

THE UNITED REPUBLIC OF TANZANIA
THE LAW REFORM COMMISSION OF TANZANIA



**REPORT
ON
PRIVATE LEGAL PRACTICE**

**PRESENTED TO THE
ATTORNEY-GENERAL AND
MINISTER FOR JUSTICE**

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

The Commissioners are:

- Hon. Mr. Justice Hamis A. Msumi - Chairman
- Mr George B. Liundi - Full time Commissioner
- Mr. Pius Msekwa - Principle Secretary Office of Vice President And Prime Minister
- Prof. Josephat L. Kanywanyi - Associate Professor of Law, University of Dar es Salaam
- Mr Mohammed Ismail - Advocate of the High Court And Court of Appeal of Tanzania
- Hon. Mrs Justice Eusebia N. Munuo - Judge of the High Court of Tanzania
- Hon. Henry M. Limihagati, M.P- Chairman, Tanzania Red Cross Society
- Mr Nathaniel Issa - Secretary to the Commission

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To:

The Honorable Mr. Justice Lubuva, M.P., Attorney-General and
Minister of Justice, DAR ES SALAAM

Dear Mr. Minister,

REPORT ON PRIVATE LEGAL PRACTICE

1. Pursuant to section 8(1) of the Law Reform Commission of Tanzania Act, 1980, the Commission acting on your Reference No. 3 sent to it under cover of your letter dated 17th November, 1983, appointed a committee of ten people, headed by Prof. Issa G. Shivji, Professor of Law, University of Dar es Salaam, to exercise the subject and report to the Commission.

2. In August 1985, the Committee issued a working Paper No.1/1985 entitled Discussion Paper on Issues on reform in the Private legal Practice in Tanzania for the purpose of soliciting views of the members of the public, the bar and the bench and members of other professional bodies as well as interested persons in academia. The Committee held public consultations and conducted seminars at the University of Dar es Salaam and at the National Central Library in August 1985; and at Arusha in February 1986 to discuss issues contained in the paper. The Committee presented its Report to the Commission on 29th September 1986.

3. In compiling this report the Commission has been greatly assisted, by the findings of the Committee. Are satisfied that the views expressed in our report reflect the views of the majority of the people of Tanzania consulted on the issues in question.

4 Having completed the study of this important subject I have the honour, on behalf of the Law Reform Commission of Tanzania, to submit herewith our Report on Private Legal Practice in Tanzania.

Yours respectfully,

Justice Hamisi A. Msumi

**CHAIRMAN
LAW REFORM COMMISSION OF TANZANIA**

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I: INTRODUCTION —TERMS OF REFERENCE

1. In terms of section 8(1) of the Law Reform Commission of Tanzania Act, 1980, the Honorable and Attorney-General and Minister of Justice under cover of his letter dated 17th November, 1983, sent to the Commission, inter alia, a Reference on Private Legal Practice in Tanzania. The terms of the Reference read as follows:-

The Government accepted the recommendation of the Judicial System Review Commission that the private practice of the legal profession is abolished. It however rejected the establishment of another corporation beside the Tanzania Legal Corporation. The Commission is invited to consider and advise on:-

- (a) How that recommendation can best be carried out without jeopardizing the constitutional and statutory right of persons to legal assistance and representation;
 - (b) What measures could be taken to ensure that members of the public in urban as well as in rural area availed an opportunity to obtain legal assistance and representation;
 - (c) What measures should be taken to mould the legal profession into an organ of the people in Tanzania, more responsible and responsive to the needs of the public, and whose functions and system of operation are more than better understood by the people.
2. According to our reading the Reference, the Government implicitly agrees that abolition of private legal practice will create a vacuum in the provision of legal services which must be filled, and the commission is asked to find the best method on how to fill this vacuum, otherwise than by creating another legal public corporation.

I: ABOLITION OF PRIVATE LEGAL PRACTICE:

1. Findings of the Judicial System Review Commission:

We have noted that in making the recommendation for the abolition of private legal practice the Judicial System Review Commission (the Msekwa Commission) was influenced by the following factors:-

- a) That the private bar was wholly dominated by minority group of the society in the Asian Community;
- b) that the geographical spread of private advocates showed a concentration of them in few regional centers, particularly Dar es Salaam, Arusha, Moshi and Tanga. There is dire neglect of the rural areas where the majority of people live and where most of the courts are situated;
- c) that between 1971 and 1976 there was a marked exodus of advocates from Tanzania resulting into a depletion of the roll from a total of 97 in 1971 to 43 in 1976;
- d) that advocates fees are prohibitively high leading to a situation of selective justice; that is, only the rich, could afford the services of advocates;
- e) that there were persistent public complaints of unethical conduct on part of some private advocates.

2. Observations of the Commission:

- (i) We observe that the Msekwa Commission worked
 - From 1976 to 1977 when it submitted its report to the Government, and that since 1977 to the time when the Government sent this Reference to the Commission, there have been a number of changes which necessitate having;
 - A fresh look at the decision to abolish private legal practice. For example, in contrast to the situation that prevailed up to 1977, the current roll of advocates has tremendously increased. Research shows that in July 1986 the total number of advocates enrolled was 136 as compared to 43 quoted in the Report of the Msekwa Commission. Furthermore, advocates of Asian descent no longer dominate the roll. For example,

out of the 73 advocates enrolled between 1977 and 1986 only 2 were of Asia Descent.

- (ii) We have found out that the current law is oriented towards urban centers, while most of the courts, particularly primary courts, are in fact situated in rural areas throughout the country. This means that the bulk of court work is transacted in the rural areas at the court level, unfortunately, under the magistrate Courts Act, 1984, advocates are not allowed to appear in primary courts to represent parties. This restriction partly explains their concentration in urban centres. The present un-equitable distribution of private advocates appears to be largely dictated by the statutory provision which prohibits appearance of advocates in primary courts.
- (iii) On the complaint of prohibitively high fees, it has come to our notice that the Advocates fees were originally promulgated prior to 1951 and were last revised in 1962. This means that despite persistent escalation of cost over the year, an advocate is expected to charge fees according to scales fixed in 1962. Section 49 of advocates Ordinance allows the formation of a Remuneration Committee by advocates elected by the Tanganyika Law Society. Alternatively, the Chief Justice is empowered to make Orders to regulate remuneration of advocates. None of the two authorities has taken steps to review the scales for more than two decades.
- (iv) There have been complaints on poor quality of legal services provided by some advocates and some incidents of misconduct among them. However, the Commission is convinced that the law regulating legal practice is adequate enough to control these shortcomings. Both the Advocates Ordinance and the Notaries Public and Commissioners for Oaths Ordinance provide for disciplinary machinery in case of infringement of the law or in case of misconduct. The remunerative aspect of the legal profession is taken care of by both the Advocate Ordinance and the Notaries-Public and Commissioners for Oaths ordinance. Furthermore, there is the inherent supervisory powers of the High Court over advocates. We feel that most of the complaints of indiscipline and professional incompetence would be minimized if the law regulating the legal profession were strictly enforced.
- (v) We feel that the law on the provision of legal aid by the state is not fully utilized. Under the legal Aid (Criminal Proceedings) —Act 1969 a Judge of the High Court or the Chief Justice may certify that an impecunious accused person ought to have legal aid when conducting defence or preparing an appeal. Section 2 and 3 of that Act clearly states that any accused person charged, in any court except Primary Court, is entitled to legal aid provided that the Chief Justice or a Judge of the High Court so certifies. If the case is before a district

court or a court of resident Magistrate then the certifying authority is the Chief Justice. Our research has revealed that invariably state legal aid is only given to accused persons charged in the High Court with capital offences. Besides, legal aid is provided to these accused persons as a matter of right that is regardless of whether or not they are impecunious. On the other hand no consideration is given to the majority of the accused persons facing other categories of criminal charges in the District Courts or courts of Resident Magistrate.

III: RECOMMENDATIONS:

1. In making our recommendations we have taken into account the findings of the Msekwa Commission, and our observation on those findings. We have dealt with each of the three points raised in the terms of reference in their chronological order viz.
 - a) How the Government decision to abolish private practice could be carried out without jeopardizing the constitutional and statutory right of persons to legal assistance and representation;
 - b) What measures could be taken to ensure that members of the public in urban as well as rural areas are afforded an opportunity to obtain assistance and representation; and
 - c) What measures should be taken to mould the legal profession into an organ of the people of Tanzania, more responsible and responsive to the needs of the public, and whose functions and system of operation are more and better understood by the people.
2. On the basis of the outcome of in depth and extensive research, including interviews of various individuals from different walks of life, the Commission submits to the government the following recommendations:-
 1. Having regard to the present stage of development of the legal profession and the country and all the circumstances surrounding the subject matter of the Reference, we have been unable to find a workable alternative to private legal practice without jeopardizing the constitutional and statutory right of persons to legal assistance and representation. This conclusion takes into account the following factors among others:
 - a) In contrast to the situation that prevailed at the time of the publication of the report of the Msekwa Commission in 1977; the current roll of Advocates has increased, and it shows that Advocates of Asian extraction are no longer dominant;
 - b) The 1984 Constitutional amendments to the constitution of the United Republic have introduced a Bill of Rights, which includes the right of an individual to have legal counsel of one's choice;

- c) Zanzibar, which abolished private legal practice in 1967 has restored it since 1985.
2. For the purpose of ensuring that members of the public in urban as well as in rural areas are afforded an opportunity to obtain legal assistance and representation the following measures should be taken:
- a) The legal services provided by the State under the Legal Aid (Criminal-Proceedings) Act 1969 (No. 21 of 1969) should be fully utilized by extending it to impecunious accused persons in the district courts, and for easy administration of the scheme it is further recommended that for the cases before these courts the Certifying authority should be any Judge of the Court;
 - b) The Government should establish a special fund from which to make grants to institutions engaged in the operation of voluntary legal aid schemes to support their activities. These institutions include such agencies as the Legal Aid Committee of the Faculty of Law of the University of Dar es Salaam, Institute of Development Management, Mzumbe Institute of Finance Management and Moshi Co-operative College.
 - c) The Government should help the Tanzania Legal Corporation in every way possible to implement its expansion programme, so that the Corporation may be enabled to serve well its expanding clientele.
3. As regards the need to mould the legal profession into an organ of the people of Tanzania, the Government should:
- a) Strengthen the Faculty of Law of the University of Dar es Salaam in terms of resources, in order to enable the Faculty to train undergraduates at required academic standard levels.
 - b) More formally systematize and invigorate the internship programme or, alternatively, establish a Law School, to strengthen the practical training of newly qualified lawyers and enhance their awareness of the various aspects associated with the practice of the profession, including professional ethics and etiquette. The current programme does not meet these needs.
 - c) Urge the institutions entrusted with the administration of law regulating legal practice to enforce the law strictly particularly those provisions relating to discipline and professional competence.

4. The High Court should take measures necessary to approve the administration of the Advocates Ordinance. These measures should include:
 - a) Merging under one authority the functions connected with enrolment and enforcement of discipline of advocates;
 - b) Appointing a senior member of the Magistracy to take over the functions mentioned in sub— paragraph (a) of this paragraph, who should also be the Secretary of the Council of Legal Education, and be responsible to the Chief Justice directly.
5. The Government should take note of the formation of the Law Association of Tanzania and assist it in every way possible to formulate a clear policy and related implementation strategy and action programmed designed to promote the attainment of the objectives intended for the new form of organization and working of the legal profession in Tanzania.

IV: RECOMMENDATIONS ON CO-OPERATIVE FORM OF PRIVATE LEGAL PRACTICE AND PARA-LEGAL PERSONNEL IN THE LEGAL PROFESSION IN TANZANIA

1. We also consider suggestions for the introduction of a cadre of para-legal personnel in the legal profession in Tanzania. On the lines of para-medical personnel, and the formation of co-operative firms of private legal practitioners. This suggestion was made in the context of the need for expanded and effective legal representation.
2. On the question of legal representation by Advocates and para-legal personnel in Primary Courts, both in urban as well as in rural areas, we have the following observations:-
 - (a) That Advocates be allowed to represent parties before Primary Courts where the presiding Magistrate holds a Diploma in Law from the Institute of Development Management Mzumbe, or an equivalent qualification from other recognized institutions;
 - (b) That para-legal personnel be allowed to represent parties in primary courts, presided by any competent Magistrate provided that such para-legal personnel act as agent of the respective parties and not purporting to be advocates.

We have, however, decided that there is a need for the commission to carry out further studies on the question of the provision of legal services by para-legal personnel. It is necessary, for example, to collect statistics and other data on the number of persons currently engaged in the preparation of various types of legal documents, their basic qualifications or level of training and their spread in the country. Upon completion of these additional studies the Commission will prepare a supplementary report in answer to point (b) of the terms of reference on ensuring that members of the public in urban as well as in rural areas are afforded an opportunity to obtain legal assistance and representation.

3. On the issue of co-operative form of practice legal practice, we are of the view that the best way of realizing this ideal is not to force the idea upon the profession; the Government and the Co-operative Union of Tanzania should, instead take positive steps to encourage and assist advocates to organize their practices on a co-operative basis.

V: SUMMARY OF MAJOR RECOMMENDATIONS:

1. We recommend that private legal practice should continue to be part of our legal system in order not to jeopardize the constitutional and statutory right of persons to legal assistance and representation.
2. We recommend that:-
 - (a) the definition of certifying authority in section 2 of the Legal Aid (Criminal Proceedings) Act, 1969 (No. 21/69) be amended. To include any Judge of the High Court for the purposes of granting legal aid to accused persons in subordinate court;
 - (b) the provisions of the Legal Aid (Criminal Proceedings) Act, 1969 be publicized and used — extensively for indigents even in District Courts of Resident Magistrate in deserving cases for more people to benefit from the provision of legal aid services than it is at present.
3. We recommend that the Government establish a special fund from which to make grants to support voluntary legal aid schemes.
4. We recommend that the Government should help the Tanzania Legal Corporation to implement its expansion programme in order to enable it to serve well its expanding clientele.
5. We recommend that the Government should strengthen the Faculty to Law of the University of Dar es Salaama in terms of resources in order to enhance its training capacity.
6. We recommend that the Government should review and revitalize the internship programme or, alternatively, establish a Law School, to strengthen the practical training of newly qualified lawyers.
7. We recommend that the Government should urge the competent authorities to pay particular attention to the effectiveness of the administration of the Advocates Ordinance, the Notaries and Commissioners for Oaths Ordinance and the Tanganyika Law Society Ordinance.
8. We recommended that the High Court should take measures to streamline the functions relating to enrolment and enforcement of discipline of advocates.
9. We recommend that the Government should take positive steps to help the newly formed Law Association of Tanzania contribute effectively to the environment and strengthening of the Legal profession in Tanzania.