recognise the application of automated message system. Under the CUECIC, the interaction of an automated message system and a natural person or between automated message systems result into a valid contract.[77] In this context then, a contract may be formed between automated message system and a natural person or between two automated message systems. This takes place where the seller programs a computer to seek customers online. The buyer may also program a computer to accept offers. Two programmed systems may transact without human intervention. It sounds like science fiction but this is what e-commerce has attained.

Under the CUECIC, a contract shall not be denied its validity on the sole ground that a human being was not involved.[78] The law defines automated message system to mean "a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by natural person (emphasis added)".[79] From the definition, automated message system is a computer software namely electronic agent. Electronic agents operate on behalf of the programmer or user. Nevertheless, the application of automated message system is not limited only to software; rather, it ranges from Electronic Data Interchange (EDI), bots, electronic agents or intelligent agents and any other means designed to automatically process information on behalf of a person.

2.1 Advantages of Electronic Agents

The advantages of electronic agents so far are many and varied. Electronic agents act as mediators in e-commerce.[80] They also perform transactional business tasks such as "stock and securities trading, language translation, and collaborative filtering".[81] Generally, they perform many functions in e-commerce. They look for customers, negotiate terms and conclude contracts. Many benefits evolve from these agents

[76] *Ibid*, Article 2(f).

[77] CUECIC, *supra* note 3, Article 12.

[78] *Ibid*.

[79] *Ibid*, Article 4(g).

[80] Emily M. Weitzenboeck, Electronic Agents and the Formation of Contracts, *International Journal of Law and Information Technology*, Oxford University Press, 2001, at 208.

[81] David, D. Wong, The Emerging Law of Electronic Agents: E-commerce and beyond, *Suffolk University Law Review,* 1999, at 84.

such as "reducing transaction costs, improving marketing and customer service, and increase efficiency of business processes".[82] The benefits of electronic agents in e-commerce are so many. However, many legal issues stem-up from the application of electronic agents. For instance, does consent exist in contract negotiated by electronic agents? On whom does liability lie in case of an error? What should be the extent of liability? What is the legal status of electronic agent? Should these autonomous agents be treated as agents, legal persons or communication tools? This paper delves into the legal mysteries of electronic agents.

2.2 Technological Advancement of Electronic Agents

Electronic agents have technologically advanced. The world is witnessing intelligent agents[83] and not simply electronic agents. Intelligent agents or autonomous electronic agents resemble in character as human beings. They are autonomous and can operate and control their action without human intervention.[84] Interestingly, they can modify programs and devise new instructions.[85] They are not only automated message system but also autonomous machines.[86] They can modify their behaviour depending on their "own experience".[87] Therefore, they are not limited to in-built programs because they can modify (depending on their own experience), instructions and create new instructions. Obviously, they work beyond programmed instructions. Essentially, they are autonomous and intelligent.[88] This has enormous consequences in terms of legality and liability assessment.

Intelligent agents also have interaction ability; they are equipped with "agent-communication language" to intermingle with other agents.[89] This interaction ability is commercially based and not atypically social.[90] Through this ability, they can search for customers (other electronic agents or natural person). Autonomous electronic agents can do more than seeking customers; they can compare prices, quality and effect payment for goods.[91] They can arrange for flight schedules and

[82] *Ibid*, at 88.

[83] See, Weitzenboeck, *supra* note 12, at 206.

[84] See, from the provisions of the CUECIC, *op cit*, Article 12. Weitzenboeck, *ibid*, at 207. Also, Anthony J. Bellia, Contracting with Electronic Agent, *Emory Law Journal,* 2001, at 1047.

[85] Tom Allen and Robin Widdison, Can Computers Make a Contract? *Harvard Journal of Law and Technology*, 1996, p.27.

[86] *Ibid*, at 27.

[87] *Ibid*, at 27. Weitzenboeck, *op cit*, at 207. See, also Wong, *op cit*, p.86.

[88] Weitzenboeck, *ibid*, at 208, See also, Allen, *ibid*, p. 27.

[89] Weitzenboeck, *ibid*, at 207.

[90] Weitzenboeck uses the word "social ability" which may be interpreted to mean the social capacity as human beings have. Interaction made by electronic agents is for commerce purposes only. See, Weitzenboeck, *ibid*.

[91] See, Allen, *op cit*, p. 28.

make hotel reservations.[92] They can react on the environment, "take initiatives" and function without humans.[93] There are many other characteristics demonstrated by intelligent agents, which resemble human behaviour such as "mobility", "veracity", and "benevolence".[94]

Currently, there is an on-going discussion on the autonomy of such intelligent agents. Some authors argue that even the most advanced intelligent agent cannot make "autonomous decisions".[95] Because intelligent agents are software, there is no possibility of acting beyond programs. The decision made by intelligent agents is within the instructions coded by the programmer. The liability therefore falls to the person on whose behalf the agent works. The argument is, if intelligent agents work within programs, why should the programmer or user be exonerated from liability? Because intelligent agents cannot autonomously decide; whatever act is therefore foreseeable. Conversely, other authors argue that intelligent agents are intelligent and autonomous to the extent of modifying their instructions basing on their previous experience.[96] Intelligent agents learn environment and act accordingly. The flexibility allows them to master electronic environment. Therefore, they devise new instructions from the previous programmed instructions and from new devised instructions they can make unanticipated decisions. If this is a proper assertion, the current laws has lacuna in incorporating these self-governing electronic agents.

According to the features given *supra*, there is reason to believe that, intelligent agents are not only "agents" but also "autonomous agents". If they initiate a process, receive data, process information and make decisions without human involvement,[97] they are anomalous software. It is hard for the user to envisage acts of intelligent agents. However, Tom Allen and Robin Widdison advance a substantial argument.[98] They argue that, electronic agents are not static; they work through the instructed commands and can formulate new instructions based on the existing ones. This area of law is open for further research. The question on autonomy of intelligent agents resolves the issue of liability assessment. This study conforms to Tom Allen and Robin Widdison on the position of autonomy of intelligent agents.

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[92] Bellia, *op cit*, p. 1052.

[93] Weitzenboeckop cit, p. 207.

[94] *Ibid*, p. 208.

[95] Christoph Glatt, Comparative Issues in the Formation of Electronic Contracts, *International Journal of Law and IT*, 1998, p. 46.

[96] Allen, *supra* note 17, at 27-28. Also, Weitzenboeck, *supra* note 12, pp. 206-208.

[97] See from the provisions of the CUECIC, *op cit*, Article 12.

[98] The article written by Tom Allen and Robin Widdison, *supra* note 17, gives a clear position on electronic agents because one of the authors (Robin Widdison) is the Director of the Centre for Law and Computing, University of Durham, Great Britain, so we presume that he has a better understanding of electronic agents.

Through the provisions of the CUECIC, it is apparent that, the future of e-commerce will witness more autonomous agents. The CUECIC neither limits nor defines electronic agents. It allows the application of multitude of electronic agents from simple ones to the artificially intelligent. The question that comes-up therefore is whether we should still treat these autonomous electronic agents as mere communications tools or they need special treatment? Should the user or programmer be fully liable for whatever act arising from intelligent agent? It is time to revisit the law on automated message system.

2.3 Concluding a Contract with Intelligent Agents

One of the areas of law where electronic agents have brought many legal issues is on formation of contract. For instance, under common and civil law jurisdictions, a contract is preceded by offer and acceptance.[99] A person does not enter into a legally binding contract unless and until an accepted offer exists.[100] An offer is a party's signification of willingness to be bound upon offer's acceptance.[101] An acceptance is an expression of willingness to be bound by the terms of contract.[102] Based on these facets, contracts result from the meeting of the parties' minds; *consensus ad idem*.[103] The notion nonetheless faces criticisms under common law system. The common law system treats contract as an intention of parties to create legal relations. Intention to create legal relations does not necessarily mean mental willingness but rather act or conduct (party's outward expression) signifying intention.[104] Hence, *consensus ad idem* is an alien import into common law.[105]

Besides, common law forms the base for freedom and sanctity of contract.[106] Under these principles, contract results from free consent of parties agreeing to remain

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[99] Geoffrey Samuel and Jac Rinkes, The Law of Obligations and Legal Remedies, Cavendish Publishing Ltd, London, 1996, at 218. *See* also, H.G Beale, W.D. Bishop & M.P. Furmston, Contract: Cases and Materials, 3rd Edn., Butterworths, London, 1995, p. 181.

[100] Cheshire & Fifoot's, Law of Contract, 8th New Zealand Edition, Butterworths, New Zealand, 1992, at 35.

[101] See, G.H. Treitel, The Law of Contract, 9th Edn., Sweet & Maxwell, London, 1995, at 8.

[102] Pamela R. Tepper, The Law of Contracts and the Uniform Commercial Code, Delmar Publishers, London, 1995, at 26. See, Treitel, *op cit*, p.16.

[103] Hector L. MacQueen & Joe Thomas, Contract Law in Scotland, Butterworths, Edinburgh, 2000, at 35. G.H.L. Fridman, The Law of Contract in Canada, 2nd Edition., The Carswell Company Ltd., Toronto, 1986, at 3. Bryan A. Garner, ed., Black's Law Dictionary, 7th ed., West Group, United States of America, 1999, defines *consensus ad idem* as "an agreement of parties to the same thing; a meeting of minds".

[104] Cheshire, *op cit*, p.34.

[105] *Ibid*, at 35. *See* also, Weitzenboeck, *op cit*, p. 220.

[106] See, A.G. Guest, Anson's Law of Contract, 26th Edn., Clarendon Press, Oxford, 1984, pp. 4 -7.

bound by certain terms.[107] Legally, whether *consensus ad idem* is an alien notion under common law, nothing dissolves the mandatory element of consent in contract. Consent is an outcome of mental meditation and not merely party's outward expression. It is legally unsound to define consent as outward expression since there is no free consent if the party acted under mistake,[108] duress, undue influence[109] or misrepresentation.[110] It is a trite principle that, a contract concluded without free consent is void *ab initio*. Therefore, freedom of contract remains an important element in contract. Generally, common law is built upon these components: offer and acceptance, intention to create legal relations, and consideration.[111]

Intelligent agents have the potentiality to conclude contract without human involvement.[112] They can devise new instructions to make decisions because of their aptness to learn from their experience and react accordingly.[113] From this legal background, the issue is whether contracts made through electronic agents comply with legal aspects of contract, which are consent, intention to be bound and consideration. The question might seem obsolete because the law already validates contracts concluded through electronic agents.[114] However, the necessity of knowing the bases for such contracts remains substantial. If consent is an important element of contract, how can intelligent agent consent? Consent is the willingness of the party to voluntarily remain bound by terms of contract. Conduct or certain acts reveal consent of a party. Acceptance therefore may be verbal, written or conduct[115] but does not include silence. If consent is not a mental result of a person, intelligent agent can make a valid consent. If consent results from mental expression on willingness to contract, then agreements made through intelligent agents are void for lack of consent.

Concomitantly, intelligent agents work on behalf of persons. By programming the computer, the programmer consents to transactions undertaken by the computer. Analogically, consent is not given by intelligent agents rather by persons. It is irrelevant to require consent from automated messages systems because they operate under prior-granted human consent. In addition and as stated earlier, autonomous agents modify instructions and create new commands to master electronic environment. Thus, the need to re-think on relevance of human consent given to autonomous electronic agent compels further exploration. If the person consented to purchase or sell product at a certain price and the agent decides otherwise or makes errors, what should be the extent of liability?

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107 Samuel, *op cit*, p. 218.
108 Treitel, op cit, p. 262.
109 *Ibid*, p.374.
110 *Ibid*, pp. 341-343.
111 Tepper, *supra* note 34, pp. 5 -6.
112 Allen, *op cit*, p.28. Wong, *op cit*, at 83. Weitzenboeck, *op.cit*, p. 207.
113 Allen, *ibid*, p. 27. See also, Weitzenboeck, *ibid*, p. 207.
114 See, the CUECIC, *op cit*, Article 12.
115 Tepper, *op cit*, p. 27. Treitel, *op cit*, p.17.

3. The Legal Status of Intelligent Agents

One of the legal controversies in application of electronic agents is the realisation of their legal status. Having noted that intelligent agents are more than electronic agents because they are autonomous and intelligent, the question that follows is how to treat them under the law. As pointed out earlier, electronic agents can initiate a process, process information and decide without human intervention. Despite this autonomy, the current literature and legislation do not offer them any legal status. Apparently, the characteristics demonstrated by intelligent agents call for special treatment. However, the question that remains unresolved is what should be the legal treatment of such intelligent agents? An overwhelming discussion on autonomous electronic agents still covers pages of literature. Some authors argue that they should be treated as agents under the Law of Agency. Some advocate for granting them legal personality. The third school of thought views intelligent agents as communication tools. Essentially, no clear position on the legal status of intelligent agents has been reached. In this paper, delving into this debate is necessary in realising the substance of these theories.

3.1 Intelligent Agents as Agents

There is a struggle to acknowledge intelligent agents as agents under the Law of Agency.[116] Many authors behind this theory base their reasoning on the autonomy exhibited by intelligent agents; they have capability to act without human intervention.[117] Where the agent is programmed to search for customer or compare prices from different online stores, it will normally do so without a person initiating that process. The user or programmer becomes aware after it has performed its function. The user will know after the agent has delivered back the decision. In this regard, there may be worry among users that electronic agents may initiate a process, process information and even conclude a contract.[118]

However, the question of whether intelligent agents can operate beyond the user's or programmer's foreseability is debatable. Possibly, it is legally unsafe to conclude on this point before further research. Intelligent agent's capability to modify in-built programs and devised new instructions is a big challenge.[119] Actually, the argument of

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[116] Suzanne Smed, Intelligent Software Agent and Agency Law, *Santa Clara Computer and High Technology Law Journal*, 1998, at 505. Ian R. Kerr, Spirits in the Material World: Intelligent Agents as Intermediaries in Electronic Commerce, *Dalhousie Law Journal*, 1999, pp. 242- 247. John P. Fischer, Computers as Agents, A Proposed Approach to Revised U.C.C. Article 2, *Indiana Law Journal*, 1997, pp. 557 - 560. Bellia, *op cit*, p. 1059.

[117] See, Kerr, *ibid*, pp. 194 and 196.

[118] Fischer, *op cit*, pp.556 – 557.

[119] See, Allen, *supra* note 17, at 27. Wong, *supra* note 13, at 89. Weitzenboeck, *supra* note 12, at 208.

treating them as agents under the law of agency derives from their autonomy.[120] It is argued that, if they can negotiate and conclude contracts without human intervention, it is likely that they can make decisions beyond their users.[121] However, the questions which remain unanswered are: should the agent-principal relationship be created in the application of electronic agents? Can the Law of Agency accommodate this relationship?

Under the Law of Agency, agent-principal relationship can be established between two or more persons.[122] In the relationship, the agent consents to undertake functions on behalf of the principal.[123] The agent and principal should assent to certain terms, which is the agent-principal agreement. Therefore, consent of each party is not only needed but also indispensable.[124] Possibly, the requirement of consent may hardly be accommodated by intelligent agent's relationship because they (electronic agents) cannot give consent.[125] However, it can still be argued that, the law should be loosened to allow them act as agents. So far, the relationship created under this circumstance is for legal convenience only. It is hard to decide because the Law of Agency has not been altered to permit the agent-principal relationship without consent. Furthermore, under the current Law of Agency, the agent and principal relationship can only exist if both parties are persons, either natural or legal persons.[126] Currently, the law has not yet recognised intelligent agents as legal persons and therefore, creating an agent-principal relationship with a machine which has no legal status is labouring under unenforceable relationship. This is the main obstacle behind this principle.

Furthermore, under the Law of Agency, agent-principal relationship is limited to the terms of agreement. The agent cannot operate beyond the principal's power.[127] Where the agent acts beyond, he may be personally liable.[128] What is the rationale of treating intelligent agents as agents under the law of agency if they cannot be personally accountable? When intelligent agents operate beyond the authority given, the liability falls to the principal. There is no *raison d'être* for treating intelligent agents as agents because the software cannot bear agents' legal liabilities. Even if they act beyond the instructions given by the programmer, still the person behind it will be liable. Then, why this machine should be given the responsibilities of an agent? A better solution

120 Smed, *supra* note 48, p. 505.

121 See, for instance, Curtis E.A. Karnow, Liability for Distributed Artificial Intelligences, *Berkeley Technology Law Journal, 1996*, pp. 148-149.

122 Weitzenboeck, *op cit*, p. 216.

123 Kerr, *supra*, note 48, at 242. Wong, *op cit*, p. 96.

124 Weitzenboeck, *op cit* p. 215.

125 Jean-Francois Lerouge, The Use of Electronic Agents Questioned Under Contractual Law: Suggested Solutions on a European and American Level, *John Marshall Journal of Computer and Information Law*, 1999, at 406.

126 Weitzenboeck, *op cit*, p. 216.

127 Wong, *op cit*, p. 96.

128 Bellia, *supra* note 16, at 1064. Lerouge, *op cit*, pp. 408 – 409.

is required in affording them legal status than dragging them to the agent-principal relationship. Legally, the rationale of agent-principal relationship is to realise liability in case of fault or error. The court will normally test whether the agent acted within his powers and where he exceeded, he will be personally responsible. Can intelligent electronic agents be liable? Even if they are held liable, can the judgment creditor realise any pecuniary value from the software? Truly, the question of creating agent-principal relationship to software seems academic and may hardly address the real situation.

3.2 Intelligent Agents as Legal Persons

The principle advocating for legal personality still features in the current debate on legal status of intelligent agents. Many authors have mentioned the point of granting them legal personality.[129] It is argued that, since they have ability to operate free from human intercession, they should therefore be offered legal personality.[130] Authors behind this theory believe that legal personality is a better solution. The fact that legal personality applies to ships, corporations and international organisations, there is also likelihood of affording personality to these agents.[131]

However, this theory does not run short of criticisms. It is true that ships, corporations, and international organisations currently enjoy legal personality. Unlike ships, electronic agents may not have the equivalent value sought by the judgement creditor. In reality, ships are assets by themselves.[132] It is apparent that the value of software, especially the intangible binary codes may not be enough to offset the damages resulting from transactions concluded through them. In addition, unlike corporations or international organisations, electronic agents cannot bear the duties and liabilities attached to legal personality.[133] A legal person has the right to sue or be sued in his own name; the right to own property; and the right to perpetual succession.[134] How can one sue an electronic agent, which is simply software? Also, difficulties may arise in registering them because of the complexities in determining their existence.[135] Is it the software or hardware? What should be the location of the software, which is simply uploaded over the internet to search for customers and conclude transactions? Legally, addressing the legal status of these agents by offering them legal personality is unsuitable. The argument to insure intelligent agents have also been invoked

[129] Kerr, *supra* note 48, at 216. Allen, *supra* note 17, at 35 - 40. Bellia, *op cit*, p. 1065.
[130] See, Allen, *ibid*, p. 39.
[131] See, *ibid*, p. 35.
[132] Bellia, *op cit*, p. 1066.
[133] *Ibid*. See also, Weitzenboeck, *op cit*, p. 213
[134] Weitzenboeck, *ibid*, at 212. See, Bellia, *ibid*, p. 1067.
[135] Weitzenboeck, *ibid*, p. 213.

to secure personal liability to computers.[136] Nevertheless, the responsibilities of insurance still attach to the user or programmer since the software has no capacity to enter into insurance contract.[137] Above all, the insurer may be unwilling to insure the software because of difficulties in setting its limits of functions if at all it is proved that they have ability to modify their programs. The risks attached to the functions of the software may hardly be understood by the insurer. Again, how much should be charged as premium to this autonomous electronic agent?

Besides, intelligent agents lack "necessary judgement, consciousness, soul, intentionality, feelings, interests, and free will to be persons".[138] Intelligent agents neither posses social consciousness nor moral values, they cannot therefore enjoy legal personality. Though, the argument may be challenged by the fact that ships, corporations and international organisations also lack these characteristics, the basic reason for not affording legal personality to electronic agents is their lack of capacity to bear the legal rights and liabilities attached to legal personality.

3.3 Intelligent Agents as Communication Tools

The third theory as mentioned by authors on the legal treatment of intelligent agents is by regarding them as communication tools.[139] Under the communication tool doctrine, intelligent agents regardless of their autonomy should receive the same treatment as other communication tools, such as telephone or fax machines. This kind of reasoning carries both advantages and drawbacks. The theory is advantageous since its application does not need the alteration of the doctrines of law of contract.[140] As *supra* discussed, the current principles of formation of contract face a great challenge on the doctrine of *consensus ad idem* when electronic agents are involved in formation of contract. Therefore, if electronic agents acquire "communication tool status", there is no change whatsoever of current doctrines on formation of contracts. Electronic agents will ostensibly operate as communication instruments and nothing else. In assessing liability, the person behind the computer becomes wholly liable.[141] Under the communication tool principle, users of electronic agents will be obliged to ensure proper operation of computers to avoid legal responsibility.[142] Conversely, the "communication tool theory" overlooks the autonomy of these agents.[143] This theory

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136 See, Bellia, *op cit*, p. 1067.
137 *Ibid*.
138 *Ibid*, p. 1066.
139 Allen, *op cit*, p.46. Weitzenboeck, *op cit*, p. 214. Kerr, *op cit*, p.221.
140 Allen, *ibid*, p. 46.
141 *Ibid*. Also, Weitzenboeck, *op cit*, p. 214.
142 Allen, Ibid, at 46. Also, Weitzenboeck, *ibid*.
143 Allen, *ibid*.

also "ignores the technological development" on electronic agents.[144] If this status is afforded, there is likelihood of hampering hasty evolution of such advantageous electronic tools.

The autonomy of intelligent agents should not be set aside. Unlike, fax and telephone machines, they operate autonomously. They are not only communication tools but rather autonomous communication tools.[145] They can still alter programs to operate flexibly in the cyberspace. So, grouping them under the communication tool theory is overlooking their importance in e-commerce. It is legally unfair to burden the user with the risks caused by autonomous machine.[146] If intelligent agent can alter its program without human intervention,[147] then there is a need to revisit the liability to be allocated to the user.

3.4 Legal Status of Intelligent Agents under the Convention

Under the CUECIC, it is hard to ascertain the legal status of electronic agents. The Convention only provides for the validity of contracts concluded through them.[148] The contract concluded by interactions of two or more electronic agents shall be legally valid. Alternatively, a contract may be formed between an electronic agent and human being.[149] Contracts formed under such circumstances shall not be denied validity on the ground that no human being was involved.[150] The Convention does not directly stipulate the legal position of automated message system. Through the provisions of the Convention, there is implied application of the communication tool principle.[151] Essentially, computers can be used as communication tools but not all times. Where a computer is used to send and receive e-mails, it is right to regard it as a communication tool.[152] The application of intelligent agents changes the role of computers. With the application of such agents, the computer can initiate a process, process information and conclude a contract "without human awareness".[153] Should the computer be termed as a mere communication tool under this circumstance? There is a need to recognise the autonomy of these agents. So, a theory, which takes into account of their autonomy, will not only value autonomous electronic agents but also fuel their application in e-commerce.

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144 *Ibid*.
145 See, Kerr, *op cit*, pp. 220-221.
146 Allen, *op cit*, p.46.
147 *Ibid*, p. 49.
148 CUECIC, *op cit*, Article 12.
149 *Ibid*.
150 *Ibid*.
151 See, *ibid*, Articles 10 and 12.
152 Allen, *op cit*, p. 48.
153 Fischer, *op cit*, p. 556.

3.5 Electronic Agents under the Laws of Tanzania

Tanzania has not so far made further progress in enacting laws to accommodate new challenges brought by the use of information technology especially the internet.[154] The use of computers for e-commerce in the country is however widely spread though the majority of people merely use for sending, receiving e-mails, calling abroad, searching for employment opportunities and cheap cars from Japan, and obviously charting with friends through yahoo messengers.[155] There is generally no specific law to govern the application of electronic transactions in Tanzania. Even the amendments of the Evidence Act[156] cover a minute area of law as there are many other areas affected by the use of internet, such as Law of Contract, Criminal Law, Intellectual Property Law, and even emergence of novel issues which were previously not envisaged under the law such as the use of electronic agents. The amendments made in the Evidence Act were specifically meant to accommodate the admissibility of electronic evidence in criminal cases and the use of electronic banker's books etc.[157] Law of Contract Act on its part has not been amended to reflect the challenges of the cyberspace. It is doubtful whether a valid contract can be made between two programmed computers which operate without human intervention. For instance, on the formation of contract, the Tanzanian law is almost the same as that under common law. A valid contract is formed after an offer is accepted. An offer is defined to mean that "when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other person to such act or abstinence, he is said to make a proposal" and acceptance is defined that "when the *person* to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted, and a proposal, when accepted, becomes a promise".[158]

The word "person" under the above section[159] may not include an electronic agent because a contract is legally made by persons with legal capacity. However, the law is very clear and specific that, "every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject" and that "an agreement by a person who is not hereby declared to be competent to contract is void".[160] The requirements under this section certainly disqualify an electronic agent being a person under this law because it cannot be of the age of

[154] Andrew Mollel and Zakayo Lukumay, Electronic Transactions and the Law of Evidence in Tanzania, Iringa University College, 2007, p.90.

[155] See, *Ibid*, pp. 50-51.

[156] See Sections 34 – 36 of The Written Laws (Miscellaneous Amendments) (No.2) Act, 2007

[157] *Ibid*.

[158] Section 2(1) (a) and (b) of the Law of Contract Act, Cap. 345, R.E. 2002.

[159] Ibid

[160] *Ibid*, Section 11 (1) (2).

majority and there is no measure to determine its soundness of mind. Therefore, a contract made by it is void. However, with the wide application of such advantageous information technology, there is a need to revisit the laws to accommodate new ways of contracting. If we do not act now, technology will obviously drag us to that demand, because Tanzania cannot stand out of the global electronic system. This remains to be the main challenge to the Law Reform Commission of Tanzania, legislators and lawyers; to accommodate the imports of the internet.

3.6 The New Theory on Intelligent Agents

The advantages of using intelligent electronic agents are so overwhelming. For instance, such agents can currently process an activity, which could otherwise take several months, in less than a day. However, in the due process, the agent may as well perform a malfunction and act beyond the foreseeable ambits of the user or programmer. Unlike telephone or fax machine, intelligent agents have decision ability. In regard to their autonomy, there is a need to take into account their decision ability by applying a new theory to these agents.

3.6.1 Autonomous Communication Tool Theory: The Author's Approach

The current approaches to legal status of autonomous electronic agents portray insufficient recognition of their autonomy. A new principle thus needs to accommodate the significance of these autonomous communication tools. The new approach will, *inter alia*, set-up legal status by upholding their autonomy. Precisely, the new theory calls for the perfect legal recognition of electronic agents by advocating for their legal recognition as "autonomous communication tools."

Doubtlessly, intelligent agents demonstrate autonomy as opposed to other communication tools. The fact that they can initiate a process, receive and process information without human intervention[161] necessitates a keen and diverse approach. As earlier stated, the current electronic agents function without human initiatives so long as they are programmed to do so. They can hunt for customers over the cyberspace; go through several online-stores and compute the desired prices. Depending on the programming, the result is offered to the user or programmer to decide. Alternatively, autonomous electronic agents may run through different online-stores, comparatively analyse prices and conclude a transaction by entering the details of the user's credit card. The autonomy demonstrated by these agents cannot be disregarded. There is no rationale for treating these tools as mere communication tools because of their capacity to act without human intervention. Also, their ability to change instructed codes and create new instructions to make a decision[162] compels a higher standard of recognition. In other words, autonomous electronic agents can act beyond programmer or user's imagination. Though the extent of their autonomy

[161] Lerouge, *op cit*, p.404.

[162] Allen, *op cit*, p. 27.

is still doubtful, the behaviours they demonstrate qualify for a new treatment apart from grouping them under the category of communication tools. Fax machines can fairly be treated as a communication tools because they can receive a message and obviously print electronic scripts on paper. Neither, telephones nor fax machines can process information and decide in the same way as electronic agents. Thus, placing them under the telephone and fax machine category is hindering their full utilisation.

The recognition of legal status of intelligent agents simplifies the process of liability allocation. The argument of treating electronic agents as agents under the Law of Agency makes no difference because the liability burden attaches to the person behind the machine. The Autonomous Communication Tool Principle resolves liability allocation question and reduces the burden from the user or programmer. The theory does not limit autonomy of intelligent agents. The user or programmer may utilise any technology; he can employ the most sophisticated electronic agent; and; or artificial intelligent. However, customers concluding contracts with such autonomous communication tools should have the right to know the status of the tool they are communicating with. The other party should know his status of concluding the transaction with an autonomous communication tool operating without human intervention. The party contracting with the autonomous tool knows for sure that his transaction operates under a certain risk. Just as one goes to draw or deposit money from an Automated Teller Machine (ATM), he knows that he is dealing with a machine. He has confidence in knowing the status of the machine. Also, he is cautious in handling the transaction. He will therefore take some precautions by ensuring that the transaction is concluded safely. This includes having a receipt containing the necessary details. The receipt applies as evidence in case of dispute. Although, electronic agents operate in a different way, the analogy provides a clear pattern of how the principle should apply. Electronic agents may not provide receipts because the transaction is fully electronic. But, the fact that the customer knows that he is dealing with an autonomous communication tool changes his contracting ability. On the other hand, the person employing autonomous communication machine is obliged to ensure operation of the machine is secure. This includes avoiding possibility of errors or faults. Certainly, no one desires an error to occur but the person behind the machine should take safety measures.

In terms of liability assessment, the user or programmer shall not be wholly liable because the other party knew the status of the machine he is contracting with. The theory does not wholly exonerate the user or programmer from liability. A certain extent of liability still falls on him. The question therefore is to what extent should the person behind autonomous communication tool be liable? Obviously, whenever technology is involved in communication there is a possibility of fault or error. Not every fault results from programmer or user. In case the error results from the

operation of the machine the user will be liable. Where an intelligent agent adopts its environment and probably modifies instructions to make a decision, in the due process of modification an error occurs, the programmer or user carries the liability. However, the principle of foreseability comes to play under this theory. The programmer or user shall not be liable for acts of autonomous communication tool, which are beyond his foreseeability.

Technology provides an answer on whether acts of electronic agents are foreseeable. Intelligent agents being software are programmed in codes. Every software operation runs within codes. However, software may be programmed with flexibility to increase its performance. Still the operation is within the codes even though the performance may increase. With codes every act of software is foreseeable. It is not clear whether software can really modify its programs beyond the mere capacity to increase its performance. So, the argument raised by Allen, *et al*. and advanced in other literature on the possibility of intelligent agents modifying their instructions and devising new instructions needs further scientific research. If this argument is positively proved, the autonomy of intelligent agents must be critically addressed. In this regard, the foreseeability principle also holds water because it is legally unfair to hold the user liable for acts, which he could not envisage.

Of course, when a person programs a machine he impliedly consents to its acts. This should not be the case under this theory because the machine is autonomous. The presumption of autonomous communication tool should be treated, *inter alia*, with the ability to act beyond human control.[163] If the user or programmer does not control the machine and performs an error, he should obviously be responsible. But, where the machine is beyond control, it is legally unfair to hold the user liable. So, users, programmers and customers should be aware of the autonomy of communication tools. So, liability attaches to the user or programmer subject to the conditions that he was using an autonomous communication tool, which could not be easily monitored. Therefore, the theory encourages the full utilisation of technology available in the cyberspace. So far as the liability attaches to the user or programmer, of course subject to certain limitations, the customer will have confidence in concluding transactions with autonomous electronic agents. All in all, the question of intelligent electronic agents remains a challenge to lawyers and legislators not only in Tanzania but also all over the world.

[163] Wein confirms that "some machines are beyond our control". See, Leon E. Wein, the Responsibility of Intelligent Artifacts: Towards an Automation Jurisprudence, *Harvard Journal of Law and Technology*, 1992, p. 111.

4. Conclusion

The cyberspace keeps on changing almost every day thus making its legal governance more complex. The new technology does not leave the law unchallenged. To keep pace with the advancement of technology, the law should also change almost every day. At international level, states have already witnessed the UNCITRAL Model Law on E-commerce and now the CUECIC. Comparatively, the CUECIC is better drafted than its predecessor, and it is the first to recognise the application of electronic agents. However, it does not offer assurance of smooth operation of electronic commerce at international level. New inventions are likely to confront it. Will the CUECIC withstand the forthcoming challenges of the internet, especially the wide application of intelligent electronic agents or artificial intelligent? This is just the beginning of a long journey towards regulating the cyberspace.

Legal implications and Dilemma of Information and Communications Technologies (ICT) on Intellectual Property

By Adam J. Mambi[164]

1. Introduction

This Article seeks to explore critical technologies and key legal issues raised by the impact of digital media in some areas of Intellectual Property (IP). Intellectual Property Rights can be briefly explained as the term used specifically for describing certain rights that afford legal protection to innovative, commercial goodwill and creative endeavour.[165] Generally, intellectual property is associated with intangible property rights that need to be reduced to tangible form before it can qualify for IP protection.[166] Intellectual Property can be categorized into two major parts namely; Industrial Property (Patents, Industrial Designs, Trade Marks and Service marks)[167] and copyright.[168] The Article commences with an appropriate quotation on the subject as an opening remark as shown bellow:

> "[I]n their digital form, images, music, video, and text are perfectly reproducible; not just once, but an infinite number of times. There is no degradation to limit the value of duplicate copies. With digital media, a copy is the original. There is no good reason why this time, for the first time, the law should defend the old against the new, just when the power of the property called "intellectual property" is at its greatest in our society". [169]

It is well understood that the development of digital technology brought by Information and Communication Technologies (ICTs) has affected four major areas of intellectual property namely copyright, trademarks, patent, trade secrets and

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[165] Wilson C., *Nutshells, Intellectual Property Law,* 2002 at page 2.

[166] See Nasir, Rosniwati, Ponnusamy, Vanitha and Lee, Kaw May University of Nottingham, Malaysia Campus, Copyright Protection in the Digital Era: A Malaysian Perspective, Munich Personal RePEc Archive, MPRA pg 25

[167] See Paris Convention 1883/1979 . See also Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) 1994.

[168] See the Berne Convention 1886, as amended in 1979 and The Universal Copyright Convention 1952 as revised 1971

[169] Michael Rappamanaging the digital enterprise, http://digitalenterprise.org/ip/ip.htm1, accessed on 31/06/2008

industrial designs.[170] However, due to space limitation, the discussion in this article is narrowed down to two major areas of intellectual property rights that are most affected namely; copyright and trademarks including service marks. While there is fear that the information society and digital technologies are creating cyber crimes and other related illegal activities, there is also a great concern over the impact of such computer related technologies over intellectual property rights.

The activities under the cyberspace especially the use of Internet to create and transfer information in digital format is threatening owners of those intellectual property rights due to transmission speeds which is increasing unprecedented. There is no doubt that it is now possible to publish most intellectual property rights electronically whereby most people can easily access and download them. This has led to more and more complex and substantial data being transmitted and downloaded on-line leading to infringement of copyrighted works in most cases.[171] While technology is moving fast at unprecedented speed, the policies and laws to secure the intellectual property rights are lagging behind save for some few countries which have created some legal frameworks to keep in pace with these changes.

2. Copyright

Copyright law protects certain works, and the product of human creativity that are expressed into ideas through fixation or recording into an intangible object. The rationale behind is to reward creators who use their labour, skill and judgment by providing exclusive control over specific uses of those works.[172] This argument can be substantiated in the *University of London Press Ltd v. University Tutorial Press Ltd* whereby, the court briefly argued that "…what is worth copying is prima-facie worth protecting…".[173] In Tanzania and other countries, there are various laws that regulate intellectual property rights. These laws are supported by various regional and international legal instruments. Copyright and neighbouring rights in Tanzania are governed by the Copyright and Neighbouring Rights Act,[174] which has not taken into account the development of digital technology. Most copyright laws all over the

[170] According to the WIPO Report, the major forms of IPRs for e-commerce can be divided into more than four categories namely, Patents, Trade Secret, designs, Copyright and Trademarks.

[171] See A.Mambi on the *Source Book for the for Information and Communication Technologies & Cyber law in Tanzania and East African Community; A Comparative Perspective*, 1st Edition 2010. See also A.Mambi on the *impact of digital technology on Intellectual Property (Copyright*) a Thesis submitted as part of fulfilment of LLM at the University of Aberdeen, UK..

[172] See Beckman Centre for Internet & Society on iTunes. How Copyright, Contract and Technology shape the Business of Digital Media, Harvard, Digital Media Project.

[173] [1916] Ch 601. Mr. Justice Peterson .

[174] CAP. 218.[R.E.2002].

world are dramatically being challenged by the intensification of internet use. Issues of piracy and infringement of rights in cyberspace raise concerns surrounding the enforcement of technical, policy and legal measures for protection of copyrights.[175]

2.1 Challenges of Copyright in the Digital Era.

This part of the paper focuses on understanding the challenges, role and function of copyright in the digital era. The development of digital technology brought by the innovation and use of computers and other related devices has brought a great impact on the area of copyright[176]. This has been seen as the most affected area of intellectual property by the development and use of information and communication technologies. The technology has greatly facilitated more computer users to access legally and illegally copyrighted materials electronically. This has caused a great deal of concern leading to more disputes on intellectual property rights arising out of misuse of these rights.

More specifically, the rights of adaptation, public performance, broadcasting and distribution are the major areas of copyright which are mostly affected. The so called new millennium that we are sailing under the cyberspace is creating and bringing more widespread and intensified avenue for misuse of the digital age through the use of internet. It is on this line that there is need for comprehensive and enforceable digital copyright protection mechanisms that protect works digitized, published and accessed electronically. Among four areas of subject matter for copyright protection, namely literary, dramatic, musical and artistic works (LDMA)), musical works seem to be the most affected by the use of digital technologies. For instance, content owners, such as music producers, film studios and composers who depend on their works to earn a living, are the main stakeholders who are affected and threatened by challenges posed by the digital technology[177].

1.1.1 Digital infringement of copyrighted works

Generally, infringement may take two forms namely, primary and secondary infringement depending on the infringers and facilitators. Primary infringement occurs where restricted acts are carried out without the permission of the copyright owner, while secondary infringement (done by some one other than a primary infringer) is concerned with large scale infringement taking place with actual or constructive knowledge**.** In the case of *M. Witmark &Sons v. Pastime Amusement Co*[178] the court

[175] See Collin, N., et al, Kaw May University of Nottingham Malaysia Campus Copyright Protection In The Digital Era A Malaysian Perspective, Munich Personal RePEc Archive, MPRA.

[176] Ibid.

[177] See Mambi A., op ict.

[178] 298 F.470 (E.D.SC. 1924), aff'd Pastime Amusement *Co.v. M.Witmark & Sons, 2 F.2d 1020* (4th Cir.1924).See also Dr.T.Hays (Lecturer at the University of Aberdeen 2003), The Evolution and Decentralization of Secondary Liability for Digital infringement of Copyright-Protected Works in the US.

observed that, the secondary infringer operated as a nexus for the primary infringing activity and enjoyed some reward from being in that position.

The converged technologies and the introduction of iTunes services has immensely affected copyrighted works under the music industry, which is now coming up with new business models for online publishing, transfer and distribution. The users can now easily be able to manipulate text, sounds and images of copyrighted materials electronically. This raises debates on legal issues as to the clear and appropriate balance between the rights of the authors to control the integrity of their work electronically and the rights of users to make some changes in digital format.

Arguably, the manner in which digital information can be transmitted and reproduced has affected the market due to influx of illegal copies of computer programs, software, music, and video, among others.[179] Moreover, there has been unprecedented increase in the number of scholarly and academic works resorting to plagiarism and forgery of an author's work such as software simply by copying existing documents from the web.

2.3 Legal Response on Copyright Infringement Electronically

There have been some legal responses at national, regional and International level as far as copyright protection in the digital era is concerned. Some countries like the United States of America (USA), the United Kingdom (UK), Malta, Singapore, China, Japan and Malaysia have enacted or amended their laws to cope with the development and impact of the digital technology. Unlike Tanzania, the UK has an effective legal framework on intellectual property that reflects impact of digital technologies. For instance, the economic rights such as adaptation and public performance do not include computer generated works such as cartoons. This is not the case in other countries like the UK[180]. The works that afford copyrights and the restricted and permitted acts on the use of those works in Tanzania are detailed in Sections 5 to 23 of the Copyright and Neighbouring Rights Act.[181] While literal and non-literal copying of computer programme might amount to copyright infringement in other jurisdictions, the Copyright and Neighbouring Act of Tanzania seems to be silent on this form of electronic infringement. The UK Law that regulates copyright

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[179] See ITU Cyber Security Guide for Developing Countries Report at page 41. See also A.Mambi on the *Source Book for the for Information and Communication Technologies & Cyber law in Tanzania and East African Community; A comparative perspective*, 1st Edition 2010.

[180] Ibid at page 29.

[181] Cap 218 R.E. 2002. See also the argument in *IBSCOS Computer Ltd v. Barclays Mercantile Highland Finance Ltd [1994] FSR 275* as cited by Bainbridge, D. Introduction to Computer Law 2000, at page 29-30.

reflects this under section 17 (2)[182]. This legal requirement needs to be provided under the copyright laws of Tanzania to encourage innovators and creators of software.

Unlike Tanzania, the UK CDPA is very exhaustive covering both offline and online infringement of copyrighted works be it primary or secondary infringement of copyrighted work[183]. On the other hand, some judicial decisions have developed some theories on the copyright infringement. This can be reflected in the famous US case *(NAPSTER)* which is a typical and landmark case on the cyberspace infringement of copyrighted works.

The US Digital Millennium Copyright Act (DMCA) was a good example of a statute enacted to cope with legal implications posed by the Information and Communications Technologies. This law came in line with the implementation of the 1996 World Intellectual Property Organisation (WIPO) Internet Treaties[184] and addressed legal issues brought by digital technology specifically digital infringement of copyrighted work. The applicability of this law was first tested in the landmark case of *A& M Recordings, Inc. v. Napster*[185].

2.4 The Role of Intermediaries (ISPs) on Intellectual property Rights Online.

The invention and use of software using Mp3 files through peer to peer file sharing for downloading and storing compressed music files under the so called peer-to-peer technology poses a great challenge to copyright owners and the music industry in general[186]. This has been affecting the traditional methods of music distribution and unfairly infringes the copyright of music distributors and musicians. Some people in developing countries like Tanzania have been using this technology to infringe others' copyrighted works irrespective of the existing copyright laws which seem not to clearly address digital infringement of copyrighted works[187].

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[182] Compare the UK Copy Rights, Designs and Patents Act (CDPA), 1988, section 17 (2) and (6), and the Copyright and Neighbouring Act of Tanzania 1999. The law states that copying in relation to Literary (which include software), dramatic, musical and artistic work include reproducing the work in any material form which include storage in any medium by electronic means Seee also Section 21 (4) of the UK CDPA Act 1988 and compare with Copyright law in Tanzania.

[183] See Sections 23, 24, 25 and 26

[184] the WIPO Copyright Treaty of 1996 and the WIPO Performances and Phonograms Treaty of 1996.

[185] No.00-16401, No.00-16403, US Court of Appeals for the Ninth Circuit. 239 F.3d 1004; 2001 U.S

[186] See Michael Chissick, Intellectual Property Rights in Turban E., E-commerce 2002 at page 152-53.

[187] Adam Mambi, Copyright Infringement on Music Industry and the impact of technology on IP in Tanzania, Dissertation submitted at the University of Aberdeen for LLM Requirements in 2003.

There is a great role and responsibility which might also be associated with the liability to Internet Service Providers and other Online Service Providers (ISPs and OSPs) that can be played on the copyrighted materials accessed, uploaded and downloaded electronically. They are the main firms that provide the lowest level of service in the multi-tiered Internet architecture by leasing Internet access to home owners, small businesses and large institutions or organizations[188]. Acting as hosts, they facilitate transactions and communication between the end users and identification of parties creating some kind of relationship with infringers, other facilitators, and their customers adding an additional complex layer of potential responsibility.[189] On the other hand, Section 24 of the UK CDPA provides for limited liability for ISPs such as vicarious liability where they have knowledge on illegal activities taking place online. , the court in *Cable/Home Communication Corp. Network Produs.,Inc.*[190] *Napster* the defendant was believed to have both actual and constructive knowledge that its users exchanged copyrighted music online.

The liability on ISPs might arise through copying, possession[191] or transmission of copyrighted materials by providing so much of a nexus for infringing activity and their control over the medium of exchange.In playboy *Enterprises, Inc. v. Frena*[192], a small BBS was held primarily liable for the copyright violations committed by its customers in regards to the unauthorised dissemination of protected photographs. In its holding the court considered the knowledge element in determining the ISP liability arising from secondary and contributory infringement[193]" The US Court of Appeal, at the 9th Circuit in Napster February, 2001, ruled that the Music Internet service *Napste*[194] through their MP3—Peer 2 Peer software was liable for contributory, vicarious and secondary infringement based on direct infringement by its users.

Looking at the nature of the copyright law in Tanzania, one might argue that, the role and liability of intermediaries is not well addressed by this law. The solution is to borrow the experience from other countries like the UK, Malta and USA and come up with an effective legal framework that addresses the impact of digital technology on IPRs.

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188 See Laudon C.K & Traver C.G on E-commerce, 3rd Edn, 2007 page 136.

189 Dr.T.Hays (Lecturer at the University of Aberdeen 2003), The Evolution and Decentralization of secondary Liability for Digital infringement of Copyright-Protected Works in the US.

190 902 F.2D 829, 845 & 846 N.29 (11th Cir.1990. See also *Religious Tech.Crte. v. Netcom On-line Communication Servs., Inc.,* 907 F.Supp.1361, 1373-74 (N,D.Cal 1995).

191 See Section 23 of the UK Copyright, Designs and Patents Act.

192 839 F.Supp 1552(1993).

193 Ibid, p. 1374.

194 See also *Metro Goldwny Mayer Studio v. Grokster. LTD (04-480) 545 U.S. 913 (2005)*

Unlike other laws in other jurisdictions, the definition of literary works in the copyright law of Tanzania does not include computer programmes and other related software. In addition, the Act provides a limited definition of computer programmes. The Act defines "computer program" to mean a set of instructions expressed in words, codes, schemes or in any other form, which is capable when incorporated in a medium that the computer can read, of causing a computer to perform or achieve a particular task or result. On the other hand, the Copyright and Neighbouring Rights Act[195] of Tanzania narrowly defines literary and artistic works under section 3. [196]

2.5 International Initiatives on Digital Infringement of Intellectual Property Rights The concept of copyright and related rights is defined in each country's legislation. At international level, one might observe that most legal instruments provide for reciprocal protection against illegal copying and infringement between members.[197] The most relevant legal instruments include the Berne Convention and the Universal Copyright Convention administered by the World Intellectual Property Organisation (WIPO) and the 1961 Rome Convention[198]. The Conventions are very relevant as far as copyright protection on software such as computer programs is concerned. The economic gains from software, multimedia and different technology-based products have reached very significant levels. After the adoption of the two WIPO 'Internet Treaties' in 1996, many changes have taken place in the copyright field, as a result of the digital technology, opening new horizons for composers, artists, writers and others to use the Internet with confidence to create, distribute and control the use of their works within the digital environment (WIPO Report)[199].
Furthermore, the WIPO Copyright Treaty obliges contracting parties to provide

[195] See the Copyright and Neighbouring Right Act,[Cap. 218 R.E 2002].

[196] Section 3 provides that copyright shall include; (a) books, pamphlets and other writings, including computer programs; (b)lectures, addresses, sermons and other works of the same nature; (c)dramatic and dramatico-musical works; (d)musical works (vocal and instrumental), whether or not they include accompanying words; (e)choreographic works and pantomimes; (f)cinematographic works, and other audio-visual works; (g)works of drawing, painting, architecture, sculpture, engraving, … (h… (i)works of applied art, whether handicraft …(j) illustrations, maps, plans, sketches and three dimensional works relative to geography, topography, architecture or science.

[197] A.Mambi on the *Source Book for the for Information and Communication Technologies & Cyber law in Tanzania and East African Community; A comparative perspective*, 1st Edition 2010.

[198] See also the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (commonly known as the Rome Convention), the Agreement on Trade-Related Aspects of Intellectual Property Rights (commonly known as the TRIPS Agreement), and the WIPO Copyright Treaty of 1996 and the WIPO Performances and Phonograms Treaty of 1996.

[199] See the relevant Provisions of The WIPO Copyright treaty 1996 and The WIPO Performances and Phonograms Treaty 1996.

adequate legal protection and effective legal remedies against the circumvention of effective technology measures that are used by authors in connection with exercise of their rights under the relevant Treaties and Conventions on copyright. Though Tanzania is among members who have acceded to these international conventions on IPs, her laws have not been updated to cope with current changes.

3. The Legal Implications of Digital Technology on Domain Names, Trade and Service Marks

Trademarks can be simply explained as words, symbols and signs used to distinguish goods or services dealt with or provided in the course of trade. The development of technology especially the use of ICT has made companies and other business entities to identify themselves electronically using Internet domain names. This means that Trademarks and service marks are becoming more significant in the IT industry, particularly in their use on the Internet in domain names.[200] Domain names are mere electronic addresses for web sites, rather than signifiers which seek to distinguish goods and services facilitating the identification of the sources of merchandise. The Domain Name System (DNS) which primarily serves the central function of facilitating users' ability to navigate the Internet operates on the basis of a hierarchy of names divided into two categories: the generic top-level domains, (gTLDs) such as .com, .net, .org and the country code top-level domains (ccTLDs) such as .tz, .ca, .za, www.wipo.int.

1.1 Legal Disputes on Trademarks vis-à-vis Domain Names

For some time now, domain names disputes have become more common though the allocation of such Internet names has always been based on a first come, first served basis. This is due to the fact that, many domain names might also be the names of companies, which in turn are often registered trademarks. The nature of domain names in line with trademarks might give rise to unavoidable conflict between holders of legal rights to particular names. Currently, in Tanzania, trademarks and service marks are governed and regulated by Trade and Service Marks Act[201]. However, there is no legal framework that regulates Domain names in Tanzania like in other countries in East Africa. This attracts the high possibility of cyber-squatting and passing among companies doing business on line.

3.2 Cybersquatting and the Judicial Responses

Cybersquatting has been explained as an illegal act of registering a domain name that is the same as, or confusingly similar to, the trademark of another with the intention

[200] Steve White SW computer law April 1998**.** www.computerlaw.com.au, accessed on 28/5/2008.

[201] Cap 326 [R.E..2002].

of selling (at a profit) the domain name of the trademark owner[202]. The lack of policy and legal framework create fear of legal battle among the users of trademarks and domain names creating more conflicts among companies and organization which lead to dispute due to cyber-squatting. There are a number of judicial cases that reflect the nature of domain name cybersquatting. For instance, in the UK, the case of *Pitman Training Ltd and Another v Nominet UK and Anor*, [203] presents a good illustration of how two businesses which originated from a breakup of the Pitman business both claimed [they] had the right to own the domain name "pitman.co.uk".

In *British Telecommunications and Ors v One in a Million and Ors,*[204] the court followed the US decisions in finding that, the registration of famous trademarks as domain names and their use would constitute a trade mark infringement. . The Court ordered that, One in a Million be restrained from the use or sale of the domain names in question and be compelled to assign the domain names to the plaintiffs, the trade mark owners. In the *Marks and Spencer* case, the Court held that, '[a]ny person who deliberately registers a domain name on account of its similarity to the name, brand name or trade mark of an unconnected commercial organisation must expect to face court injunction'[205]. Furthermore, In *Card Service International Inc. v. McGee,* the American Court held that, the domain name serves the same function as a trademark and is not merely to be construed as an address, as it identifies an Internet site to those who reach it, much like a person's name identifies a particular person.

3.3 Policy and Legal Response as the Solution for Domain Names Dispute Resolution

At the end of the 1990s, The Internet Corporation for Assigned Names and Numbers (ICANN) a private organization established under Californian Law (USA), which plays a big role in coordinating and administering the Internet and the Domain Name System (DNS) introduced an important instrument to curb the problem of domain name disputes and cybersquatting. This was done via the introduction and adoption of the Uniform Domain Names Dispute Resolution policy (UDRP) which seems to be speedy with relative low costs. The UDRP requires a complainant to file a complaint with "an approved Dispute resolution Service Provider" such as the World Intellectual Property Organization (WIPO), the National Arbitration Forum (NAF), the CPR Institute for Dispute Resolution, Asian Domain Name Dispute resolution Center (ADNDRC) and eResolution Consortium. The policy applies to registrations in the **.com, .net and .org** categories and is incorporated by reference

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[202] Shine joy, domain name cybersquatting and dispute resolution at http://www.legalserviceindia.com/articles/cddisp.htm accessed on 31 December 2008.

[203] [1997] EWHC Ch 367

[204] Decided In November 1997, in the UK.

[205] *See Shine Joy Domain Names Cybersquatting Domain Names Dispute Resolution page1-2,* http://www.legalserviceindia.com/articles/cddisp.htm).

into the registration agreement that the registrant had with the registrar at the time of registering its domain name, which will imply that, the registrants submits itself to the jurisdiction of the approved dispute settlement resolution provides and binds itself to the UDRP.

There are some countries which have responded to domain name and trade mark disputes and cybersquatting by enacting national laws. For instance in 1999 the USA enacted the Anti Cyber Squatting Consumer Protection Act, (ACPA). The Act creates civil liability for bad-faith registration with the intent to profit of domain names that are identical or confusingly similar to distinctive trademark. The Act further protects personal names and provide for remedies as injunction, forfeiture or cancellation of domain name, actual damages or profits, or elective statutory damages.

4 e-jurisdiction Problem

The existence of Internet has eliminated the safeguards, which were traditionally available for the protection of various rights, including the Intellectual Property Rights. The website designed to form the domain name may contain valuable information related to intellectual property rights such as designs, copyright and trademark or service marks. Information contained in a website accessed through a certain domain name might lead to infringement of intellectual property rights which in most cases will raise some legal concerns. This might as well raise jurisdiction problem in case of dispute where the parties are not able to identify the country location of the particular website or domain name. This has given rise to the jurisdictional problems for all the countries of the world as to the applicability of laws and enforcement agencies throughout the world.

The year 2001 saw a landmark and historical case[206] which further redefined the principles of the important subject of jurisdiction. In this case, two groups in France complained to the court that, Yahoo! France's auction websites sold Nazi memorabilia and Third Reich related goods, which is banned under French Law. They consequently requested the court to take stringent action. Yahoo! took up the plea that it was a company incorporated in the United States of America and that the French Laws did not bind it.

The French Court ordered Yahoo! France to remove all Nazi memorabilia and content from its website which it would have to pay a fine of 100,000 francs for each day of non-compliance. Yahoo! complied with the order of the French Judge and removed almost all of the Nazi memorabilia links on its auction sites. However, Yahoo! also moved an American court for a declaration that the directions given by the French

[206] See *Yahoo! France case,2000.*

Judge were not enforceable in USA and that Yahoo! being an American company was not bound by the decision of the French Court. The American District Court of California held that the directions of the French Judge could not be enforced in the United States of America, as the same were violative of the first Amendment of the US Constitution.

Arguably, one might say that, the judgment in this case might have far reaching relevance, significance and consequences on the entire subject of jurisdiction under cyberspace. Before this case most courts over the world could assume and were assuming jurisdiction on Internet transactions and websites that were located outside the country[207]. This decision underlines the principle that even if a foreign court passes a judgment or issues a direction against a legal entity of a particular country, say Country A, that judgment or direction would not be applicable automatically to country A's legal entity or citizen.

207 See also *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) and *The iCraveTV* case whereby iCraveTV had sought to limit its distribution to Canadians and thus avoid U.S. jurisdiction.

Anti-Terrorists' Financing: Does it Undermine Privacy of the Customer of a Bank?

By Kevin Mandopi[208]

1. Introduction

Terrorists require substantial funds in order to carry out their activities. With a view of combating terrorist's activities by suppressing terrorists financing system, Tanzania enacted a specific law for that purpose, namely, the Prevention of Terrorism Act, 2002. This law requires commercial banks and financial institutions to disclose statements of the accounts of customers to police officers when suspecting that, certain funds were intended to be used in favour of terrorists operation.

Taking into consideration that the banking laws of Tanzania under the principle of the banker's duty of confidentiality restrict banks to disclose the affairs of their customers' account acquired in the course of banking business, detection and curtailment of funds intended to finance terrorist activities would appear to be difficulty. However, the Prevention of Terrorism laws compel banks to disclose the affairs of the customer's account to the police when demanded or suspected to have connection with terrorist groups. In view of the conflicting position of laws between the banking laws and anti-terrorists' laws, this paper examines whether the banking and financial laws contradict with the prevention of terrorism laws in respect of protection of the banker's duty of confidentiality in Tanzania, hence abusing the privacy right of a customer of a bank.

2. The Origin of the Protection of Privacy of a Customer of a Bank

The protection of privacy of a customer's financial affairs originates from the principle of the bankers' duty of confidentiality[209] which originated from the common law-banking system. The principle was elaborated in a well-known case of *Tournier versus National Provincial and Union Bank of England limited*[210] where it was held that:

> "[A] bank owes a duty of confidentiality to its customers. The duty extends at least to information concerning account transactions and extends beyond the date of the termination of the banker-customer contract."

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[208] LL.B, LL.M in Criminology & Penology (Dar), Assistant Lecturer – Institute of Judicial Administration, Lushoto, Advocate of the High Court of Tanzania.

[209] Banker's duty of confidentiality is the banking principle that prohibits any member of the board or staff of the Bank to disclose any information relating to the Bank or to any transaction or customer of the Bank acquired in the course of employment or the discharge of his duties. The duty covers more than customer's information received from normal banking activities. The duty further, prohibits banks and financial institutions to reveal information shared between them. The concept of customer's account in this context includes also customer's affairs such as where a customer is nearly penniless.

[210] [1928] All. ER. 550

The legal position stated in Tournier's case applies in Tanzania when it comes to the banker's duty of confidentiality.[211] Hence, the banker is required to protect the balance of the customers account, names and all other particulars of the account holder. The bank is also required to do the same to all sources of the income of the customer which are within the knowledge of the bank and any transactions executed by the customer relating to his account. The duty extends to information concerning any transactions made by the customer which relates to his account. The principle of the bankers' duty of confidentiality binds banks and financial institutions not to disclose the information acquired during the banking business. The same duty exists beyond the date of termination of banker and customer contract.

3. Rationale for Protecting Privacy of Banker's Customer

The banking laws require banks and financial institutions to protect information relating to a customer's account as the relationship between the customer and the bank is regarded as being of pecuniary and private in nature. As the relationship is private, it is considered that, a bank should not divulge to third parties the state of customer's affairs.[212] Therefore, the bank is duty bound to protect the affairs of a customer's account. It is further noted that, protection of privacy of customer by abiding to the principle of the banker's duty of confidentiality assists to protect fraud over the accounts of the customers with large sums of money. This is because if a third party receives information relating to the affairs of somebody's account, a deal may be made to steal such amount from the account of the customer. If a third party lacks such information to a larger extent it reduces the possibility of a third party committing fraud or stealing money from someone's account. However, where information on customer's account is not protected, then the lives of customers with larger sums of money will be at risk.

4. Fighting Terrorists' Financing in Tanzania

In fighting terrorism, Tanzania aims at freezing terrorists' financial resources. This includes generation of funds, transfer of the same and any other means through which terrorists accrue funds for conducting their activities. The detection of funds that are intended to finance terrorists' activities or the means by which terrorists obtain and transfer funds simplifies the way by which terrorist financing can be curbed. In this regard, Tanzania enacted a law named as the Prevention of Terrorism Act, 2002.[213] This law provides for comprehensive measures for eliminating terrorism and

[211] Section 16 of the Bank of Tanzania Act, 2006 and Section 48 of the Banking and Financial Institutions Act, 2006.

[212] Sheldon, H.R., Practice and Law of Banking, 9th Edition, Macdonald and Evans, London, 1962 at page 21.

[213] Act No. 21,2002.

terrorists financing. The law prevents terrorist activities and establishes a mechanism through which Tanzania co-operates with other states in fighting terrorism. Moreover, the law denies terrorists' groups access to international financial systems, impairs the ability of terrorists to fundraise. It exposes, isolates and incapacitates terrorists financing. Generally the Act criminalizes any act relating to terrorism activities in Tanzania.[214] The Act declares it a crime for any person to commit terrorist acts,[215] rendering support to terrorism,[216] harbouring terrorists,[217] provision or collection of funds to commit terrorists' activities,[218] use of property for commission of terrorist act,[219] collection of property or provision of property and services for commission of terrorists' activities,[220]soliciting and giving support to terrorist groups for the commission of terrorist acts.[221] However, banks and financial institutions have been conferred the obligation of suppressing terrorist's financing. The responsibility to suppress terrorists' financing further extends to the individual person working with a bank or financial institution due to the fact that, terrorism operates whenever it can secure massive financial resources.

The way terrorists organise and execute their terrorists' attacks involves the accumulation of massive financial resource to finance their activities ranging from the initial stage of organising themselves in plotting to the material time of manifestation of the intended terrorist act. For instance, a terrorist is trained on how to attack, make preparation of tools of action; including acquisition of motor vehicles, bombs, travelling and shelter, all of which need funds. These preparations cannot be possible without availability of massive financial resources. This necessitates terrorist groups to have linkage with financial institutions through which funds can be channelled to finance terrorists' attacks.

Terrorists group generally organise and operate their activities successfully due to organised leadership, good group discipline, obedience, and loyalty, division of labour, fellowship, sacrifice, co-operation and group planning, which spell efficiency in their operation.[222] These may be the cause of their success. It is primarily for this reason that, investigation and detection of terrorists' activities becomes too difficult for the police and other law enforcement agencies. Terrorists have their leaders and members of their group work in harmony and understanding. They have their code of

[214] *Ibid,* Section 4-10
[215] section 4 of the Prevention of Terrorism Act, No. 21of 2002.
[216] *Ibid.,* Section 7.
[217] *Ibid.,* Section 8.
[218] *Ibid.,* Section 13.
[219] *Ibid*., Section 15.
[220] Ibid., Section 17.
[221] Ibid., Section 18.
[222] Paranjape, N.V., Criminology and Penology: 11th Edition, Central Law Publications, Allahabad, 200, page 84.

ethics that govern their performance of duty. Participants to this group prefer death rather than divulging the confidentiality of their group. They have perfect labour division. A terrorist group in one place works in liaison with another group operating at another place. Due to the development of industry and modernisation of science and technology, terrorists are conducting themselves in a more scientific manner at national, regional and international levels.

The police who are duty bound to counter terrorists' activities must also have forensic knowledge of investigation and detection of terrorists' activities. Lack of the said knowledge of investigation and detection of terrorists activities makes anti-terrorists' police to rely on informers and this is a serious bottleneck in fighting against terrorist's activities at national, regional and international levels. Fighting terrorism must also be interlinked at all levels; because terrorists operate at all these levels. Due to strategies adopted by terrorists' groups, it has been difficult to curtail terrorists' means of financing without the assistance of banks and other financial institutions in disrupting terrorists' sources of financing. Thus it becomes necessary to unify the efforts of anti-terrorists' policing on one hand, and banks and financial institutions on another hand.

The provisions of the Prevention of Terrorism Act require banks and other financial institutions[223] to disclose the affairs of their customer's account and any other banking transaction suspected to be of terrorists' nature to designated police officers[224] and to any other body authorised to fight against terrorist's activities. Section 41(2) of the Prevention of Terrorism Act, 2002 states that:

> Every financial institution shall report, every three months, to the police officer and any body authorised by law to supervise and regulate its activities-
>
> a) that it is not in possession or control of any property owned or controlled by or on behalf of a terrorist group;
> b) that it is in possession or control of such property, and the particulars relating to the person, accounts, and transactions involved and the total value of the property.

According to this provision, banks and financial institutions have an obligation to perform with respect to the information relating to terrorism activities. They are obliged to report, within the interval of every three months, to the police and to anybody authorised by law to supervise and regulate their activities. By fulfilling

[223] The term Financial Institution in the Act is defined as "a commercial bank, any other institution which makes loans, advance, and investments or accepts deposits of money as defined under the Banking and the Financial Institution Act, 2006."

[224] The Prevention of Terrorism Act, 2002, section 3 states that, Police means a police officer of or above the rank of Assistant Superintendent of police.

this obligation, banks and the financial institutions are obliged to convey information which reveals as to whether the bank is in possession or control of any property owned or controlled by a terrorist group.[225] Banks and financial institutions must give statement on particulars relating to the person, accounts, and transactions involved and the total value of the property suspected to be used in favour of terrorists.[226] Banks and financial institutions are duty bound to reveal to the police any banking transaction which is suspected to have elements of funding terrorists or relates to the commission of terrorism.[227]

The police may intercept communication suspected to be of terrorist['s] in nature.[228] The interception of such communication requires an order of the court after the consent of the Attorney General.[229]Through the process of intercepting terrorists' financial information, the communication of banks and financial institutions with their customers relating to bank transactions, may also be intercepted by the police. In case the communication intercepted relates to a customer's account, then the particulars of that account would be divulged in the hands of the police officers to third parties. Although, the principle of the banker's duty of confidentiality by these acts seems to have been violated, the law allows intercepting such information in good faith, that is, for the purpose of suppressing terrorists' financing. Hence, the principle of banker's duty of confidentiality remains protected under the law.

5. Suppression of Terrorists' Financing: Canada Experience

Efforts to fight against terrorists' financial network in Canada are governed by the Criminal Code, 1985.[230] The Code provides that, everyone who, directly or indirectly, provides or collects property with intention to be used to carry out terrorists' activities commits a crime.[231] The Canadian Code also criminalizes financing terrorist activities. This is to say, a person who provides money with intention to be used, or knowing that it would be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out any terrorist activity will be liable of an offence. However, banks and financial institutions of Canada are not directly compelled under the Code to report the affairs of their customer's account to third parties, including the anti-

[225] The Prevention of Terrorism Act, 2002 at section 41(2).

[226] *Ibid.*

[227] *Ibid*, Section 41 and the Ant-Money Laundering ,Act, 2006 at Section 17(1),(2) and (3).

[228] Section 3 of the Prevention of Terrorism Act, 2002, states that, "[C]ommunication" means a communication received or transmitted by post, telegraphic, telephone, or other communication received or transmitted by electricity, magnetism or other means.

[229] *Ibid*, Section 31.

[230] Criminal Code (R. S. 1985 C. C-46), Canada. The Code defined terrorism group to mean an entity that has the purpose of facilitating and/or carrying out any terrorist activities.

[231] *Ibid*., Section 83.1.

terrorist agencies, for the purpose of identifying the money allocated for funding terrorists' activities. This helps banks and financial institutions of Canada to honour the banking principle of confidentiality and protection of customers' information relating to his account. However, if the bank chooses to disclose such information for the purpose of suppressing terrorists' financing it is still justifiable to do so by relying on the compulsion of law as an exception to the principle of the banker's duty of confidentiality.

6. Targeting and Disrupting Terrorists' Financing: United Kingdom's Experience

It is increasingly evident that, terrorists and their organizations need to raise significant amounts of cash for a wide variety of purposes like recruitment, training, travel and materials as well as often making payments for safe haven.[232] Hence, tracking, intercepting and strangling the flow of funds is a vital element in the widening global effort against terrorists financing.

United Kingdom is a world leading participant in efforts to counter the financing of terrorism. It combats financing of terrorism in conjunction with international partners in targeting, disrupting and cutting off sources of terrorist finance. This is made by a range of bodies within the government and beyond. The United Kingdom's domestic measures aim at tearing down the sources of terrorists' finance.[233] In fighting terrorists' financing, Britain has enacted laws which grant the police power to seize terrorists' cash anywhere in Britain. It allows the police to freeze funds at the outset of any investigation and it empowers police to monitor accounts which may be used to facilitate terrorists' activities. The law further imposes obligations on people to report suspicious funds transfers which are destined for financing terrorism.[234]Acting in accordance with the requirement of the terrorists' laws, Britain has frozen the assets of over 100 organizations and over 200 individuals. This is in response to domestic laws and the United Nation Security Council Resolutions, particularly those targeting *AlQa'ida* and the Taliban. These funds have been frozen both before and after the 11

[232] For instance, the United States of America authorities estimate that Osama bin Laden paid over US $100 million to the Taliban during the five years he was in Afghanistan which was used to fund the operation of terrorists' organization.

[233] The United Kingadom has acted in concert with international partners to support multilateral initiatives and has fully implemented key anti-terrorist United Nations Security Resolutions. The United Kindom further has joined with other G7 and G8 partners in taking swift action to disrupt and cut off sources of terrorist financing. Since 11 September 2001, over 160 countries have taken concrete action to freeze terrorist assets and in between US $112 million have been frozen worldwide. Since the Bali bombings, the international effort has been redoubled. Australia along with the United Kingdom and the United States of America have co-sponsored the designation of Jemaah Islamiah to the United Nations. These have the effect, amongst other measures, of freezing Jemaah Islamiah's assets.

[234] The Anti-Terrorism, Crime and Security Act 2001, Britain.

September 2001 terrorist attack in New York, USA. It is further noted that, Britain has frozen terrorists' assests worth of $100 million.

In the process of disrupting terrorist financing, Britain has established the National Terrorist Financial Investigation Unit (NTFIU) which is responsible for investigation and seizures of terrorists' cash and the identification and disruption of terrorists' fundraising activities.[235] The National Terrorist Financial Investigation Unit has identified in excess of £500,000 of assets linked to an individual on the United Nations sanctions lists. Since its foundation, the number of financial disclosures referred to the Unit has risen to over 3,500. Terrorist cash has been seized from couriers, including cash believed to be linked to *Al Qa'ida*. A criminal prosecution against suspected couriers is currently ongoing. In the year 2005, the British police have made 20 arrests in connection with terrorist fundraising. Fifteen of those arrests have resulted in the institutionalization of charges of terrorist fundraising.

According to the laws of Britain, banks and financial institutions are legally obliged to freeze funds of all individuals and organisations whose names appear in terrorists list which may have been issued by the Bank of England. They must also notify the Bank of England if they know or suspect that a customer has been listed by the United Nation Sanctions Committee under Resolution No. 1390, or is a person who commits or facilitates acts of terrorists financing. Under the current United Kingdom's legislation, banks and financial institutions are obliged to work in accordance with the principle of Know Your Customers' (KYC) information. The KYC principle has proved valuable in identifying individuals and organisations on the sanctions list. Within the year 2005, Britain has also used its systems to identify an increasing range of suspicious transactions of terrorists' in nature. In addition, payment systems make information available to the authorities in the United Kingdom and other countries as required by the relevant local legislation.

The Chancellor of the Bank of England on 24 March 2004 issued a Notice under the United Nations Act 1946.[236] The notice contains a direction under article 4 of the Terrorism (United Nations Measures) Order, 2001 (S.I. 2001/3365).[237] In the exercise of powers under the Act, the Treasury through the Bank of England acting as the Treasury's agent has directed all relevant institutions that, any funds which they hold for or on behalf of persons whose names appear in the list of terrorists must not be made available to any person except under the authority of a licence granted by the

235 The National Terrorist Financial Investigation Unit was established in November 2001 within the National Criminal Intelligence Service (NCIS). The Unit delivers financial intelligence packages for further investigation of the terrorists' activities.

236 htt:// www.bank of England.co.uk.

237 On 28 September 2001, the United Nations Security Council adopted resolution 1373 (2001).

Treasury. This direction remains valid until revoked by further notice given by the Treasury. Where a relevant institution holds funds for or on behalf of persons listed as terrorists, it must without delay send a copy of the notice to the person whose funds are held.[238]

Despite the fact that the B**ank of England is authorised to disclose the affairs of customer's account according to the law, nevertheless some customers and members of the public have challenged such disclosure.[239] Some of the people whose names have been listed as terrorists by the Bank of England have attempted to challenge the bank's action through courts of law. For instance, they have brought a case before the Court of First Instance on the basis that the measures taken infringe fundamental principles of the European Community law (such as European Convention on Human Rights which ensures the right of fair trial and no punishment without an appropriate law providing for the same). On12 July 2006, Faraj Hassan and Chafik Ayadi, both British residents who had been listed under the regime since 2002, had** their cases dismissed with the statement that:

> "...the Court... recognise[s] that freezing of funds constitutes a particularly drastic measure, but adds that the measure does not prevent the individual concerned from leaving a satisfactory personal, family and social life, in

238 The lists of terrorists issued by the Bank of England on 24 March 2004 contain the names of individuals which include Al-Alami Imad Khalil, Hamdan Usama, Marzouk Musa Abu, Mishaal Khalid, and Rantisi, Abdel Aziz. The Bank of Britain also has relesed the International Islamic Relief Terrorists Organization which include Hayat al-Aghatha al-Islamia al-Alamiya, Al Igatha Al-Islamiya, International Islamic Aid Organization, The Human Relief Committee of the Muslim World League. The Bank of England has also released the list of 19 suspected terrorists which contain names of British residents arrested in connection with plot to blow up airplanes:- 1. Abdula Ahmed Ali, 25, London, 2. Cossor Ali, 23, London 3. Shazad Khuram Ali, 27, High Wycombe, 4. Nabeel Hussain, 22, London, 5. Tanvir Hussain, 25, London, 6. Umair Hussain, 24, London, 7. Umar Islam, 28, High Wycombe, 8. Waseem Kayani, 29, High Wycombe, 9. Assan Abdullah Khan, 21, London, 10. Waheed Arafat Khan, 25, London, 11. Osman Adam Khatib, 19, London, 12. Abdul Muneem Patel, 17, London, 13. Tayib Rauf, 22, Birmingham, 14. Muhammed Usman Saddique, 24, London, 15. Assad Sarwar, 26, High Wycombe, 16. Ibrahim Savant, 25, London, 17. Amin Asmin Tariq, 23, London, 18. Shamin Mohammed Uddin, 35, London, 19. Waheed Zaman, 22, London.

239 http:// www.hm-treasury.gov.uk. The public ask themselves questions and lamenting as follows; is the Bank of England an official "terrorist" information source? This may sound stupid, but why is the Bank of England releasing names of terror suspects. Have they stopped pretending who is really in charge or what? Do banks regularly release "important" information about "terror" plots? Please tell me I'm missing part of this story, or that I'm confusing things, imagining too much, but wow. Honestly someone please tell me why this happened? I'm confused. So the bank is the voice of the "war on terror" now…interesting.

a given circumstances. In particular, they are not forbidden to carry on a trade or business activity, it being however understood that the receipt of income from that activity is regulated".[240]

This makes the measures almost impossible to challenge the disclosure of customers account made by the bank for the purpose of disrupting terrorist financing. Hence, the disclosure of customers' information can not be challenged successfully under the United Kingdom law especially since Judges will give the benefit of the doubt to what they see as objectives of the highest importance, namely, combating international terrorists financing.[241]

7. Tanzanian Efforts to Target and Disrupt Terrorists' Financing

Tanzania has also experienced the effects of terrorists operation in August 1998, whereby the terrorists attacked United States of America embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. In these attacks, 224 people were killed. The bombings continued, on 11th September 2001 in which the World Trade Centre and the Pentagon both of the United States of America were attacked by terrorists using passenger planes. In these attacks, more than 1000 people were killed.

Tanzania is considered among countries which are in danger of terrorist attacks.[242] Fearing terrorists operation in Tanzania, the British and United States governments have strongly advised their citizen not to visit public places in Tanzania.[243] The report stated that:-

"[T]he British Foreign and Commonwealth Office believe that Tanzania,

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240 http://en.wikipedia.org.

241 Ibid.

242 http://www.Somali watch.org.archivese01/011122101.htm. Terrorists' activity in Tanzania is operated by the local and the foreign people. For instance, the names which are presented to the Bank of Tanzania most of them are foreign, but some are Tanzanian names. One of the top ten most wanted terrorist in the world, Khalfan Ghailani, is a Tanzanian from Zanzibar with a residence at the centre of Dar es Salaam. It is further believed that Police suspect that bin Laden's Sudan operations moved to Tanzania after the United States of America bombed a Khartoum pharmaceutical plant in retaliation for the 1998 bombings of the United States of America embassies in Dar es Salaam and Nairobi.

243 http://www.Smartraveller.gov.au. This has also been provided by the Australian Department of Foreign Affairs and Trade. The advice inta alia stated that, "We advise you to exercise a high degree of caution in Tanzania, including Zanzibar, because of the high threat of terrorist attack and high levels of violent crime. We continue to receive reports that terrorists are planning attacks against a range of targets, including places frequented by foreigners. In planning your activities, consider the kind of places known to be terrorist targets which include commercial and public areas known to be frequented by foreigners such as hotels, clubs, restaurants, bars, schools, places of worship, airports, market places, outdoor recreation events and tourist areas."

including Zanzibar and Pemba Islands, is one of a number of countries in East Africa where there is an increased terrorist threat. They have received information that an international terrorist group may be planning an attack on the Island of Zanzibar. British nationals in Tanzania, and especially in Zanzibar, should be vigilant, particularly in public places frequented by foreigners such as hotels, restaurants, shopping malls, markets, bars and nightclubs."

This indicates that, there is a threat of terrorist operations in Tanzania. Terrorist use funds for the purpose of fulfilling their terrorist operations. Therefore, in order to curtail terrorism there must be established a mechanisms for curtailing the flow of fund from reaching terrorists. On 27th August, 2002 Tanzania signed an agreement with the United States of America on technical assistance for capacity building in the war against terrorist finance.[244] This has been intended to eliminate terrorists' financial network. The process of eliminating terrorists' financing is governed by the anti terrorism laws. The provisions of the Prevention of Terrorism Act, 2002 of Tanzania, compel banks and financial institutions to disclose the affairs of customer's account and any other banking transaction suspected to be of terrorists' nature. The disclosure must be made to any other body authorised to fight against terrorist's finance networking. The condition of disclosing the affairs of the customer's account is the strategy of targeting and disrupting terrorist financing.[245]

In order to disclose correctly the affairs of customer's account on allegation that the funds are intended to support terrorists' activities, banks and financial institutions are working in accordance to the principle of Know Your Customers' (henceforth KYC) information. In the process of knowing the affairs of the customer, banks and financial institutions take steps to work in accordance with the principle of Know Your Customer's Customers' (henceforth KYCC) information. The principle of KYC and KYCC is part of the statutory banking law in Tanzania used in banking transaction. Circular No. 8 issued by the Bank of Tanzania[246] at its Regulation 17 states that:-

"Every covered institution shall develop procedures to determine a 'transaction profile' of each customer by knowing enough about the customer's business. The "transaction profile" so developed

[244] At a ceremony in Dar es Salaam, Tanzania the United States of America Ambassador Robert Royall and Tanzanian Finance Minister Basil Mramba agreed on a work-plan which is aimed at enabling Tanzania to build capacity in prevention, investigation and prosecuting those who participate in terrorists' activities in Tanzania.

[245] The Prevention of Terrorism Act, 2002, Section 41(2)

[246] The Circular issued by the Bank of Tanzania through his Governor is the very usefully and powerfully law. All banks and financial institutions must abide to it failure of which attracts the penalty.

shall be used in recognizing that a transaction or series of transactions are unusual."

Through the principle of KYC and KYCC, banks and financial institutions have become aware of the sources of fund accrued by their customers. Therefore, banks and financial institutions can easily suspect transactions intended to be used in favour of terrorists. If banks and financial institutions suspect that the funds will be used to finance terrorism, they can disclose the same to the police who will take necessary steps for investigating, arresting and prosecuting the culprits and concurrently issuing an order for freezing the account of the suspected customer.[247]

Some of the customers of banks and financial institutions interviewed by the author have told the author that, when they have deposited huge amounts of money they are questioned about the source of such money. In case a customer fails to give a plausible explanation, then banks and financial institutions can take steps of freezing the account pending investigation. The interviewees further, stated that, banks and financial institutions can even request clarification of the customers' financial dealings through the phone. Even if the clarification is requested through the phone and the customer fails to give proper clarification, banks and financial institutions can opt to freeze the account pending investigation which may be conducted by the police.[248]

In the process of curtailing terrorists' financial networks, the Bank of Tanzania is also involved. The Bank of Tanzania may give directions to all banks and financial institutions to freeze accounts of customers whose names have been listed on suspicion of funding terrorist activities. In working in accordance with the anti terrorists financing provisions, Tanzania's central bank has frozen 65 bank accounts of companies allegedly related to terrorists organizations especially the Al Qaeda.[249] The Bank of Tanzania can also freeze the accounts of customers when a foreign Bank or a foreign State presents an official request and a list of names of persons suspected to finance terrorists. Among the accounts that were frozen, some of them were presented to the Bank of Tanzania by Government of the United States of America. Sources in the banking industry in Dar es Salaam said that in the initial list issued by the government of United States of America, 20 names out of the 65 names were globally sought after as being international companies that are said to be linked to Al Qaeda businesses. Most of these companies were said to have branches in Tanzania and Kenya, having moved to Tanzania when bin Laden left the Sudan in 1996.[250]

Another list of over 20 companies had been circulated to Tanzanian banks and financial

[247] The Prevention of Terrorism Act, 2002, Section 41(2).
[248] The interviewees denied their names from appearing in this work report.
[249] http://www. Somali awatch.org.archivese01/011122101.htm.
[250] Ibid.

institutions to check if they operated any suspected bank accounts. However, banks, financial institutions and the Bank of Tanzania declined to name them or release to the public, the names of individuals, organisations and companies suspected to operate their bank accounts in favour of terrorists' activities. Generally, when banks, financial institutions and the Bank of Tanzania officials are requested to explain; and; or to give justification for the process of freezing the accounts of the customers suspected to have linkage to terrorists they are not ready to do so. This is probably to avoid pre-empting investigations which are being conducted on the customers' bank account which have been frozen.

8. Conclusion

The general principle of the bankers' duty of confidentiality prohibits members of the board and staff of the Bank of Tanzania, commercial banks and financial institutions from disclosing any information relating to any business transaction of a customers' account acquired in the course of banking business.[251] The Bank of Tanzania Act 1996 also provides for this prohibition. However, the Prevention of Terrorism Act, 2002 of Tanzania requires banks and financial institutions to disclose the affairs of customers account to the police at any time, provided that it has been ordered by the police. Such disclosure is justified under the compulsion of the law.[252] Through the Act, commercial banks and financial institutions are compelled to disclose information relating to a customer's account to the anti-terrorists agencies for the purpose of curtailing terrorists finances. According to the Anti-Money Laundering Act, 2006 banks and financial institutions are at liberty to disclose information of its customers' accounts relating to terrorists financing for the purpose of curtailing terrorists activities.[253]

The Canadian Code[254] which is the base of curtailing the terrorists' funds in Canada do not expressly require banks and financial institutions to divulge the affairs of the customer's account to the police for the purposes of restraining terrorists financing. However, Canadian banks can still disclose the affairs of their customer's accounts to the anti-terrorists agencies for the purpose of preventing terrorists' activities under the compulsion of the law. Therefore it is obvious that disclosure of such information tempers with the principle of confidentiality and the privacy of a customer's information.

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[251] The Bank of Tanzania Act, No. 4 of 2006, Section 16. see also section 16 of the Banking and Financial Institution Act, 2006

[252] The Prevention of Terrorism Act, 2002, section 41(2).

[253] The Anti-Money Laundering Act, 2006 Section 21 of the Act states that, "The provision of this Part shall have effect, notwithstanding any obligation as to secrecy or other restrictions, upon the disclosure of information imposed by any law or otherwise."

[254] Criminal Code (R. S. 1985 C. C-46),Canada.

The anti-terrorism measures for requiring a banker to disclose the affairs of the customer's account may interfere with the privacy of the customer of a bank without necessarily breaching the law.

In curbing problems arising from disclosing customers' information in compliance with the anti terrorism laws, Tanzania needs to establish a National Terrorist Financial Investigation Bureau. This will be responsible for investigation and disclosure of terrorists financing to law enforcement agencies. Through the bureau, banks and financial institutions will be able to operate and maintain the privacy of the customer and the principle of the bankers' duty of confidentiality.

Undermined Democracy in Tanzania: An Examination of Political Financing Legal Regime

Mr. Evaristo Longopa and Mr. Henry Njowoka***

1.0 Introduction

Free and fair elections are among the pivotal pillars of democracy. A lot of finances are required in order to meet the cost of these elections. Tanzania adheres to the principles of democracy[255] and it conducts its general elections periodically.[256] This paper analyses the financing of the political parties in relations to democratic elections. It focuses on the significance of accountability by political parties and electoral candidates with regard to raising and spending of finances before, during and after the elections. Hitherto, we have been witnessing high expenditures in election campaigns in Tanzania especially during by elections.[257] In the circumstances, there is a need to examine the mode of raising, spending and regulation of finances of the political parties to ensure that principles of free and fair election are not compromised.

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Article 3(1) of the Constitution of the United Republic of Tanzania states that the United Republic of Tanzania is a secular democratic and socialist state that adheres to the multiparty system.

[256] Todate Tanzania has held four multiparty elections since the reintroduction of the multiparty system in 1992. These elections were conducted in 1995, 2000, 2005 and 2010 where the incumbent Chama Cha Mapinduzi emerged victorious both in parliamentary and presidential elections.

[257] In Tarime Constituent by-election recently Chama Cha Mapinduzi claimed to have spent more than two billion to bid for campaigning for their contestant against their rival Chadema contestant. The ruling party Chama Cha Mapinduzi hired two helicopters and used a number of motor vehicles for its campaign team while Chama cha Demokrasia na Maendeleo used a helicopter to campaign for the by election. Recently the government was urged to formulate the law that will allow internal and external audit account books of the political parties. As a response the government introduced some amendments to the Political Parties Act to the effect that the CAG is empowered to audit all political parties' accounts. This is reported in The East African of June 22 to 28, 2010, "Political Parties to Have their Accounts Audited and Published", pp. 1 and 5

Without adequate mechanisms to control and regulate political finances, democracy will be jeopardized. Free and fair elections are only rhetoric in absence of fair play ground to all political parties and candidates contesting in democratic elections. This paper addresses the legal framework in this country with regard to control and regulation of political finance before and after the enactment of Election Expenses Act, 2010.

The importance of this discussion is to complement efforts so far made in the fight against all forms of political corruption in Tanzania. This paper should *inter alia* be taken to join hands with the Government on the current war against grand corruption (*Ufisadi*). It is from this perspective that this paper calls for serious enforcement of legal regulations in financing elections and other political activities generally. The relevance of this paper is due to yet unsubstantiated allegations that the ruling party, *Chama Cha Mapinduzi* (CCM), used corruptly obtained money to finance its campaign during the 2005 general elections.[258] It is herein argued that had it been that Tanzania had clear laws on financing political activities particularly in elections, such allegations could hardly have been raised during the 2005 General Election. This is because the public could have some information on the sources of finances used by CCM or any other political party. Fortunately, we now have a new legislation in place, which is the Election Expenses Act (EEA)[259] which has hopefully limited to some extent the use of ill-gotten funds during the just ended General Election in October 2010. This article therefore calls for serious enforcement of the rules on political and election financing contained in the Act in order to ensure that elections are free and fair.

2.0 Understanding the Concept of Political Finance

There is a direct relationship between money and democracy.[260] Political finance is influenced and influences relations between parties, politicians, party members and the electorate. In absence of any regulation of political finance it results in anarchy. It is settled that, "money organizes elections in the interests of those who possess it; and the elections themselves are a rigged game staged as though the people were

[258] See for instance Elias Msuya, CCM Haiwezi kujinasua kashfa ya EPA, *Mwananchi* Jumatano November 26, 2006, Simon Mhina, Jaji Mkuu apasua bomu, *Nipashe*, Ijumaa Oktoba 17, 2008, 1 & 4 and Kulwa Karedia, Zitto aishika pabaya CCM, *Tanzania Daima*, Jumatatu Desemba 1, 2008, 2 & 2

[259] No 1 of 2010, Gazzeted by GN No 12, Vol 91 on 19th March, 2010

[260] Steven Griner and Daniel Zovatto subscribe that "both history and comparative experience show that the relationship between money and politics is and will remain complex, and that it is a key issue in terms of quality and stability democracy. See Steven Griner, "A Comparative Regional Analysis of the Funding of Political Parties and Election Campaigns in Latin America" in Steven G. *et al* (2005), *Funding of Political Parties and Election Campaigns in Americas*, OAS and International IDEA, San Jose, 2005, 17.

making decisions."[261] In any electoral process, there are lot of expenses incurred in different ways. Campaigns use public appearances and rallies, printed materials, billboards, the mass media, and the mail to convey messages and project their desired images. Newspapers and televisions are used for presenting issues and the qualities of the candidates. Modern campaigns, especially those for more influential offices, often use 'paid experts for public relations, advertising polling and fund raising.'[262] These expenses range from one country to another, as well as time.[263] The elections campaigns utilize a lot of resources especially finances.

The sources of campaign contributions are very diverse. Soliciting friends, large contributions from people who have special view points or interests, candidates themselves can contribute to their own campaigns and borrowing. The reasons for one to contribute to election campaigns are as well diverse: friendship, opportunity to associate with the candidates who are powerful, people who hold strong opinions about political issues or ideology are important campaign contributors and those who have interests to protect or push-axe to grind- give money to secure access and influence. Owing to a number of major contributors to election campaigns having different reasons to do so, it is apparently necessary to have transparent modes of raising, spending and controlling political finances in any democratic society.

In the heart of it, political party finance regulation seems to create equality between political parties and their nominated candidates. These regulations of political funding can be achieved through different ways. These include bans on corrupt electoral practices such as buying of votes; disclosure of financial deposits for candidates to deter frivolous candidature; limitation on the campaign expenditure by setting a ceiling on the permitted level of spending by each candidate for parliamentary and presidential elections and their national political parties. Other means of regulating political funding are contribution limits or restrictions on the amount of money an individual or corporation is permitted to donate to an election campaign or to a political party; disclosure regulations requiring parties; and; or candidates to submit for official scrutiny; and; or publish financial account; and bans against certain types of contributions, especially foreign contributions, donations by corporations or trade

[261] Oswald Spengler, The Decline of the West (Vol. II), New York, Knopf., 1961; Reginald Austin & Maja Tjernstrom (Eds) (2003), Handbook Series: Funding of Political Parties and Election Campaigns, Stockholm, International IDEA, 464

[262] See Harrison, R.F, America's Democracy: The Ideal and the Reality (2nd Ed.), Scott, Foresman and Co., Illinois, 1983, 296-315.

[263] Harrison R. Fred points out that in 1980 US Elections, total of estimated more than $1 billion was spent I campaigns for all levels in the United States compared to $540 million that was spent just four years before in the 1976 US Elections. See Harrison, R.F, *America's Democracy: The Ideal and the Reality* (2nd Ed.), Scott, Foresman and Co., Illinois, 1983, 314.

unions.[264] These indicators are cumulative in nature in a democratic society.

Politics and money are inseparable aspects in any democratic society. The relation between money and politics has come to be one of the great problems of the democratic government.[265] As such, "healthy political life is not possible as long as the use of money is unrestrained. Indeed, money provides access to the basic tools of a modern democracy, such as advertising, running political parties, selecting candidates, mobilizing voters and polling and for that reason, political finance affects almost every aspect of democratic politics in both developing and consolidated democracies. Thus, reform of political finance regimes is high on agenda in all democratic countries, as greater transparency in political finance and accountability on part of the party leaders is essential for democracy"[266]

2.1 Examining Political Finance in Tanzania

Tanzania is among of the countries grouped as medium political corrupt countries, characterized with prevalence of illegal political donations. Generally, Tanzania, as we shall demonstrate shortly in this paper, is a new entrant in regulating election financing as the Election Expenses Act referred to above was just enacted in March 2010 and hence there is a lot to be done.

Legislation is one of the ways of controlling and regulating human conduct. It is

[264] Michael Pinto-Duschinsky, Political Financing in the Commonwealth, Commonwealth Secretariat, UK, 2008, 7. (Available in www.thecommonwealth.or, visited on March 12, 2009)

[265] The fourth phase President Honourable Jakaya Mrisho Kikwete noted clearly that political finance in Tanzania needs to be addressed squarely for the reasons that it is possible to have leaders who come to office vide discreditable means. He stated that "there is a notion beginning to emerge that political office can be bought with money. If this is true, we have to be careful and ensure our country will not one day be mortgaged to finance someone's desire for high office. No party or candidate can successfully conduct election campaign without money. But it is not right to buy victory. In my view, we must fight this tendency. Let us then have a broad national dialogue on transparent campaign finance. This should help us agree on an open, legal and transparent way for the party or candidate to raise campaign funds and open, legal and transparent way in which the use of the funds can be ascertained. What we agree on will then be part of our code of conduct for elections nationally and within political party themselves." See His Excellency President Jakaya Mrisho Kikwete Speech Inaugrating the Fourth Phase Parliament of the United Republic of Tanzania, Parliament Buildings, Dodoma on 30 December, 2005, 4. See http://www.tanzania.go.tz/hotuba1/hotuba/051230_bunge.htm also available in http://www.parliament.go.tz/bunge/docs/pspeech_en.pdf, all visited on July 10, 2009

[266] Marcin Walecki, *Political money and corruption*, in Global Corruption Report, Transparency International (London: Pluto Press, 2004), 19-30.

also an instrument which controls various interests according to the requirements of the social order. Law represents the consciousness of the whole society. Scholars, such as Pound, one of most renowned social thinkers considers that the horizon of the law is constantly widening because of continually wider recognition of human wants, demands and interests. It plays a social engineering role by adjusting and reconciling the interests in the general security, individual life, protection of morals, the conservation of natural resources, and the interests in economic, political and cultural progress.[267]

Politics being part of human life is regulated by the law. In Tanzania, we have several pieces of legislation dealing with regulation of political parties and elections campaigns. These include the Political Parties Act[268], the National Elections Act[269] and the Election Expenses Act.[270] In this paper we shall examine each law in order to have an overview of the legal position with regard to political funding. The National Elections Act (1985) and the Political Parties Act (1992) are the old laws in the regime of regulation of election financing or political activities financing. The Election Expenses Act (2010) is still a new law as noted above and hence, its introduction aims at covering some gaps which were not covered by the earlier two mentioned Acts.

2.2.1 The National Elections Act

This law deals with the electoral processes for the Presidential and Members of Parliament. It states clearly that, in a contested election in a constituency, election campaign shall be organized by the candidate, candidate's party or his agent. It is the duty of either candidate contesting to be elected or his party, to ensure that they conduct campaigns effectively. It is well settled that in various states of the world, the electoral laws prohibit certain forms of practices in elections either as corrupt or illegal practices. According to Heidenheimer, "the electoral laws of most countries contain provisions, dating mainly from the nineteenth century, which prohibit certain practices that greatly contributed at the time to the high cost of campaigns. Most universally prohibited practices are various forms of bribery as well as indirect forms such as treating. Tanzania is not exception in that regard. The electoral laws take aboard various practices that are prohibited during election processes.

Part II of Chapter Six of the Act deals with detailed offences relating to election. Some of these offences reflect the need to have regulation of political funds during elections. Treating, bribery or undue influence amount to corrupt practices and is

[267] Freeman, M.D.A, *Lloyd's Introduction to Jurisprudence* (7th Edition), London, Sweet and Maxwell Ltd, 2001, 672-678.
[268] Cap. 258, [R.E.2002].
[269] Cap. 343, [R.E.2002].
[270] See footnote no. 260.

prohibited during elections. It attracts a fine of an amount not exceeding five hundred thousand Tanzania Shillings or imprisonment for a term not exceeding five years or to both fine and imprisonment. Any person convicted of these offences, illegal and corrupt practices, must be disqualified from being registered as a voter or voting in any election during the five years since the date of conviction, in addition to other punishments.[271] This disqualification applies only where the conviction is not set aside by the competent court.

The Act provides for a number of circumstances under which a person will be deemed to be guilty of bribery.[272] It states that, every person who gives, lends or agree to give, lend or offer or promises to procure any money or valuable consideration for any voter; giving or procuring any office, place or employment for any voter on account of such voter having voted or refrained from voting at any election; makes any gift, loan, offer, promise, procurement or agreement to procure nomination of a person as a Member of Parliament; advances or pays or causes to be paid any money intended to be expended in bribery; receives, agrees to receive or contracts for any money, gift, loan or valuable consideration, office for voting or agreeing to vote or for refraining from or to agreeing to refrain from voting at any election; and receives any money or valuable consideration on account of any person having voted or refrained from voting, having induced any other person to vote or refrain from voting at any election. Therefore, the giver and acceptor are all treated equally as guilty of bribery. This is whether the incident took place before, during or after election campaigns. The yard stick here is the connection between giving, procuring or accepting or contracting with election campaigns. It may be done directly or indirectly. However, lawfully and *bona fide* expenses incurred during the electoral processes are exempted from being termed as bribery. Also an act or transaction designed to advance the interests of community fund raising, self-help, self-reliance or social welfare projects within the constituency and that have been done before the campaign period cannot amount to bribery.

More importantly, treating is criminalized as an election offence. It involves giving, providing or paying wholly or in part, the expenses of giving or providing food, drink or entertainment to or for any person in order to influence that person to vote or refrain from voting. On the other hand, every person who corruptly accepts or takes such food, drink, entertainment or provision, is guilty of treating as well. The law was amended severally. The amendment[273] introduced to the National Election Act, created a setback to the war against corruption in elections. These provisions are commonly known as *takrima* provisions. It states that:

"98(2) For the purpose of subsection (1), anything done in good faith as an

[271] Section 117 of Cap. 258, [R.E.2002].

[272] Section 118, Ibid.

[273] Act No 4 of 2000.

act of normal or traditional hospitality shall be deemed not to be treating.
(3) Normal or ordinary expenses spent in good faith in the election campaign or in the ordinary cause of election process shall be deemed not to be treating, bribery or illegal practice.'

This provision sparked a lot of criticism against the government at large and members of parliament in particular for enacting a law that clearly promotes corrupt practices during elections. It is argued that the amendment appeared to encourage 'treating' in anticipation of some reward contrary to the actual intention behind the normal and ordinary hospitality act of appreciation that is envisaged and not otherwise as the case proposed in the current law. The defunct Prevention of Corruption Bureau (PCB) study found that normal and traditional hospitality (*takrima*) contributed significantly to corruption during elections. It concluded that:

> Following traditional hospitality in Tanzanian context, usually the host was responsible to provide hospitality in the form of drinks and food, etc. The opposite seems to be true when compared to the amendment made in the electoral laws where the visitors take the position of the hosts. Furthermore, amended electoral laws are silent on the form, amount and timing of the hospitality to be provided. Seen in this light, hospitality during elections is definitely one of the elements of corruption.

Mwakyembe argued that "in order to preserve the sanctity of the electoral process in Tanzania, there is an urgent need to do away with the 'traditional hospitality' clause in the Election Act since it has given rise to a marked increase in the incidences of corruption in the country. Mashamba concludes that the said amendment is ultra vires the Constitution as well as it infringes the basic principle of free and fair elections to the extent that it encourages political corruption. As such "political corruption is the worst form of corruption. A country led by politicians who assumed their office through corrupt means has no chance of successfully fighting the scourge. It is imperative thus to make sure that those who assume elective office are honest members of the society and above all free from corruption.

On that premise the civil society had to challenge that provision of the law. This was through a public interest litigation, in the case of *Legal and Human Rights Centre, National Organization for Legal Assistance and Lawyers Environment Team versus Attorney General*[274] whereby the petitioners averred that the amendments introduced by the provisions of section 119 (2) of the National Elections Act vide Act No. 4 of 2000 legalize the offering by a candidate in election campaigns anything done in good faith as act of hospitality to the candidate's electorate or voters. The

[274] Miscellaneous Civil Cause No. 77 of 2005, The High Court of Tanzania, At Dar es Salaam (Main Registry), (Unreported).

introduced amendments are popularly known as *takrima* provisions. They felt that it was irrational for the government to enact a law restricting the application of the provisions against corrupt practices in such sweeping clause while corruption is one of the serious problems in Tanzania. In interpreting the *takrima* provisions in the light of the Tanzanian environment, it is impossible to avoid the conclusion that the *takrima* provisions legalize corruption in the election process. In that case the High Court of Tanzania observed that:

> since the takrima provisions are violative of Article 13 (1), 13(2), 21(1) and 21(2) of the Constitution, we declare that the said provisions are null and void and we order that the same to be struck out of the National Elections Act, Cap 343 R.E. 2002 forthwith.

The civil societies especially human rights based organizations are very instrumental in advancing the cause of legal and social justice as well as human rights. It is clearly demonstrated that it is the civil society that took initiatives through public interest litigation especially in the "takrima" case leading to the reform of national electoral process by agitating for elimination of corrupt practices in election processes. Thus there is a need to strengthen civil society organizations in order to promote equal justice to all.

2.2.2 Political Parties Act[275]

This piece of legislation deals with the procedure and basic requirements for registering political parties in the United Republic of Tanzania.[276] Basically, this law contains a total of twenty three sections. It provides for the applicability to the whole territory of the United Republic of Tanzania.[277] The major part of it deals with establishment of the Registrar of Political Parties Office, appointment of the Registrar and Deputy Registrars, duty of political parties to register, conditions and processes for the registration, prohibition on the revival of names of pre-existed political parties, rights and privileges, cancellation of political parties and its effects together with appointment of the board of trustees to administer properties of the political parties.

The concept of political funding is covered under section 13. It describes various

[275] Act No.5 of 1992, Cap. 258, [R.E.2002].

[276] Its long title states it as 'an Act to provide for terms and conditions and the procedure of registration of Political Parties and related matters thereto.'

[277] According to Article 4 read together with the Second Schedule to the Constitution of the United Republic of Tanzania, 1977 Cap 2, R.E. 2002, legal affairs is not among the Union matters thus it is possible to have two different law pertaining to a certain matter but the registration of Political Parties and issues incidental thereto form part of the union matters under item number 22 of the Union matters.

sources to finance for political parties. These are: membership fees, voluntary contributions, the proceeds of any investment, project or undertaking in which the party has an interest, subvention from the Government, donations, bequests and grants from any other source. Thus, the legislation permits the political parties to utilize different sources of funds for their activities. It does not limit the amount of foreign contributions nor prohibit foreign sources of funding. Subsection 2 of section 13 of the law, regulate to a limited extent these foreign sources by requiring the parties to disclose to the Registrar information relating to funds obtained by a party from foreign sources, foreign organisations stationed in the United Republic and from any resident of the United Republic who is non-citizen of Tanzania.[278] Failure to disclose foreign sources of funding of political parties attracts a penalty of either twelve months custodial sentence or a fine equal to the value of the property or resource not disclosed or a combination of the two: imprisonment and fine. It is a crime against any party official or person responsible to disclose to fail to make the same known to the Registrar.[279]

Accountability of the political parties in respect of use of funds by party is prescribed in the legislation. The Registrar is empowered to receive annual statement of the audited account and declaration of all property owned by the party. Upon receipt and thorough perusal, the Registrar is entitled to publish any matter relating to funds, property, resources or use of the funds, resources and property. Similarly, the annual audited accounts of each registered political party must be published in the official gazette.[280]

Use of public funding is one of the sources of political finance.[281] There are more stringent regulations on the application, and use of the funds obtained through Government subventions.[282] Political parties which are qualified to receive

[278] See Section 13(2) of the Political Parties Act, Cap. 258, [R.E. 200[2.

[279] *Ibid,* Section 13 (3).

[280] See Section 14.

[281] There are both direct and indirect public funding of the political parties in the modern world. According to Steven Griner, all Latin America States, with exception of Venezuela, provide direct public funding in form of money or bonds and indirect public funding vide services, tax exemptions, training and media access. For a detailed discussion on this aspect see Steven G. *et al*, *Funding of Political Parties and Election Campaigns in Americas*, OAS and International IDEA, San Jose, 2005. The similar sentiments are expressed by Richard Kelly, *The Funding of Political Parties*, London, House of the Common Library 2007, pp. 8-17. It is stated that public funding include direct funding like Short Money, Cranborne Money and Financial Support for Sinn Fein while indirect political funding include funding of members and other elected representatives which may assist party in turn, party political broadcasts, free postage, free use of meeting rooms and inheritance tax relief.

[282] Only few political parties have access to the Government subvention as qualified parties. The qualifications include those having elected members of parliament basing on ratio of

subvention are required to use the same for the parliamentary activities of a party, the civil activities of the party, a lawful activity relating to election in which the party nominates a candidate and any other necessary or reasonable requirement of the party.[283]

Party subsidization is among the methods of financing politics in developed countries as well as developing countries. In Germany the subsidy plan started in 1959 when the federal budget included DM 5 million 'for promotion of political education by parties' and in 1962 a further DM 15 million was added a 'special funds for the tasks of political parties according to section 21 of their constitution'. In the distribution of these funds, the principle of 'political importance' of parties was applied. Only parties already represented in the respective Parliament were held worthy of being supported. The amount assigned to each party was primarily calculated according to the proportion of seats obtained. In some cases the proportional scale was added to a uniform basic quota for each party. As to the use to which these funds could be put, there were virtually no requirement or public controls.[284]

The current legal position in Tanzania seems to import some elements in the old Germany system as to the manner in which parties are entitled to get the government subsidy. However controls are put in place to ensure that public finances are not misused. Funds obtained through subvention must be accounted specifically. The Act goes further setting out clearly that "the party that fails to adhere to the requirements of accounting for subvention funds forfeits its right to any subsequent subvention due to the party. Similarly, any unaccounted amount or unsatisfactory account of the subsidy funds may be deducted from the subsequent subvention due to the party. Finally, the Registrar is empowered to report to police for investigation of the matter in case he suspects that any offence has been committed under Penal Code by the failure to submit the account.[285]

It is clearly observed that, the Political Parties Act does not ban any sources nor limit the amount of the funding to either political party or candidate. It only requires the party to disclose foreign sources of funding to the Registrar of Political Parties. Thus

number of constituents in the United Republic and those parties which got more than five per centum of the total valid votes casted in the constituents within the country as per provisions of Section 17 of the Act.

[283] Section 18 of the Act.

[284] Arnorld Heiderheimer, " The Major Modes of Raising, Spending and Controlling Political Funds During and Between Election Campaigns" in Arnorld Heiderheimer (Ed.), Comparative Political Finance, D.C Heath and Company, Massachusetts, 1970, pp. 43-44.

[285] See Section 18(2), (3), (4) and (5) of the Act.

the principle of funding under this legislation is based on two premises: one, that all registered political parties must disclose foreign sources of funding and two, all registered political parties have mandatory obligation to give thorough account of the resources, property and funds to the Registrar. Additionally, all entitled parties to government subvention must account categorically on the use of subvention in permitted activities as enumerated on foregoing part of this paper.

These two pieces of legislation namely, the National Elections Act and the Political Parties Act, prior to March 2010 were the only pieces of legislation providing some form of regulation on election financing or political activities financing generally. As it is seen in the above discussion, the coverage of these two laws on election financing was very limited to the extent of saying that the legal regime in the election financing was inexistent. This resulted into some calls from the Tanzanians for Tanzania to have in place the law dealing specifically with regulating political financing and particularly election financing. The Government saw the importance of having such a law and hence the enactment of the Election Expenses Act which is discussed here below.

2.2.3 The Election Expenses Act.

This Act unlike the two discussed above provides substantial provisions for the regulation of funding to cover for expenses for nomination process, election campaigns and actual election, with a view to controlling the use of funds and prohibited practices in the nomination process, election campaigns and elections. It also provides for allocation, management and accountability of funds and some other consequential and related matters.[286] This Act is divided into eight parts which are; preliminary provisions, administration of election expenses, election expenses, accountability, prohibited practices, offences and penalties, general provisions and consequential amendments.[287]

This Act defines election expenses as; a) in relation to nomination process, all expenses incurred by a political party during the nomination process; b) in relation to nomination of candidate under National Elections Act all expenses or expenditure incurred by a political p rty for facilitating its candidate for nomination; c) in relation to election campaigns all expenses or expenditure for the purpose of election campaigns and d) in relation to an election all expenses incurred by the Government, political parties and candidates.[288] All funds used for promotional arts group for purposes of presentation of a candidate also form part of the definition of election expenses.[289]

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[286] See the long title to the Act.
[287] These are part I, II, III, IV, V, VI and VII respectively.
[288] See section 7(1)(a)-(d).
[289] See section 7(2).

The Act further provides that, election expenses are to be incurred by political parties as per the Political Parties Act. Subject to the limitations put by the Act; a candidate may use his own funds during nomination[290] and election campaigns. Section 9(1) provides also that a candidate shall be required to disclose at least within seven days before the nomination day; in the case of a Presidential candidate, to the Secretary General; in the case of a candidate for the post of a Member of Parliament and a member of the Council, to the District Party Secretary, of a political party which sponsored that candidate the amount of funds which the candidate has in his possession; and expects to receive, intends to use as election expenses. The Act also obliges every political party which participates in any election, within thirty days after the nomination day, to disclose to the Registrar all funds which it intends to use as election expenses, including use of funds by candidates sponsored by such political parties.

In the other two Acts, there were no provisions limiting election expenses. Section 10 of the Election Expenses Act (EEA) is a remedy to this deficiency as it provides that the Minister shall, by an order in the Gazette, prescribe the maximum amount of election expenses depending on the difference in the size of electoral constituency; categories of candidates; population of people; and communication infrastructure. The Minister may also vary the amount of election expenses to be used by political parties during election campaigns. In case a political party or a candidate expends funds in excess of the amount prescribed, that political party or the candidate, as the case may be, shall be required to make a report to the Registrar containing reasons for the use of excess funds. A political party which or a candidate who uses funds contrary to the limit prescribed, commits an offence.

Subject to some conditions imposed, section 11 of the EEA allows voluntary donations. The Act provides that a political party may, for the purposes of financing election expenses, appeal for and receive voluntary donations from any individual or organisation from within and outside the United Republic, provided that the source of every donation, exceeding one million Tanzania shillings for an individual donor and two million Tanzania shillings for an organization shall, within thirty days of its receipt, be disclosed to the Registrar by the Board of Trustees of the political party concerned. Apart from other conditions, the Act in section 11(5) provides further that, it is an offence for a person to threaten to use force or violence, injure, damage or harm any person who donates or intends to donate any funds to a candidate, a member of his family or any of his undertakings. The penalty for this offence on conviction, is a fine of not less than one million Tanzania shillings and not more than five million Tanzania shillings or an imprisonment for a term of not less than six months and not more than two years or to both.[291]

[290] See Section 14.

[291] See section 11(7).

As it may be noted, the two Acts discussed above do not prescribe any limit of foreign funds that can be utilized to finance election. The EEA thus provides a solution to this deficiency in that section 12(1) provides clearly that;

> "No political party, Non-Governmental Organisation, Faith Based Organisation, Community Based Organisation, other body or institution or any member of such political party, Non-Governmental Organisation, Faith Based Election Expenses Organisation, Community Based Organisation, body or institution and no other person shall receive, bring or cause to be brought into the United Republic, any funds or anything which can be cashed or converted into funds which, on the ground of a donation or on other ground, is intended to be used or, in the discretion of such political party, Non-Governmental Organisation, Faith Based Organisation, Community Based Organisation, body, institution, member or other person, may be used to further the interest of any political party, own candidature or any other person who has been nominated or may be nominated as a candidate for any contested election".[292]

This is a good provision although it appears to contradict with section 11 discussed above which allows voluntary contributions from individuals or organisations outside the United Republic. This being the case, it is better to harmonize the two provisions before any problem occurs as regard the interpretation of these provisions.

Section 12(3) provides also that except as provided for under the Political Parties Act, the restriction on foreign funding imposed shall not apply to any funds received within, brought or caused to be brought into the United Republic during any period, in the case of the General Elections, ninety days before the election day; and in case of a by- election, thirty days before the election day. Here again there is a weakness which waters down the intention of the Act on prohibiting or restricting foreign funding. If foreign contribution is allowed in the case of the General Elections, ninety days before the election day; and in case of a by- election, thirty days before the election day, then a lot of illegal funding can be done timing these days. That, clever people will just be counting days to bring in money which in one way or another undermines democracy as the intention of the funders is unknown apart from the disclosure requirement discussed above.

The disclosure of sources of fund requirement in the Political Parties Act referred

[292] Section 12(2) provides that, the term "funds" as used in subsection (1) shall be construed to include: (a) money; (b) a motor vehicle; (c) an aircraft; (d) transportation; (e) T-shirts; (f) a flag; (g) printing, publication or distribution of leaflets, brochures or any other publications; (h) broadcasting, radio or television equipment; (i) provision of food or drinks; (j) promotional art groups; and (k) any other thing intended to be used for furtherance of election campaigns.

to above is also repeated in EEA under section 13 and 15. Section 13 of the Act provides that any Non-Governmental Organisations, Faith Based Organisations or Community Based Organisations which, for the purpose of election, wishes to participate in advocacy and public awareness, shall be required to disclose sources and the amount of funds that shall be used for that activity.[293] Within ninety days after the election these organizations are required to furnish to the Registrar information in relation to expenses incurred for the election .i.e. advocacy and public awareness. Contravention of provision of this section is an offence and upon conviction, one is liable to a fine of not less than five million shillings or to an imprisonment for a term not exceeding three years or to both sentences.

The disclosure requirement in respect of funds for election also falls on the political parties as well under section 15 of EEA. This section provides that;

> 15.-(1) All funds provided by an association or group of persons or by any person for the nomination process or election campaigns of a political party, whether as a gift, loan, advance, deposit or donation, shall be paid to the political party concerned and not otherwise and the political party shall disclose the received funds in the returns respecting election expenses.
> (2) A political party which fails to disclose any gift, loan, advance, deposit or donation received as required under subsection (1), commits an act of prohibited practices.

This provision clearly discloses persons who have made contributions to a particular political party. Such disclosure rule may discourage some organizations or individuals especially those with questionable integrity from continuing to make contributions to political parties thus enhancing the development of free and fair elections. However, this good provision is somewhat watered down by the weaknesses discussed in sections 11 and 12 relating to foreign contributions. In addition, failure to make such a disclosure can render one, in the absence of any reasonable explanation, be liable for disqualification from participating in the election.[294]

For purposes of accountability, section 16 provides that, any person who effects payments in respect of any election expenses shall ensure that the payment made is vouched for by a bill stating the particulars and by a receipt or some other evidence of payment. Section 17 further provides for apportionment of election expenses incurred by a political party. Section 18 provides for returns as to election expenses where a candidate who receives funds as election expenses is required, within sixty days from the polling day, to prepare and submit a verified report to his political party which sponsored him in the election. Furthermore, within one hundred and eighty days after submission of the report by the candidate, a given political party has to transmit to

[293] See section 13(1)&(3)

[294] See section 20.

the Registrar a report containing true returns in the prescribed form in relation to the candidate, a financial statement of all expenses incurred together with all bills and receipts or some other evidence of payment. The Act further provides that, where the political party fails to file the financial report and the audited report as required, that political party shall, in addition to payment of default fine of three million shillings and the requirement to file financial report at any later time, be disqualified to contest in any election including the next General Elections unless that political party files such financial and the audited report to the satisfaction of the Registrar before the next nomination day.[295]

Other important provisions in the EEA are those under PART V on prohibited practices. The Act provides for unfair conducts during the nomination process, election campaign or election.[296] It also provides for unconscionable funding[297], conveyance of voters[298], disqualification of candidates[299], and prohibition of prohibited practices prior to nomination process.[300] Lastly, on General offences and penalties, the Act provides that where no specific penalty is prescribed, on conviction the one concerned shall be liable to - (a) in the case of a political party, to a fine not exceeding shillings three million; (b) in the case of a candidate, to a fine not exceeding shillings one million; (c) in the case of an organization, corporation or institution, to a fine not exceeding shillings five million.

3. Political Finance as a Corruption Fuelling Factor

Lack of accountability and transparency in funding of political parties and election campaigns normally result into entrenchment of political corruption[301] in a state. We have noted that the current legal position in Tanzania addresses in a wide coverage issues on political and election financing. There are limits with regard to contributions that can be made to the political party or its candidate in election, banning or restricting certain sources, or limiting the expenditure in electoral processes.

Generally, corrupt political finance involves improper or unlawful conduct of finance operations, often by a candidate or a party, for the profit of an individual candidate, political party or interest group. According to Walecki,[302] there are at least ten major

[295] See section 18.
[296] See section 21.
[297] See section 22..
[298] See section 23.
[299] See section 24.
[300] See section 25.
[301] In its *Global Corruption Report,* Transparency International defines political corruption as 'the abuse of entrusted power by political leaders for private gain, with the objective of increasing power or wealth. (See http:/www.globalcorruptionreport.org/gcr2004.html, visited on March 12, 2009)
[302] Marcin Walecki, *Political money and corruption*, in Global Corruption Report, Transpar-

types of political finance-related corruption. First, there is illegal expenditure including vote buying. This is either directly or indirectly done by a candidate, party or agent to bribe voters or election officials.[303] Funding by infamous sources is yet another form of the political corruption. Either a political party or a candidate may accept money from organized crime such as drug traffickers, terrorist groups or foreign governments. These groups might even form their own political parties in order to protect their interests through political control. Thirdly, selling of appointments, honours or access of information is another form. Under this category, contributors may gain rewards in form of job selections, appointments in ambassadorial, ministerial or judicial positions, decorations or title nobility. Also money may be used to buy a seat in a parliament or candidacy.

Abuse of state resources is another major form of political corruption. Certain state resources, such as money and infrastructures, which are available to office holders, may capture state resources through the unauthorized channelling of public funding into companies, organizations or individuals. The fifth form is in terms of personal enrichment. This happens where a candidate is required to contribute significant amounts to a party's election funds and also to pay for their individual campaigns. Politics then becomes a rich man's game and elected representative accumulate necessary funds to pay for their next elections by taking a percentage on secret commissions and accepting bribes.

The sixth form of political finance corruption-related is demanding contribution from public servants. Political party or a candidate in need of money may impose excises upon office holders, both public and elected. In some regimes, a political party may also force public servants to become party members and then extort kickbacks from their salaries for some party expenditure. Activities disobeying political finance regulations form another category of political corruption. It is possible for a party or a candidate to accept donations from prohibited sources or spend more than the legal ceiling permits. Violations of disclosure requirements, such as inaccurate accounting or reporting or lack of transparent funding are often the cause of political scandals. The eighth form relates to political contributions for favours, contracts or policy change. One of the political motives for political contributions to political party or candidate is possibility of pay offs in the shape of licences and government contracts. These donations may be given for a government policy change or legislation favourable to a specific interest group.

Forcing private sector to pay 'protection money' may be synonymous to political finance associated with corruption. This is done in the form of extortion such as

ency International (London: Pluto Press, 2004), pp. 19-20.

[303] This form of political corruption is prohibited in Tanzanian Election law especially under Sections115 and 118 of the National Elections Act, Cap. 343, [R.E. 2002].

using tax and customs inspections to force entrepreneurs to hand over part of their profits to a political party. Lastly, limiting access of funding for opposition political parties is another form of political finance corruption. Some authoritarian regimes with a patrimonial economic system and political repression may seriously constrain financial resource to opposition parties.[304]

Political corruption being one of different forms of corruption ought to be reflected in the anti-corruption regimes in the democratic state. The international community, both globally and regionally recognize that political corruption is having adverse effects to democracy and good governance. The African Convention on Preventing and Combating of Corruption[305] takes that cognizance into account. It states that:

> Each State Party shall adopt legislative and other measures to (a) prescribe the use of funds acquired through illegal and corrupt practices to finance political parties; and (b) incorporate the principle of transparency into funding of political parties."[306]

The AU Convention provides a basis for the anti corruption regimes to deal with aspects of political corruption. There are two principles that are very crucial to that end. One is the express prohibition of the use of illegally and corruptly acquired funds to finance political activities. In the second part, the legal instrument requires the law to put in place the control mechanisms to ensure that the political finance is transparent.

4.0 Political Finance and Democracy

4.1 Introduction

Money matters for democracy because much of the democratic political activities could not simply take place without it. The misuse of money in politics, particularly when it reflects corrupt practices, creates major problems for democracies, not least because it threatens democratic principles of equal justice and fair representation. The public interprets irregularities in party and campaign finance in a broad context leading to distrust of the political institutions and processes.[307]

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[304] Marcin Walecki, *Political money and corruption*, in Global Corruption Report, Transparency International (London: Pluto Press, 2004), pp. 19-20.

[305] See UNDOC Compendium of International Legal Instruments on Corruption Second Edition, United Nations New York, 2005, 259. This Convention was adopted on 11th July 2003 by the General Assembly of the African Union Meeting held in Maputo, Mozambique.

[306] See Article 10 of the AU Convention.

[307] Marcin Walecki, *Political money and corruption*, in Global Corruption Report, Transparency International London: Pluto Press, 2004, Loc. Cit.

The regulation of the political finance has been an arena of conflict with the two fundamental principles of freedom speeches and right of association. Though there is a respect of these freedoms on one hand, the infringement imposed to them by regulating the political finance furthers the governmental interests of protecting the electoral process from corruption or appearance of corruption. It is stated that an absolute political marketplace is neither mandated by the First Amendment nor it is desirable, since when left uninhibited by reasonable regulation, corruptive pressures undermine the integrity of political institutions and undercut public governance in republican governance. Neither the freedom of speech and association nor the government's regulatory powers are absolute. There is doctrinal tension in striking the balance between protecting the freedom interests in free speech and association, on one hand, and upholding campaign finance regulation enacted with the intent to encourage political debate while protecting the election process from corruption on the other hand.[308]

According to Reginald Austin, there are five key points for funding of political parties learned from the experience of established democracies. One is that, political parties and their competition for political powers are essential for sustainable democracy and good governance. Viable party competing requires well entrenched political parties. They need to be encouraged to develop, strengthen and consolidate. Competing parties need adequate resources for necessary activities. Secondly, money is an essential part of this process and should be treated as an essential resource for good political practice. Thus, in new democracies it should not be treated solely as a problem but as a means to create a basis for democratic government. The challenge is to find the best with the wider interest of curbing or curtailing corruption and avoiding undue influence in politics. Thirdly, unfortunately some of activities of political parties are purely partisan. These activities will do no good either to civil society or the political system. The challenge is on modality of selection as to which activities are deemed necessary to run a democracy and how much money should be applied to finance these activities. Fourthly, the funding of political activity by parties and candidate should be made an issue of public debate. Disclosure and reporting rules and their implementation can provide for transparency of political funds. Transparency allows voters to make better decisions about which party or candidate they want to support. Lastly, too much reliance on funding from either private or public sector of the society is unwise.

Democracy involves pluralism in all things, including sources of funds for political activities. New democracies should try to encourage a mixture of public and private

[308] See Buckley versus Valeo 424 US 1(1976).

funding when designing law to regulate political finance.[309]It is agreed, therefore, that regulating political finance is one of the measures of ensuring that democracy takes its course within the community. Regulation of the political finance is directly proportional to enhancement of democratic principle in a state and absence of these regulations is an anathema to democracy. Non regulation and uncontrolled political finance create unequal playgrounds for political competitors in elections.

4.2 Controlling and Regulating Political Finance: Lessons to Tanzania

In the modern democracies, most countries have put in place regulations that regulate political financing. Before the enactment of EEA, 2010, Tanzania had no legislation that categorically dealt with regulation of modes of collection and spending of political finance before, during and after election in order to promote democracy in electoral process. However, Tanzania can also draw certain lessons from other countries in order to promote its democracy.

United States of America has several laws regulating and controlling the political financing. These include, Bipartisan Campaign Reform Act of 2002 (BCRA)[310] and Federal Election Campaign Act of 1971 (FECA).[311] These statutes provide for limits and prohibitions in relation to political finance in the USA. As a result they have been subject to contests before the Supreme Court. For instance, in the case of *Buckley versus Valeo*[312] the Supreme Court had to review the constitutionality of the Federal Election Campaign Act, 1971, which requires political committees to disclose political contributions and expenditures and limited to certain degrees, the ability of natural persons and organizations to make political contributions and expenditures. The Supreme Court upheld the constitutionality of certain provisions including contributions limitation to candidates for federal office, disclosure and record-keeping provisions and public financing provisions, so long as participation is voluntary. However, the Court declared unconstitutional other provisions dealing with expenditure limitations by candidates from their personal funds, the $1000 limitation on independent expenditures and expenditures limitations on candidates and their political committees.

More recently in the case of *Senator Mitch McConnell& 10 others versus Federal Election Commission*[313] the plaintiffs/petitioners in a consolidated petition challenged the constitutionality of the BCRA and sought declaratory and injunctive relief to prohibit its enforcement. In short the petitioners prayed the Court to nullify disclosure

[309] Reginald Austin & Maja Tjernstrom (Eds), Handbook Series: Funding of Political Parties and Election Campaigns, Stockholm, International IDEA, 2003.

[310] Pub. No. 107-155, 116 Stat. 81 (2002).

[311] 2 U.S.C $ 431.

[312] 424 U.S. 1 (1976).

[313] United States District Court for the District of Columbia, Civ. No. 02-582.

provisions that require the organizations to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections. Other provisions relate to national party soft money ban, the state and local party soft money, fundraising costs, tax exempt organizations soft money ban, federal officeholder and candidate soft money and state candidate soft money ban.[314]

The U.S Supreme Court in a majority decision[315] ruled out that the disclosure provisions relating to "electioneering communications" were constitutional. In reaching to this decision the court gave a rationale for the need to have provisions regulating the disclosure of identities and prohibition to accept, solicit, receive or transfer any "soft money", any contributions or expenditure that is not regulated in the following words:

> "First, disclosure provides the electorate with information as to where campaign money comes from and how it is spent by the candidate in order to aid the voter in evaluating those who seek federal office. It allows the voters to place each candidate in a political spectrum more precisely than is often possible on the basis of party labels and election speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office. Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favour that may be given in return. Third, and not least significant, recordkeeping, reporting and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above."[316]

Under American politics disclosure and expenditure limiting provisions are among the provisions that form part and parcel of the democratic processes. They are vital in the sense of creating fair playfield to all candidates and political parties participating in Federal, State or Local Elections.

Herbert E. Alexander[317] demonstrates the delicate balance between political equity

[314] See Section 323(a) -323(f) of the BCRA.

[315] Judge Kollar-Kotelly and Judge Leon gave per curiam decision while judge Henderson dissenting.

[316] United States of District Court for the District of Columbia, Civ. No. 02-582, p.120.

[317] Herbert E. Alexander, "Comparative Analysis of Political Party and Campaign Financing in United States and Canada" in Steven G et al (Eds), *Funding of Political Parties and Election*

and freedom of expression in underscoring the importance of regulating political finance. He states that "special interests, consisting of corporations, labour unions, trade associations, and members and ideological groups, seek influence on three levels in additional to lobbying, which is not herein covered. One is the political action route, using hard money and fully regulated by FECA; and political action committees (PACs) can give limited amounts to Federal candidate ($5,000) per election) and to party committees ($15,000 per year). A second route is through exercising of independent expenditures, which is hard money that is spent by PACs or individuals in unlimited amounts but must be disclosed. The third route is through use of soft money and issue advertising; both regulated but essentially is soft money spent directly by interests for issue advertising outside the 30-60 day limits for broadcast advertising.

In the UK, political finance is regulated by the Political Parties, Election and Referendums Act, 2000.[318] The Act makes provisions for establishment of the Electoral Commission, registration and *finance of political parties, donations and expenditure for political purposes*, election and referendum campaigns and conduct in the referendum, election petitions and other legal proceedings in connection with elections.[319] The Act provides, *inter alia*, for the right of the public to inspect the parties' statements of accounts,[320] criminalization for failure to submit proper accounts,[321] require the party to return the donations to the unpermitted donors either direct, through institution or submit the same to the commission where the donor is unidentifiable,[322] and the Courts are empowered to order forfeiture of the donations made by the impermissible donors.[323] Also, evasion of restrictions on donations through arrangements that facilitate or likely to facilitate the disguise or concealment of donations by a person other than the permitted ones is made an offence under section 61 of this Act.

It sanctions the treasurer of each political party to make quarterly reports on the donations received by the party in case the amount exceeds or in case added with other contributions amount to 5,000 pounds[324] while during general election period reports on the donations must be done on weekly basis.[325] According to section

Campaigns in Americas, San Jose, OAS and International IDEA, 2005, p.98.

[318] Chapter 41.

[319] See the preamble to the Act.(Emphasis added).

[320] Section 46 of the Act.

[321] See Section 47.

[322] Section 57.

[323] See Section 58.

[324] Section 62.

[325] Section 63. According to paragraph 6 of Section 63, the general election period commences on the date Her Majesty's intention to dissolve the Parliament in relation to general election is announced to the date of polling.

65 and 66, the report must be submitted within thirty days of the period under the report and must be accompanied by the declaration as to the treasurer's adherence or compliance to the law.

Similarly, donors whose donations to a party in their aggregate amounts to 5,000 pounds are required to submit the report to the Commission the donations made to party. This report must be submitted by 31st January of the year following that of which the donations were made.[326] This report must be accompanied with declaration and it is an offence for the donor to submit false information on donations that were made. The limit on expenditures is well addressed under Part V and the 8th Schedule to the Act. It provides in essence for the qualifying expenses.[327] It sets the limit for England, Scotland and Wales' parliamentary general elections.[328] Part VI read together with 10th Schedule to the Act, clear sets out controls relating to third party national election campaign and controlled expenditures by recognised third parties.[329]

5. Conclusion

Having in place a legislation that regulates political finance is of outmost importance to the deepening of democracy in electoral process. It has been demonstrated that, Tanzania is a new entrant in the regulation of political finance. This being the case, it is an opportune moment for Tanzania to have in place laws and other mechanisms which will ensure that the law of election financing is adhered to. If this is not done, the importance of the election financing provisions will be watered down and hence undermining democracy. While this is being done, the weaknesses which have been identified in the new legislation should be taken into consideration, because the weaknesses relating to foreign funding appears to pull back the efforts of furthering democratization in Tanzania. It is on account of this point that the Author of this article argues that democracy seems to be undermined in Tanzania.

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[326] Section 68 states firmly that full particulars and address of the donor, amount donated and the name of the political party or candidate to whom donations were directed must be disclosed.

[327] The qualifying expenses are those relating to party political broadcasts, advertising of any nature, unsolicited materials addressed to electors, any manifesto or document setting out the party's policies, market research and canvassing conducted for purposes of ascertaining polling intention, provision of any services or facilities in connection with press conference or other dealing with the media, transport to any place(s) to obtain publicity in relation to an election campaign, rallies and public meetings connected with an election campaign.

[328] Section 79 and the 9th Schedule to the Act puts the limit at £80000, £120000 and £60000.

[329] Section 94.

Finality of Trial Court Assessment on the Credibility of Witnesses as a Source of Injustice

By
John Rutta[330] and Frank Mukoyogo.[331]

1. Introduction

This paper attempts to review the rule of practice that, 'the trial court is best placed to assess the credibility of a witness and the court hearing the appeal which merely reads the transcript of the records, usually has no business to inquire into the decision of the trial court in this regard'. This rule, which traces its origin from the English Law[332], has been used by appellate courts in Tanzania, when hearing appeals, to escape their duty to inquire into the findings made by trial courts on the credibility of witnesses. The reason stated is that the trial court has the advantage of having the witnesses testify before it. However, there must be indicators of credibility or incredibility which are discernible from a witness's testimony or even his demeanour and which could go on record to justify the decision arrived at and to assist a court hearing an appeal to ascertain whether the grounds for the decision are valid. A higher court hearing an appeal on grounds of the weight attached to the testimonies given by witnesses, where the trial case was decided on the strength of the credibility of the witnesses, should be able to see on record the indicators of credibility which the trial court evidently perceived.

Furthermore, this paper argues that even though trial courts do not in most cases do it, it is possible to articulately take down the indicators of credibility or incredibility and thus account for one's decision where such decision is based on the credibility of witnesses and that the need and possibility to record indicators of credibility or incredibility at trial is almost never explored by trial courts and in turn by higher courts when exercising their supervisory jurisdiction on appeal because the rule that the trial court is best placed to assess the credibility of a witness appears to have, in most cases, ousted appellate jurisdiction with regards the credibility of witnesses.

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[331] LL.B, Mzumbe University, LL. M (IT & T) Student, Open University of Tanzania.

[332] Under English Law, a court's finding made after hearing the witnesses and observing their demeanour, is entitled to great weight and should not be disturbed unless it is clear that it is unsound (see Watt v. Thomas [1947] A.C. 484). In the English case of Clark v. Edinburgh Tramway Co. (1919) S.C. (H.L.) 35, an explanation was given for this rule in the following words, "Witnesses without any conscious bias towards a conclusion may have, in their demeanour, in their manner, in their hesitation, in the nuances of their expressions and even the turn of an eyelid, left an impression upon the man who saw and heard them which could never be reproduced in the printed page". The authors are opposed to this view.

2. Judicial Trends on Assessing Credibility of Witnesses

The rule is that, a trial court is better placed to assess the credibility of witnesses than the court hearing an appeal. In this connection the authors speak of trials and appeals and the general mechanism in which cases are heard by courts in Tanzania. The order of hearing cases is that, the subordinate court competent to try a case is the one that has the legal authority to entertain the matter first (original jurisdiction) before the dispute finds its way to the appellate court at the instance of the party aggrieved by the decision of the lower court. The exercise of original jurisdiction entails the carrying out of a trial. The purpose of a court trial is to allow the evidence to unfold so as to enable the presiding magistrate or judge to observe, hear and make findings as to the issues of fact between the parties.

Once the trial is over, it is done with and will not be repeated unless on appeal it is discovered from the record of the trial proceedings that the trial did not meet the standards of a valid trial or the trial judgment is insufficient, in which case the appellate court may order a retrial. Indeed, the court hearing an appeal does not carry out a trial but simply goes through the record of the proceedings and the judgment of the lower court against whose decision the appeal was lodged, in search of substantial irregularities[333], if any, within the confines of the grounds of appeal. The appellate court also allows the parties or their legal representatives to argue their respective cases but they are not, under normal circumstances, permitted to present any new evidence or witnesses or to recall their witnesses[334] for such is the character of a trial and ordinarily this could have and should have been done at trial[335]. They may only argue their respective cases while making reference to evidence they have already adduced which should be on record.

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[333] For instance in Michael Luhiye v. Republic [1994] T.L.R 181, the Court of Appeal of Tanzania held, among other things that, for a trial in a criminal case to be a nullity it must be shown that the irregularity was such that it prejudiced the accused and therefore occasioned failure of justice.

[334] Order XXXIX rule 27 (1) of the Civil Procedure Act, Cap. 33, [R. E. 2002] forbids the presentation of new evidence at the appellate stage.

[335] However, paragraph (a) of Order XXXIX rule 27 (1) of Cap. 33 provides an exception to the effect that where the court from whose decree the appeal is preferred had refused to admit evidence which ought to have been admitted, the appellate court may allow such evidence or document to be produced or witness to be examined on appeal. Paragraph (b) to this rule provides another exception which is where the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. Cap. 33 only applies to the district court, court of the resident magistrate and the High Court. The Court of Appeal is governed by the Appellate Jurisdiction Act [Cap. 141 [R. E. 2002] and the Tanzania Court of Appeal Rules enacted under this Act. The power to take additional evidence on appeal is provided for under rule 34(1) (b) of these rules.

At trial, parties are allowed to recount on their respective versions of the facts of the case. They do so by adducing evidence and calling witnesses. The party whose evidence and witnesses persuade the court to the required standard of proof wins the case. It is therefore important that the witnesses called appear to have credibility by inspiring confidence in the judge or magistrate presiding over the case. The term credibility denotes the quality of being believable. The signs of credibility are not usually described in statutes. The question of credibility is one to be determined on the facts of each case. Matters of credibility have little to do with the admissibility[336] of evidence. The credibility of a witness is determined way after the question of admissibility has been determined. The question of credibility of witnesses seeks to determine the weight to be attached to the evidence so adduced and evidence may be admissible even though the witness who adduced it does not appear to be credible. There are many indicators of credibility or otherwise, to be observed and recorded[337] by the court presiding over the case, and these include the demeanour displayed by a witness, that is, the general way in which the witness comports himself while giving his testimony.

The trial court's finding as to the credibility of witnesses is, usually, not to be disturbed on appeal. Various words have been used by courts in Tanzania to state this rule, the common one being, "the trial court is better placed to assess the credibility of witnesses than the appellate court which merely reads the transcript of the evidence"[338]. Also in *Omary Ahmed v. R.*[339] the Court of Appeal used the following words to describe the rule; "the trial court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on the record which call for a reassessment of their credibility". Different words have been used in some other cases, for instance in *Hassan Juma Kanenyera and Others v. Republic*[340] the Court of Appeal of Tanzania had the following to say;

> … in this particular case the reliability of the identification of the appellants largely depended on the demeanour of P. W. 4.

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336 The term admissibility has to do with the question whether or not a particular item of evidence will be received in court. There are certain classes of evidence which generally will not be admitted in court and they are thus described as inadmissible. These excluded classes of evidence are provided for in statutory law.

337 The authors take the view that even the most subtle of features of a witness's demeanour can be taken down on record for if they can be observed they can be recorded notwithstanding the suggestion in the English decision in Clark v. Edinburgh Tramway Co. (1919) S.L. (H.L.) 35, that some things are too subtle to be recorded. A judicial officer must in the first place be articulate and eloquent both in speech and in the preparing of court records.

338 See Augustino Kaganya, Athanas Nyamoga & William Mwanyenje v. Republic [1994] T.L.R. 16 (CA) and Ali Abdallah Rajab v. Saada Abdallah Rajab and Others [1994] T.L.R. 132. (CA)

339 [1983] T.L.R. 52 (CA)

340 [1992] T.L.R. 100 (CA)

This was the monopoly of the learned trial judge who believed P. W. 4. and we will be wrong to fault her[341]**.** The Court of Appeal of Tanzania in this case speaks particularly of the demeanour of the witness and not the credibility in its generality.

The rule does not entirely exclude all forms of indicators of credibility of a witness as perceived by the trial court from scrutiny by higher courts on appeal. For instance, credibility may be found in the consistency of a witness's statements in his testimony and because these statements usually go on record, the rule, clearly does not bar higher courts from reviewing the witness's statements to ascertain this consistency[342]. Therefore, a rather accurate statement of the rule should read thus: 'where the credibility or otherwise of a witness is inferred from his demeanour as displayed before the court, the trial court is better placed in the assessment thereof than the appellate court which merely reads the transcript of the record'. However, courts that invoke this rule do not, in most cases, make it clear that the rule applies to the witness's demeanour as displayed before the trial court. Instead, they use the term credibility which is quite wide and which may mislead some subordinate courts to consider that, under the rule, the trial court's findings as to all forms of indicators of credibility should not normally be disturbed on appeal.

3. Witnesses and Judicial Decision-Making

Where a witness gives a testimony with a direct bearing on the fact in issue and he is found by the trier of fact to be a witness of credibility, there is a great chance in that case that a decision may be pronounced in that case on the strength of that testimony even though it is the sole evidence supporting the decision[343]. In the event of an appeal on grounds of the weight of this evidence, the appellate court would have to go through the evidence as recorded by the trial court and assess its weight before reaching its own conclusion. In a case where findings are made on primary facts, these are also important because they form the basis for the ultimate decision of the case. It follows here, therefore that, in the event of an appeal on account of the weight of the evidence adduced, the appellate court would not only have to inquire

341 The emphasis is ours.

342 In Jeremiah Shemweta v. Republic [1985] T.L.R. 228, the High Court of Tanzania reversed the decision of a resident magistrate that convicted the appellant along with another, on account of, among other things, inconsistent testimonies of some prosecution witnesses which, the High Court ruled, seriously affected their credibility.

343 Section 143 of the Evidence Act, Cap. 6 [R. E. 2002] makes it clear that no particular number of witnesses is required for the proof of any fact. This has been interpreted in a number of cases to mean that even a single witness's testimony may form basis for judicial pronouncement provided he is found to be of sufficient credibility and his testimony answers the main question before the court. See Masudi Amlima v. Republic [1989] T. L. R. 25 (HC) and Yohanis Msigwa v. Republic [1990] T. L. R. 148. (CA)

into how the ultimate decision was reached but also as to how the primary facts were found[344].

It is therefore imperative that, the evidence as it unfolds in court including the testimonies made by witnesses goes on record. Indeed, Order XVIII rule 5 of the Civil Procedure Code[345] requires that the evidence of each witness be taken down in writing, in the language of the court, by or in the presence of and under the personal direction and superintendence of the judge or magistrate. The judicial duty to take down records of the evidence as it unfolds should never be underestimated because the judge or magistrate must be keen to take down exactly what is said, presented or what manifests itself in court and which is relevant to the facts in issue for the sake of manifestation of justice in the eyes of the parties and also to furnish the prospective appellate court with sufficient material to enable it to be in a position to fairly decide whether to uphold or reverse the trial court's decision.

4. Effect of the Credibility Assessment Rule

Most legal systems recognize in a variety of ways the possibility, indeed the probability, of error, and make provision for having the actions of officials reviewed at higher levels.[346] The appellate court is naturally superior to the trial court and if its view of the case differs from that of the trial court, the latter is superseded.[347]

This is not exactly the case with matters of credibility of witnesses particularly when such credibility is inferred from the witness's demeanour. Courts hearing appeals have been reluctant to interfere with the trial court's finding on the credibility of witnesses and to justify such an omission they invoke the rule that the appellate court is usually bound by the trial court's finding as to the credibility of witnesses where this is based on their demeanour. This is not peculiar to the law of Tanzania but also certain other jurisdictions are of this character. For instance, the United States of

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[344] In Jones v. Nation Coal Board [1957] 2QB 55, Lord Denning who spoke for the whole Court that heard the appeal said the following words, among others, at page 61, "We much regret that it has fallen to our lot to consider such a complaint against one of Her Majesty's judges but consider it we must, because we can only do justice between these parties if we are satisfied that the primary facts have been properly found by the judge on a fair trial between the parties. Once we have the primary facts fairly found, we are in as good a position as the judge to draw inferences or conclusions from those facts, but we cannot embark on this task unless the foundation of primary facts is secure".

[345] Cap. 33,[R. E. 2002]

[346] William Burnet Harvey, 'An Introduction to the Legal System in East Africa', at 132.

[347] Ibid

America has a similar rule[348] and so does India[349] and, as stated earlier, England. In East Africa the rule was described in *Selle v. Asso. Motor Boat Co.*[350], where Sir Clement De Lestang, the, then, Vice- President of the Court of Appeal for Eastern Africa, wrote as follows:

> … [An] appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect (emphasis is ours). In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially, to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

It is our view that, the court hearing an appeal must be independent of the trial court whose decision it is reviewing. It must only get hold of the trial court's record to know the facts but with the purpose of forming conclusions of its own. The fact that the court hearing the appeal ought to form conclusions of its own is testimony that it should never be bound by the findings of the trial court. If its independent conclusion matches that of the trial court, that does not mean that it was bound by the decision of the trial court. However, if we insist on the application of this rule which suggests that in most cases the appellate court is bound by the trial court's findings as to the credibility of witnesses, we create room for some judges or magistrates, in some cases, to refrain from inquiring into trial courts' findings by reason that they are

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[348] According to Ruggero J. Aldisert, while speaking of the exercise of the judicial function in America, in his book entitled 'The Judicial Process', 2nd Ed. At 678, "Fact finding is the province of the trial tribunal, be it a court or an administrative agency…....the fact finder is the sole judge of credibility and is free to accept or reject even uncontradicted oral testimony".

[349] In Sara Veeraswami v. Talluri Naraya AIR 1949 PC 32, an Indian case cited by Vinay Kumar Gupta in the book entitled MULLA, Code of Civil Procedure (Abridged), 14th Ed., It was stated, "Two conflicting view points have to be reconciled, namely, on the one hand, the undoubted duty of the court of appeal to review the recorded evidence and to draw its own inferences and conclusions, and, on the other hand, the unquestioned weight which must be attached to the opinion of the judge of the primary court (trial court) who had the advantage of seeing the witnesses and noting their looks and manner". In the words of Gupta in the book cited above, "Generally speaking, it is undesirable for an appellate court to interfere with the findings of fact of the trial judge who sees and hears the witnesses and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credit which attaches to one or other of conflicting witnesses". The authors are opposed to this view.

[350] [1968] E. A. 123.

bound by such findings. Such is the effect of the credibility assessment rule.

The rule has been interpreted as yielding the result that the trial court's credibility assessment power cannot usually be questioned on appeal. This also means that the right of appeal is thus curtailed. The right of appeal on grounds of fact is limited in some respects provided for in statute. Where the High Court has exercised appellate or revisional jurisdiction in a criminal case originating from the district court or court of the resident magistrate, either party may appeal to the Court of Appeal on a matter of law only[351]. In the words of Prof. G. M. Fimbo[352], "since this is a second appeal, there is nothing to be gained by canvassing matters of fact once again". If a criminal case originates from the primary court to the district court and then to the High Court, then no appeal on a matter of fact will be entertained by the Court of Appeal and likewise on matters of law. However, if the High Court certifies that a point of law is involved then such appeal will be entertained but raising matters of fact under these circumstances is out of the question. With civil proceedings, where the High Court has exercised appellate or revisional jurisdiction in a case originating from the primary court and finding its way to the district court and then to the High Court, an aggrieved party can only appeal to the Court of Appeal if the High Court certifies that a point of law is involved in the decision or order[353]. Otherwise if it is the first or second appeal, grounds of law and fact may form the basis for an appeal.

However, the credibility assessment rule is yet another curtailment of the right of appeal which is not known to statutes and which does not depend on whether it is a third, the second or first appeal. The application of this rule is inherently risky and it has insufficient justification. In a country like Tanzania where courts are vulnerable to issues of integrity[354], it is dangerous to have such a rule that makes the credibility assessment power at trial largely unquestionable on appeal. Therefore not only is this rule dangerous in itself but the situation is worsened by the circumstances of Tanzania.

Even though it appears that Common Law jurisdictions along with some other jurisdictions have accepted this as a well-settled principle of practice, we have no obligation to embrace it as well. Indeed the provisions of Section 2(2) of the

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[351] Section 6(7) (b) of the Appellate Jurisdiction Act, 1979. This means that you cannot appeal, under such circumstances, on a ground based on fact.

[352] Fimbo G.M. (1992), 'Constitution Making and Courts in Tanzania' at pg. 82.

[353] Section 5(2) (c) of the Appellate Jurisdiction Act, 1979.

[354] See the former CJ, Samatta's remarks, *"Corruption in the Judiciary Denies me sleep",* available at http://ip-216-69-164-44.ip.secureserver.net/ipp/guardian/2007/07/19/947, accessed on 19/07/2007

Judicature and Application of Laws Act[355] empower the High Court to modify the English Common Law to suit our circumstances[356].

5. Access to Justice and the Credibility Assessment Rule

An ideal system of administration of justice presupposes that all subjects with a sufficient interest to protect have access to courts and similar forums. Article 13(6) (a) of the Constitution of the United Republic of Tanzania[357], goes a step further to guarantee the subjects of the law of this country whose rights and; or obligations are being determined, the right to a fair hearing. It is implicit in the right to a fair hearing that one must have the right of appeal because, as pointed out earlier, there is always a possibility of error in the trial. Therefore the right of appeal is there to perfect the right to a fair hearing. Indeed the Article cited above guarantees further that the subjects of the law of this country will have the right of appeal or other legal remedy against the decisions of courts of law and those of other bodies which decide on their rights. Therefore, the right of appeal, where it is allowed by statute, is an essential part of the right of access to justice.

It has been established above that, the credibility assessment rule has been interpreted to limit the right of appeal in certain respects. It is important that any limitation of the right of appeal is sufficiently justifiable. In *Julius Ishengoma Francis Ndyanabo v. The Attorney General*[358], the Court of Appeal of Tanzania made the following remarks, "while in England a person's right to unimpeded access to court can be limited by mere express enactment, in Tanzania that right can be limited only by a legislation which is not only clear but also not violative of the provisions of the Constitution". This means that any curtailment of the right of appeal, which is not founded on clear provisions of statutory law, is questionable. The credibility assessment rule is not provided for in statutes in force in the United Republic of Tanzania and one may ask why is it so important to have such a rule that cuts into the right of access to justice.

The importance of the right to access to justice cannot be overemphasized. It was eloquently put in *Chief Direko Lesapo v. (1) North West Agricultural Bank (2) Messenger of the Court, Ditsobotla*[359], by Mokgoro, J., in a unanimous judgment of members of the Constitutional Court of South Africa, who had the following to say:

> The right of access to court is indeed foundational to the stability of any orderly society. It ensures the peaceful, regulated and institutionalized mechanisms to resolve disputes, without resorting to self help. The right

[355] Cap. 358 [R.E 2002].

[356] See Tanzania Air Services Limited v. Minister for Labour, Attorney General and The Commissioner for Labour [1996] TLR 217 (HC)

[357] Cap. 2 [R.E. 2002].

[358] Civil Appeal No. 64 of 2001 (CA).

[359] (CCT 23/99) [1999].

> of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.

The fact that the trial court has an advantage of seeing and hearing the witnesses who testify before it does not appear to be a good enough excuse for the court hearing the appeal to refrain from inquiring into the fairness and validity of the assessment of the credibility of witnesses by the trial court. This is due to the fact that, a court is bound to record what transpires during proceedings it presided over, in connection to the case under consideration, including the demeanour displayed by the witnesses in so far as this is material to the outcome of the case.

6. The Duty to make a Sufficient Record of the Trial vis-à-vis the Credibility Assessment Rule

This paper raises the question, 'to what extent is the need for the trial court to furnish the prospective appellate court with sufficient material to enable it to serve the purpose of an appeal compatible with the rule that the trial court is better placed to assess the credibility of a witness than the appellate court as this rule has been interpreted by courts'.

Appellate courts usually make a statement to this effect, "the trial court's decision was wholly based on the credibility of witnesses. It is that court which saw and heard the witnesses. I see no reason why I should fault the trial court on a matter of credibility when it is clear that the trial court believed the witnesses"[360]. In a case whose decision is solely based on the credibility of witnesses, it is strange for the record to contain nothing about this credibility but simply the words, "I believe the witness(es)" and it is even more strange for the appellate court to overlook this omission and say, "I see no reason why I should fault the trial court which believed the witnesses". Order

[360] In Hassan Juma Kanenyera & Others v. Republic [1992] T. L. R. 100 where the reliability of the identification of the appellants largely depended on the demeanour of PW4, the Court of Appeal had this to say: "The learned trial judge believed PW4 and we see no good reason to fault her". Also in Augustino Kaganya & Others v. Republic [1994] T. L. R. 16, the Court of Appeal said the following: "The learned judge came to the conclusion that PW2 and PW3 were credible witnesses and that their evidence was a true account of what happened. We see no reason to differ with the trial court's finding of fact". Again in Adventina Alexander v. Republic, Criminal Appeal No. 134 of 2002, the Court of Appeal stated, "The learned trial judge who saw PW1 giving evidence was satisfied she was truthful. We have found nothing to fault him on this".

XVIII rule 8 of the Civil Procedure Act[361] provides that, "The court may record such remarks as it thinks material respecting the demeanour of any witness while under examination". This rule is permissive but by no means does it confer an absolute discretion on courts to indiscriminately choose whether or not to record remarks on the demeanour of witnesses.

As pointed out above, the rule that the trial court is best placed to assess the credibility of a witness only applies where the credibility or incredibility is inferred from a witness's demeanour displayed while he was giving testimony. If a decision is founded solely on the credibility of witnesses which is inferred from their demeanour then it goes without saying that the court found this demeanour to be material and accordingly therefore, under Order XVIII rule 8 of Cap. 33, the court is enjoined to record remarks on the demeanour of the witness(es). A similar provision to this is section 212 of the Criminal Procedure Act[362] and the distinction between the provisions of this section and those of Order XVIII rule 8 of Cap. 33 are that, the latter states that, where the court finds the demeanour of a witness to be material to its decision, it shall record remarks respecting such demeanour. The use of the word 'shall' in Cap. 20 is what sets it apart from Cap. 33, which, surprisingly, uses the word 'may'.

B.D. Chipeta[363] argues that, case law on the consequences when a judgment does not comply with the provisions of subsection (1) of section 312 of the Criminal Procedure Act is to the effect that:

> failure to comply with these provisions will not necessarily invalidate a conviction if there is sufficient material on the record to enable the appeal court to consider the appeal on its merits: but that if there is insufficient material on the record to enable the appeal court to consider the appeal on merits, the conviction will be quashed[364].

The duty imposed on a trial court to furnish the prospective appellate court with sufficient material of the trial case on record to enable the latter to consider the appeal on its merits must always be complied with since non-compliance invalidates the judgment. The consequence of a judgment being invalid in this respect is that a retrial must be conducted. However, it is surprising that, courts hearing appeals in Tanzania condone the behaviour of trial courts of stating nothing in their judgments on the credibility of witnesses in a case whose decision was largely or wholly based on this credibility.

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[361] Op cit.

[362] Cap. 20, [R. E. 2002]

[363] In his book entitled 'A Magistrate's Manual', at p. 121.

[364] Willy John v. R., (1956) E.A.C.A. 509 and Kagoye Bundala v. R.; (1959) E.A. 780 (as cited by Chipeta).

The fallacy of the words, "I see no reason to fault the trial court which believed the witnesses", is that, in the absence of any recorded evidence to support the finding under consideration other than a recital of the trial court's expression of belief that the witness is credible but without giving reasons thereof, the appellate court is not telling us what justification it has in upholding the finding. Without inquiring into the reasons that prompted the trial court to take the view that a particular witness is credible, it is unfathomable that the court hearing the appeal can uphold this finding or, for that matter, upset it. Where, in a decision based on the credibility of witnesses, no reasons are on the record of the trial court to explain this credibility then the court hearing the appeal ought to quash the trial judgment. If the court hearing the appeal proceeds on the assumption that all is well with a trial court's finding that the witnesses were credible, it certainly will not see any reason to fault such a finding because there is no room to assess the credibility of a witnesses.

In *Augustino Kaganya and others v. Republic*[365] the Court of Appeal of Tanzania stated while referring to the trial case, "… we are satisfied that PW1 is credible. First, this is because the learned trial judge found her to be so and he is the better judge of that basing on the demeanour…" Now, the Court of Appeal in this case gave other, perhaps sufficient, reasons for taking the view that this witness was credible but it is disappointing that it stated as one of its reasons for taking this view and indeed the first of all the reasons, the fact that the trial court had reached the same finding. This reasoning does not appear to be in accord with the appellate court's duty to form its own independent conclusions. This is the highest court in the judicial hierarchy in Tanzania and of course it is a precedent setting court. Future courts hearing appeals would definitely be inclined to invoke the credibility assessment rule to avoid having to inquire into matters of credibility where the trial court made an inference in this regard from the witness's demeanour, content in the knowledge that the Court of Appeal has implied that the trial court binds the appellate court with its findings on credibility.

One serious ramification of the credibility assessment rule is that, if the sole ground of appeal is that the witnesses were not, by their demeanour, credible, then this ground would most likely be rejected and the appeal will not be heard on merits.

The contention in this work is that, it is possible for a trial court to not only observe the demeanour of a witness but also to articulately describe it on record and thus provide justification for its decision in a manner that is sufficient to give an impression to the prospective appellate court of what prompted it to decide the way it did. In *Mariam Tumbo v. Harold Tumbo*[366] the High Court through the late Justice Lugakingira set an

365 [1994] TLR 16 (CA)

366 [1983] TLR. 293 at 304-5.

excellent example to show that this is possible. He stated that:

> I have given long and anxious consideration to the petitioner's denial as well as her suggestion but, on a balance of probabilities I am inclined to accept the respondent's charge. And these are my reasons: First, I was not impressed with the petitioner's demeanour when the ownership of Exh. D11 was put to her. She suddenly changed and looked troubled, her voice sinking low**…**[367]

7. Conclusion

In order to be in a position to form conclusions of its own with regards to the ultimate decision reached by a trial court, the court hearing an appeal needs to ensure that, the trial court's findings as to primary facts were properly made. The court hearing an appeal cannot act on the assumption that the trial court's finding, regarding the credibility of witnesses, was sound for if such is the procedure then an appeal in this regard would be futile. Most of the court decisions referred to above detract from the need to answer questions of the credibility of witnesses. The record of a trial court, in so far as the demeanour of witnesses is concerned, does not, justify a finding that the witnesses in question are credible. Rather, it usually improves upon the statement of the trial magistrate or judge that he believed or did not believe the witnesses.

When a party questions the credibility of witnesses on appeal, the appellate court has nothing to go by in reviewing the record of the trial court to ascertain this finding as to the credibility. Under these circumstances, instead of invoking the credibility assessment rule to uphold or reverse a decision which the appellate court does not understand how it was arrived at, a more appropriate course of action would be to declare that the trial judgment is not a judgment as it is unfounded, and accordingly to order a retrial. Alternatively, the court hearing the appeal could call the witnesses and conduct a trial with regard to questions that need to be answered to properly find a judgment. What this work suggests may mean more work for magistrates and judges but such is the monumental responsibility of a judge or magistrate and the effect of the Latin maxim that goes, "*Fiat justitia, ruat coelum*". Properly translated into English, this maxim states, "Let justice be done though the heavens fall". A court must do its duty without regard to consequences.

[367] The emphasis is ours.

Critical Analysis of the UN Convention on Rights of Persons with Disabilities

By Harold Sungusia[368]

1. Introduction:

On 24th May 2009, Tanzania ratified the UN Convention on Rights of Persons with Disabilities. The step taken by Tanzania in ratifying the Convention calls for serious discussion on the whole subject of protection of the rights of persons with disability in Tanzania and will inevitably lead to the reform of laws in order to ensure compliance with the provisions of that Convention.

The whole essence of protection of human rights is essentially centred on assurance of respect of human dignity. This underlying reality can be construed from the text of every human rights instrument such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the rest of other international, regional and national human rights instruments. It has even been stated explicitly that, the elements for establishing human dignity are the cornerstone of human rights. It is thus said that the "concept of human right is endowed with an inner regulatory unity that is grounded on the equality and dignity of each human being."[369] In this foundation of dignity is where the discussion on the rights of persons with disability will be focused upon. The paper considers the magnitude and seriousness of abuse of rights of persons with disability; taking note that by August 2006 there were about 650 million people worldwide who have been with different types of disabilities[370].

In addressing the matter, the paper discusses briefly basic concepts and theories about disability and various international instruments that address disability. The main part focuses on the discussion of whether the newly adopted Convention on Rights of Persons with Disabilities will be able to provide for a better mechanism for protection of rights of persons with disability. Finally the paper makes propositions

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[369] Ibid pp. 39-40.

[370] See Press Release, UN News Centre, Annan hails agreement on treaty protecting rights of persons with disabilities (August 28th 2006) see also http://www.vovnews.vn/?page=126&nid=21126.

which attempt to redress the mischief identified in the UN Convention on Rights of Persons with Disabilities.

2. Conceptual Discussions on Disability

The term 'disability' is defined literally in English thesaurus[371] to mean, a restricted capability to perform particular activities, which is an inability to perform some or all of the tasks of daily life, when defined medically; it connotes a medical condition restricting activities: a medically diagnosed condition that makes it difficult to engage in the activities of daily life. The concept has been widely debated about its universal and generic application.[372] Many scholars agreed that the term is a complex one which cannot easily be defined. Despite these complexities, those who are promoting protection of rights of persons with disabilities have never ceased to attempt to define it which categorically has led to various schools of thought in respect to the meaning of disability. The complexity is further aggravated by the distinction between impairment and disability. Those who see impairment itself as a disability can be classified as medical[373] model school of thought. The medical school treats disability as a disease and a person with disability as a patient. Medical personnel try to fix the impairment of the disabled person through rehabilitation or corrective surgeries. For clarity, the word 'impair' literally means 'weaken something or to lessen the quality, strength, or effectiveness of something'[374].

The other school of thought is the social model, which considers that social exclusion is a huge problem than impairment itself. This school of thought tries to see how the society organises itself to exclude or include people with disabilities in the society. The school addresses three major areas of exclusion such as physical, institutional, and attitudinal. In reality the two concepts mean that the former focuses on the individuals physical challenges as a problem while the latter focuses on the society [including environment] and the way it fails to accommodate an impaired person as a problem.

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371 Encarta ® World English Dictionary © & (P) 1998-2005 Microsoft Corporation.

372 See the report of scientific meeting held in Charles University in Prague devoted in addressing Article 2 of the UN International Convention on the rights of Persons with Disabilities, which agreed that the definition of disability to have been proven to be one of the most contentious issues facing the delegates. See Measuring Health and Disability in Europe at www.mhadie.it.

373 See disability only as 'medical' or 'biological' dysfunction a http://www.who.int/disabilities/media/news/30_03_2007/en/index.html.
see also F. Given., Moving Towards the Social Model of Disability, a Presentation at the 2005 Commonwealth Law Conference, London available at www.interights.org/doc/Moving%20Towards%20the%20Social%20**Model**%20of%20**Disability**.doc

374 Encarta ® World English Dictionary © & (P) 1998-2005 Microsoft Corporation.

3. International instruments of general application

Drawing the above mentioned challenge of defining the term disability to the discussion, the international bodies have been addressing the issue of disability in various capacities. The adoption of the Convention on the Rights of Persons with Disabilities in December 2006 could also raise a legal question as to whether the International Community really needs a particular convention, meant to exclusively promote and protect the rights of a cluster of individuals with disabilities. Additionally, a similar issue may be framed in other words questioning whether the available numerous list of international, regional and national human rights instruments have failed to protect the rights of persons with disabilities hence adoption of this particular convention? Likewise, one may also query whether persons with disabilities do not have the same rights as everyone else? Such issues go into the essence of the Convention for rights of persons with disabilities by exploring its mandate, legitimacy and relevance.

The Universal Declaration of Human Rights,[375] which is not legally binding, but read together with various human rights instruments if ideally applied, would be enough to protect everyone. The international community through UN has adopted six core human rights instruments to carter for human rights generally. These core instruments are the International Convention on the Elimination of All Forms of Racial Discrimination;[376] the International Covenant on Civil and Political Rights;[377] the International Covenant on Economic, Social and Cultural Rights;[378] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[379] the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[380]; and the International Convention for the Protection of All Persons from Enforced Disappearance.[381] However, practice has shown that, various vulnerable groups, such as women and children, need special protection. Thus, it become necessary to evolve other Conventions, such as the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women, which added core instruments to eight covering women and children as vulnerable groups.

The Convention on the Rights of Persons with Disabilities, adds in the list of core instruments to make them nine. To answer the issue whether the rest of the above

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375 Adopted by the UNGA on 10th December, 1948.

376 Came into force on 21st December, 1965.

377 Came into force on 16th December, 1966.

378 Ibid.

379 Came into force on 10th December, 1984 up to June 2009, this convention was not yet ratified by Tanzania.

380 Came into force on 18th December, 1990.

381 Not yet in force.

instruments could not be sufficient, it is important to address the reality that issues of disability are normally related to xenophobia and discrimination. In principle, discrimination contradicts the whole essence of equality of human dignity hence a human rights concern. As all of human rights instruments are founded on the equality of human dignity; it could be assumed therefore that, discrimination on the basis of disability is well covered. However, disability requires specific attention by the international human rights law just like the way the vulnerability of women and children required such attention. It is indicated that about 10 per cent of the world's population are persons with disabilities who eventually lack the opportunities of the mainstream population.[382] They face barriers both socially and physically such as inhibiting them from services such as education, employment opportunities, information, health, exercising their freedom of movement, and having social interactions. World Health Organisation (WHO)[383] is quoted as stating that:

> Because of discriminatory practices, persons with disabilities tend to live in the shadows and margins of society, and as a result their rights are overlooked. A universal, legally binding standard is needed to ensure that the rights of persons with disabilities are guaranteed everywhere.

4. Analysis of the Convention on the Rights of Persons with Disabilities

1.1 Background:

There have been prior efforts to promote universally acceptable standards for disability legislation.[384] In 1993 the UN adopted the Standard Rules on the Equalization of Opportunities for Disabled Persons[385] that have provided policy guidelines on promoting the same opportunities to persons with disabilities that others enjoy and these have served as a threshold in the making of the UN. However these Rules are not binding as there is no convention to support it.

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[382] http://www.who.int/disabilities/media/news/30_03_2007/en/index.html.

[383] Ibid.

[384] Declaration on the Rights of Mentally Retarded Persons; the Declaration on the Rights of Disabled Persons; Principles for the protection of persons with mental illness and the improvement of mental health careConvention on the Rights of Persons with Disabilities [adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106] and Optional Protocol to the Convention of Persons with Disabilities 2006. At its July 2000 session, ECOSOC adopted by consensus a resolution on the further promotion of equalisation of opportunities by, for and with persons with disabilities (2000/10)

[385] In 1993, as a result of the International Year of Disabled Persons in 1981 and the United Nations Decade of Disabled Persons from 1983 to 1992, Member States of the United Nations agreed on a new international document to focus worldwide attention on the need for equal rights and opportunities for persons with disabilities - *the Standard Rules on the Equalization of Opportunities for Persons with Disabilities*. See http://www.un.org/ecosocdev/geninfo/dpi1647e.htm

The General Assembly established an Ad Hoc Committee in 2001 to negotiate a Convention. The first meeting was held in August 2002, and drafting of a text began in May 2004. In August 2006, the Committee reached agreement on the text. Delegates to the Ad Hoc Committee represented NGOs, Governments, national human rights institutes and international organizations. It was the first time that NGOs had actively participated in the formulation of a human rights instrument.

4.2 Anatomy of the Convention:

The Convention can be classified into four major parts as set out below.

1.1.1 Policy/Principles

The first part is what can be referred to as Policy or Principles part. This part has two sub parts which cover the objective contained in the Preamble and in Article 1[386] and the key principles embodied in Article 3. These principles go together with the eleven general obligations which are listed in Article 4. The convention comes with a number of new terminologies such as universal design, reasonable accommodation, and minimum possible adaptation which still need a close scrutiny. The general rule laid in Article 4(1) of the Convention diverges from the doctrine of maximum available resources, where it states that the state parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on basis of disability.

1.1.2 Rights

The Second part defines the rights, which we can categorize into two major types, those which are general rights applicable to all human beings irrespective of their status, and the second type being the specific rights which are meant for disabled persons. The main qualification on these rights enumerated from Article 5 to Article 30 in the Convention is a general prohibition of discrimination on basis of disability. It is mandatory for state parties to ensure that human rights are enjoyed by all persons on equal basis. The specification is thus imposed on various rights in order to address the vulnerability of persons with disability.

Essentially, it is here submitted that, the Convention has not pronounced any new human rights but makes qualifications in a number of human rights in order to address disability.[387]. For example, the right to freedom of movement in Article 12 of the ICCPR, is qualified in the present Convention in a number of ways such as in Article 9 by imposing obligations upon states to ensure that, persons with disability have access on equal basis with others to the physical environment, to information and communication including identifying and elimination of obstacles and barriers

[386] This is the preamble and the purpose of the Convention as indicated in Article 1,

[387] See from Articles 5 to 30

to accessibility to buildings, roads, transportation and other indoor and outdoor facilities.

Additionally, the Convention in Article 18 qualifies the freedom of movement and nationality by imposing obligation on states to ensure that persons with disability are treated on equal basis with other persons in regard to liberty of movement and right to change ones nationality. Finally, in Article 20 the convention declares right to personal mobility, which is specifically meant for persons with disability where the state parties are obliged to facilitate the personal mobility of persons with disabilities in a manner and at time of their choice and at affordable cost. Such qualifications to freedom of movement may tempt one to think that there are new rights which are pronounced, but in reality they are not new pronounced rights but additional qualifications meant to eliminate discrimination and enhance realization of the rights by persons with disabilities.

The rights that are mentioned in the Convention[388] includes right to equality before the law; freedom from multiple discrimination; equality of children and child's right to freedom of expression; freedom from discrimination; right to access to physical environment; right to respect of one's dignity; liberty of movement and nationality; right to live in the community; right to personal mobility; freedom of expression, opinion, and access to information; right to respect of privacy; right to respect of home and family; right to education; right to health; right to rehabilitation; right to participate in international affairs; right to participate in cultural life, recreation, leisure and sport; right to adequate standard of living and social protection; right to participate in political and public life; and right to work and employment.

1.1.3 Obligations

The third part of the Convention comprises of obligations. The classification of the obligations is done in three ways; firstly, it classifies them in respect of their targets. In this manner, one could classify them as states' obligations vis-à-vis non state actors' obligations. The States' obligations can also be sub classified into intra-state[389] obligations and inter-state[390] obligations. The non state actors' obligations cover a number of actors such as individual members of the society, guardians or parents of a person with disabilities, companies or entities, and the society at large[391]. Secondly, the classification may be made on the nature of the obligations. There are obligations whose nature is recognition of certain values, standards or rights,

[388] From Articles 5 to 30

[389] Obligations which an individual state party has to implement within its territorial jurisdiction

[390] The Obligations of a state within the international community such as in Article 4(2) and Article 40

[391] See Articles 4(1)(e); 9(2)(b); 21(1)(c)

as compared to obligations which in nature are enforceable ones. The convention requires recognition of certain rights and stipulates measures to be undertaken; this is what we regard here as recognition vis-à-vis enforcement obligations, however, all enforcement obligations are secondary where the recognition obligations are primary. Lastly, the classification can be made on basis of weight of implications inferred by the text language. There are obligations scribed in light weights such as "states undertake"[392] or "states recognize".[393] Such phrases seem to impose lighter obligations than the ones which say "states shall"[394] do certain things. Likewise it may suggest that the language of the text of the convention suggests mandatory obligations and progressive obligations.

4.2.4 Operational matters

The fourth part consists of operational matters. These include provisions for ratification, reporting, cooperation, reservation and denunciation. Additionally, there is an optional protocol to the Convention which may be deemed to be part of the operalization component since it provides for the recognition of the competence, mandate and jurisdiction of the Committee on the Rights of Persons with Disabilities.

1.2 Drafting irregularities

There are some noted irregularities in the drafting of the text of the convention. In Article 1, there is no link between the purpose in paragraph one and the definition in the second paragraph. Since there is a definition Article, the definition of persons with disability would have been moved there. Secondly, in Article 2, the definition of discrimination ought to have used the word "any" instead of the word "all"; likewise Article 26(1) uses the word "through" instead of "thorough". Article 12(5) concerns right to own property. This right should have been treated as an independent right in its own article, since its inclusion in Article 12 is misleading.

5. Foreseeable Challenges facing the Convention;

The Convention is one of the steps of the international community in addressing the vulnerability of disabled persons. Article 1 describes a threefold purpose of the Convention which is to promote, protect and ensure full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity. The adoption of the convention therefore leads to the discussion as to whether violation of rights of persons with disability would now be curtailed. Despite of all progressive elements that the convention has brought there are foreseeable limitations or challenges that are certain.

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[392] See for example Article 4(1); 8(1)

[393] See also for example Articles 5(1); 6(1); 24(1)

[394] Most of the text of the provisions of the Convention see Articles 7(1); 10

1.1 Definition problem

The Convention does not define the term "disability". This is exemplified by the long debate of various groups during the drafting of the convention some of which had proposed that each state party to the convention creates its own definition[395]. Such proposal would have defeated the conventions primary goal of universality, indivisibility and interdependence of all human rights and fundamental freedoms for persons with disabilities. As a compromise, the Convention has instead tried to encompass the two models in the definition of disability by considering both the individual impairments and the societal exclusions in defining persons with disability. The definition offered by Article 1 of the Convention reads:

> Persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. (Sic)

The ordinary meaning of the paragraph suggests that, what is written is not conclusive, that is why it began by stating that persons with disabilities "include" It may be argued that the Convention treat disability is an evolving concept and results from the interaction between a person's impairment and obstacles such as physical barriers and prevailing attitudes that prevent their participation in society[396].

It is also said that the more obstacles there are the more disabled a person becomes[397]. One would also like to enquire as to what other areas of disability that is impliedly defined, since the provided definition caters for an expressly defined category. The European team had suggested the following definition[398];

> Disability is a decrement in functioning at the body, individual or societal level that arises when an individual with a health condition encounters barriers in the environment

However, the consensus was reached that, Convention is intended to be a document that seeks to ensure progressive realisation of rights that will lead to an ever-increasing response to the rights of persons with disabilities, the definition of 'disability' must not be restricted to specific groups that are in dire need, but it should be flexible so that as resources become available, the threshold of disability can be adjusted so that more and more individuals can benefit from these resources. It can be argued that, both defining and not defining has advantages and disadvantages, but since the International Convention is an international law, the general rule is that law must be certain. It is impractical to adopt a vague document, since its implementation

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395 See MHADIE (2004), op cit, p. 5.

396 Given, F., Moving Towards the Social Model of Disability op cit.

397 http://www.who.int/disabilities/media/news/30_03_2007/en/index.html

398 See MHADIE (2004), op cit, p. 5.

would adversely be impaired. How could a state legislate on rights of persons with disabilities without knowing what disability is?

1.2 The General Principles in relation to disabled persons' social economic and cultural rights and state obligations

1.2.1 "Equal basis" principle

Article 3 of the Convention lists eight general principles. These principles are reflected in the whole text of the Convention. The principles include, respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; and respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities. The underlying principle here is the principle of equality. It is strange to note that the affirmative action is not expressly reflected in the Convention even where persons with disability have been victims of marginalization, exploitation and discrimination for centuries. A good example is Article 3(e) which addresses the equality of opportunity. This principle is reflected in most of the Articles where the phrase "on equal basis is dominant.

Equality of opportunity in this scenario may still be disadvantageous to persons with disabilities and still result into social injustice. Equality of result would have been the best practical solution to the implementation and enforcement of the rights of persons with disabilities. Right to education in Article 24 and right to work in Article 27 stipulate the equal basis" principle which is a reflection of the principle of "equality of opportunity". Nevertheless, Article 24(1) (c) tries to qualify the substance of the equality of opportunity by directing towards the end result by stating that the education system shall be directed to enabling persons with disabilities to participate effectively in a free society. However, that is a pre-meditated product of equality of opportunity and not necessarily the equality of result[399] which is achieved through an affirmative action. The text of the convention guarantees procedural equality but not substantive equality. It focuses on equal treatment of individuals but does not guarantee an outcome which is equal; it ought to have considered persons with disabilities as disadvantaged groups thus invoke affirmative action.

5.2.2 The Concept of Multiple Discrimination

Article 6 of the Convention addresses the incidence of multiple discrimination against

[399] Bob Hepple, Equality and Empowerment for Decent Work, ILO, 2001, pp.7-9.

women and girls with disabilities. Since human rights are universal, indivisible and interdependent, it may be inferred that the level of protection should be the same. In the same case multiple discrimination is discrimination in itself, but discharged on different basis. Protecting an individual from multi discrimination requires multi-measures. Article 6 (2) is vague in respect to the object and purpose of the Convention. Unlike the rest of the articles which keep referring to persons with disability, Sub Article 2 is of general application to all women. The Article requires state parties to ensure the full development, advancement and empowerment of women, not women with disabilities whereas the Article 7 consistently referred to children with disabilities. Furthermore, measures that state parties should take must be directed to children with disabilities unlike the measures that are required to be directed to women generally. Since most forms of discrimination are prescribed by certain instruments, it is illogical for Article 6 to impose a blanket obligation to state parties which in essence may dilute the effectiveness of the measures in other words general measures have proved unviable that is why the Convention was adopted.[400]

5.2.3 General Obligations

Article 4 of the Convention imposes general obligations to states parties. The General rule is that, state parties undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on basis of disability. This general rule suggests a clear divergence from the doctrine of "maximum available resources". Controversially, the Convention assumes that there is a clear cut difference between other human rights vis-à-vis economic, social and cultural rights. The Convention gives a reasonable standard that of "full realization" but later falls back to the controversial trap in Article 4(2) by requiring measures to be taken by state parties to the "maximum of their available resources". Critically, it may also be argued that there are obligations which states have to undertake regardless of their available resources. These are mentioned in Article 4(1) (a) to (i) such as legislating to implement the convention, modify and or abolish laws affecting persons with disabilities, protection of human rights in all policies, take measure to eliminate discrimination, promote research and development of universally designed goods and facilities, as well as assistive technologies, to provide accessible information and promotion of training of personnel working with persons with disabilities.

[400] See the preamble of the Convention stating that "*Concerned* that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world"

5.2.4 Specific Obligations for enforcing the rights provided for in the convention

5.2.4.1 Obligations related to rights:

State parties are given specific obligations in implementing the rights provided by the Convention. The general character is that, state parties are given obligation to recognise the said rights then there are specific measures which the state parties are supposed to undertake in order to ensure the realisation of the said rights by persons with disabilities. For example, Article 15 which prohibits, torture, requires state parties to take legislative, administrative and judicial measures to prevent persons with disabilities from torture. For rights which do not fall under the category of economic, social and cultural rights, it may be presumed that states have an obligation to implement immediately.[401] Additionally, the Convention, uses slippery language such as "state shall recognise" unlike the European Social Charter which clearly states that persons with disability shall have right to education or employment.[402]

5.2.4.2 Rights without Obligations

Arguably, there are some rights in respect of which measures to be undertaken by state parties are not defined. For example, Article 17 provides that, a person with disability has right to respect for his dignity. It is not stated as to what measures the state parties should undertake. Additionally, there are measures which are for general application. For example, Article 8 creates an obligation to state parties to take immediate, effective and appropriate measures to raise awareness in the society on disability. Likewise, some provisions of the Convention create outline measures to be taken by state parties. See for example Article 8, outlines awareness raising as being a measure, which states are specifically required to undertake through a number of activities such as initiating and maintaining effective public awareness campaigns.

5.2.4.3 Obligation to Regulate Non-state Actors

Article 4(1)(e) of the convention goes further to create an obligation upon states to take appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise. This obligation is consistent with the provisions of Article 16, which requires state parties to undertake measures to prevent exploitation, violence or abuse of persons with disabilities. The main challenge that still remains is the extent at which such measures can address the attitudinal behaviour of individuals. Some forms of discrimination are not easily controlled by law and that is why Article 8 imposes a duty on states to undertake campaigns for

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401 See Article 8

402 Cf. Rights of people with disabilities :Fact sheet on Article 15 of the Revised European Social Charter and the wording in the convention that state parties shall recognise such rights, the EC charter says that individuals shall have such rights, not just a matter of recognition of the same by states..

behaviour changes. Additionally, the Convention requires state parties to encourage the media to portray persons with disabilities in a manner consistent with the purpose of the convention.

5.2.4.4 Obligation to Consult Non-state actors with Disability (bi-partite system)

Among the new innovations that the Convention devised was the inclusion or participation of non state actors in the decision making process for development of policies and legislation in the implementation of the convention. Article 4(3) requires state parties to closely consult and actively involve persons with disability including children with disability through their representative organisations. It is a good strategy to involve the relevant actors in the process of addressing their interest but goal may be difficult to achieve unless there is an additional protocol that describes the nature and jurisdiction of their participation, since conflicting representatives may lead to an abuse of the process to the detriment of the persons for whom the convention seeks to protect.

5.2.4.5 Obligation to Cooperate within the International Framework

State parties are required to undertake measures to the maximum of their available resources but where there is a need, Article 4(2) allows for international cooperation. This cooperation is important as a facilitating factor. The preamble to the Convention considers poverty as an aggravating factor to victimisation of persons with disability. International cooperation may then be invoked as a ladder towards achieving the obligations. This may be in areas such as development of universally designed goods, services, equipments and facilities calculated to relieve the burden experienced by persons with disabilities. The Convention goes a step further by providing for conference of states in Article 40, whereby state parties have to meet regularly to consider any matter with regards to the implementation of the Convention. The first meeting was to be convened within 6 months after the coming into force of the Convention and the rest of the meetings were to be convened biannually. Likewise the Convention encourages non-state actors to convene meetings and state parties to organise regional conventions. Unfortunately, Article 40 does not define the composition of the state delegation. It can be argued that there ought to be a mandatory requirement that such delegation must consist of representatives of Disabled Persons Organisations. Absence of such provision may still lead to the exclusion of persons with disabilities from participating in the decision process of matters which affect them.

6. Recommendation and Conclusion

The Convention has particular implications to civil, political, economic, social and cultural rights of persons with disabilities. The mischief that persons with disabilities are facing is not in itself the only issue, but it is a multi-faced one, which in essence

requires a multi faced approach too. According to the Vienna Convention on the Law of Treaties,[403] States that have signed a convention are taken to have shown their preliminary intention to comply with the objectives therein. In a way states are thus expected to promote, protect and ensure the full and equal enjoyment of the human rights and fundamental freedoms by all persons with disabilities, and to promptly respect their inherent dignity.

Tanzania has ratified the said Convention. The Convention comes into force one month after 20 countries have ratified the treaty and ten states have ratified the optional protocol. It is said that the Convention came with innovative provisions due to its rich and wider involvement of diversity of stakeholders such as individuals and NGOs, hence breaking the taboo[404] of closed door drafting of UN instruments. More interestingly, some ILO features are also embodied in the Convention, such as "non reduction of standards" rule which is provided for by Article 4(4) which reads that, "nothing in the present Convention shall affect any provisions which are more conducive to the realisation of the rights of persons with disabilities and which may be contained in the law of a state party."

The Convention which is a progressive instrument, being the first of its kind, tries to set a threshold standard. The innovations such as assigning a special meaning to "reasonable accommodation" widen the scope of protection of the rights of individuals with disabilities. Notwithstanding some drafting irregularities as stated above, the Convention is drafted in sufficient detail, which may even be criticised as being verbose and which does not need to be legislated. To resolve such possible criticism the language of the Convention consistently maintains the open end by invoking the word "including" when referring to the measures which can be adopted by state parties. Nevertheless, there is a challenge that keeps facing the international community on how to effectively address the attitudinal change by the society. These should be means of changing the attitude of the society so that it may frankly admit the equality of dignity between persons with disabilities and persons without disabilities.

Lastly, there has been a tendency by a number of developing states (including Tanzania) to invoke an excuse of poor economies in denying enforceability of social,

[403] Article 12 of the Vienna Convention on the Law of Treaties 1969, consent to be bound by a treaty expressed by signature, page 108 Elementar International Recht, Assur Institute, 2007

[404] Justesen, T.R, and Justesen , T.R., Analysis of the Development and Adoption of the UN Convention Recognising the Rights of Individuals with Disabilities. In Human Rights Brieaf winter 2007 page 36

economic and cultural rights. Borrowing the wording from the Limburg Principles,[405] this Convention makes similar reference to "progressively achieve full realisation of the rights," the term means to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realization.[406] On the contrary, all State parties have the obligation to begin immediately to take steps to fulfil their obligations. As a general rule State parties are obliged, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all. The phrase "Its available resources" refers to both the resources within a State and those available from the international community through international co-operation and assistance[407]. And in determining whether adequate measures have been taken for the realization of the rights recognized in the Covenant, attention shall be paid to equitable and effective use of and access to the available resources. In this scenario, the historical excuse by the state parties not to implement the Convention can be monitored.

[405] experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) met in Maastricht on 2nd to 6th June 1986 to consider the nature and scope of the obligations of States to the Covenant on Economic, Social and Cultural Rights

[406] Para 21 ibid

[407] Para 22 ibid

Court Room Humour[408]

By Fredy Kandonga[409]

A Judge in a semi-small city was hearing a drunk-driving case and the defendant, who had both a record and a reputation for driving under the influence, demanded a jury trial. It was nearly 4 P. M. And getting a jury would take time, so the judge called a recess and went out in the hall looking to impanel anyone available for jury duty. He found a dozen lawyers in the main lobby and told them that they were a jury. The lawyers thought this would be a novel experience and so followed the Judge back to the courtroom.

The trial was over in about 10 minutes and it was very clear that the defendant was guilty. The jury went into the jury room, the Judge started getting ready to go home, and everyone waited. After nearly three hours, the Judge was totally out of patience and sent the bailiff into the jury-room to see what was holding up the verdict.

When the bailiff returned, the Judge said, "Well have they got a verdict yet?" The bailiff shook his head and said, "Verdict? Hell, they're still doing nominating speeches for the foreman's position!"

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It had to happen sooner or later. Lawyer Dobbins was wheeled into the emergency room on a stretcher, rolling his head in agony. Doctor Green came over to see him.

"Dobbins," he said, "What an honor. The last time I saw you was in court when you accused me of malpractice."
"Doc. Doc. My side is on fire. The pain is right here. What could it be?"
"How would I know? You told the jury I wasn't fit to be a doctor."
"I was only kidding, Doc. When you represent a client you don't know what you're saying. Could I be passing a kidney stone?"

"Your diagnosis is as good as mine."
"What are you talking about?"
"When you questioned me on the stand you indicated you knew everything there was to know about the practice of medicine."
"Doc, I'm climbing the wall. Give me something."
"Let's say I give you something for a kidney stone and it turns out to be a gallstone.

[408] Compiled from http://www.legal-forms-kit.com/legal-jokes/courtroom-humor.html, accessed on 02/11/2010

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Who is going to pay for my court costs?"
"I'll sign a paper that I won't sue."
"Can I read to you from the transcript of the trial? Lawyer Dobbins: 'Why were you so sure that my client had tennis elbow?' Dr. Green: 'I've treated hundreds of people with tennis elbow and I know it when I see it.' Dobbins: 'It never occurred to you my client could have an Excedrin headache?' Green: 'No, there were no signs of an Excedrin headache.' Dobbins: 'You and your ilk make me sick.'
"Why are you reading that to me?"
"Because, Dobbins, since the trial I've lost confidence in making a diagnosis. A lady came in the other day limping ..."
"Please, Doc, I don't want to hear it now. Give me some Demerol."
"You said during the suit that I dispensed drugs like a drunken sailor. I've changed my ways, Dobbins. I don't prescribe drugs anymore."
"Then get me another doctor."
"There are no other doctors on duty. The reason I'm here is that after the malpractice suit the sheriff seized everything in my office. This is the only place that I can practice."
"If you give me something to relieve the pain I will personally appeal your case to a higher court."
"You know, Dobbins, I was sure that you were a prime candidate for a kidney stone."
"You can't tell a man is a candidate for a kidney stone just by looking at him."
"That's what you think, Dobbins. You had so much acid in you when you addressed the jury I knew some of it eventually had to crystallize into stones. Remember on the third day when you called me the 'Butcher of Operating Room 6? That afternoon I said to my wife, "That man is going to be in a lot of pain.' "
"Okay, Doc, you've had your ounce of flesh. Can I now have my ounce of Demerol?"
"I better check you out first."
"Don't check me out, just give the dope."
"But in court the first question you asked me was if I had examined the patient completely. It would be negligent of me if I didn't do it now. Do you mind getting up on the scale?"
"What for?"
"To find out your height. I have to be prepared in case I get sued and the lawyer asks me if I knew how tall you were."
"I'm not going to sue you."
"You say that now. But how can I be sure you won't file a writ after you pass the kidney stone?" In a courtroom, a purse snatcher is on trial and the victim is stating what happened. She says, "Yes, that is him. I saw him clear as day. I'd remember his face anywhere." At which point, the defendant bursts out, "You couldn't see my face, lady. I was wearing a mask!"

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Matthew P. Dukes, 26, sentenced to 30 days in jail in 1989 following his sixth drunken-driving conviction, tried for 15 months (through December 1990) to get into jail in Ravenna, Ohio, but each time was turned away because the jail was full. In December, Dukes filed a lawsuit in federal court claiming that his constitutional rights are being violated by the jail's refusal to admit him.

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In 1993 in Bangladesh, Falu Mia, 60, was released from prison after 21 years. He had been locked up until his trial for theft in 1972, then found not guilty, but a lethargic bureaucracy failed to release him. He recently filed a lawsuit against the government for 21 years' back wages (about $26,000).

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A prospective juror in a Court was surprised by the definition of voluntary manslaughter given the panel:

"an intentional killing that occurs while the defendant is under the immediate influence of sudden passion arising from an adequate cause, such as when a spouse's mate is found in a 'compromising position.'"

"See, I have a problem with that passion business," responded the jury candidate. "During my first marriage, I came in and found my husband in bed with my neighbor. All I did was divorce him. I had no idea that I could have shot him."

She wasn't selected for the jury.

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Prosecutor: Did you kill the victim?
Defendant: No, I did not.
Prosecutor: Do you know what the penalties are for perjury?
Defendant: Yes, I do. And they're a hell of a lot better than the penalty for murder.[410]

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[410] For more information visit http://www.legal-forms-kit.com/legal-jokes/courtroom-humor.html

Call for Contribution of Articles for Publication in the Next Journal

1. Introduction

The Law Reform Commission of Tanzania is pleased to invite for contribution 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 third edition of the Journal, in June 2007, April 2009 and April, 2011 respectively. Incoming contributions are intended for the fourth publication due in December, 2011.

2. Persons from whom Contributions are invited, Themes and Selected Topics for 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 well being of Tanzania's society. The Journal also accepts essays on particular issues that are thematically appropriate and contribute a unique and useful perspective.

3. 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, [Cap. 171, R.E. 2002], with the mandate of taking and keeping under constant review, all the laws of Tanzania for the purpose of its development and reform.

4. 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 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 and are 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 an easy-to read format.

5. 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 **30/08/2011** and the article should preferably be submitted in electronic form.

6. Length of Contributions

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.

7. 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. Contributers 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.

8. Early Indication of Intention to Contribute

Persons who intend to contribute to the fourth coming edition of the Journal are kindly requested to indicate their responses to this invitation within three month of the circulation of this Edition and announcement or invitation, indicating briefly the areas or subjects they intend to cover in their submissions, also giving indication as to when the Secretary of the Editorial Board should expect to receive their articles.

9. Contact Address

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

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