

**THE UNITED REPUBLIC OF TANZANIA**  
***THE LAW REFORM COMMISSION OF TANZANIA***



**REPORT ON FLOW OF JUSTICE**  
**IN TANZANIA**

**2004**



# THE FLOW OF JUSTICE IN TANZANIA

## CHAPTER ONE

### 1.0 INTRODUCTION

#### 1.1 Mandate

1.1.1 The Law Reform Commission of Tanzania was established by the Law Reform Commission Act, No. 11 of 1980. Under this law the Commission is required to take and keep under review all laws of the United Republic with a view to their systematic development and reform.<sup>1</sup> In order to undertake this task the Commission has in place a Strategic Plan, based mainly on the Public Service Mission and Vision as well as the Nation's Development Vision, 2025. In the list of priorities for the Commission work the improvement of "the Flow of Justice" has been found to be a subject of immense importance since it encompasses the whole society of Tanzania. It is common knowledge that the various laws regulating lives of Tanzanians have not had much change. It is obvious, however, that all Justice Systems of the World cannot remain static. They have to change to suit the current circumstances for the better of the citizens of each country. It is with the above in mind that the Commission has found it fit to examine, among other things, the Justice System of Mainland Tanzania.

#### 1.2 Objective

1.2.1 The objective of this study is to examine the status of the flow of justice in the country, identify constraints and put forward recommendations aimed at ensuring that adjudication of cases does not take unduly long time, remand prisons are not congested and

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<sup>1</sup> Section 4 of Act No. 11 of 1980

that the rule of law is generally strengthened. This study is in line with the Governments' Vision of Accessible and Timely Justice for all in the new Millennium as enunciated by Hon. H. Bakari Mwapachu, Minister of Justice and Constitutional Affairs who had this to say: -

*"It is a cardinal principle of the Constitution of the United Republic of Tanzania to unflinchingly uphold the rule of law. In a developing state like ours, this can be secured only if there is established and maintained in the country an efficient, fair and transparent system for the administration of law and justice. Such a system is crucial for securing and perpetuating an enabling environment for the peaceful and dynamic, social and political development and prosperity of the nation. This is the main reason why the Government is unequivocally committed to institute and expeditiously execute the reform and development of the legal and judicial services in the country, and to rapidly enhance access of these services to all people without discrimination of any sort."*<sup>2</sup>

### **1.3 Statement of the Problem**

1.3.1 The problem facing legal and justice system in the country have been sufficiently restated in the Vision of Accessible and Timely Justice for all in the New Millennium and can be summarized as follows: -

- (a) inordinate delays in resolving disputes and dispensing justice,
- (b) limited access to justice and legal services and justice for the majority of our people,
- (c) corruption and other unethical conduct of officials in the legal system,
- (d) the system is, in significant ways outdated and not responsive to the emerging social, political, economic and technological developments,
- (e) limited public trust in the legal system,
- (f) low competence and morale of the public sector's legal personnel,
- (g) ...

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<sup>2</sup> A Vision of Accessible and Timely Justice for All in the New Millennium.

- (h) poor provision and maintenance of the work environment for most public institutions in the legal sector.<sup>3</sup>

## **1.4 Mission**

1.4.1 The shared mission of all institutions in the legal sector is: The development of social justice, equality and rule of law through quality and accessible legal services which is underpinned by the following values and principles: -<sup>4</sup>

### **1.4.1.1 Principles**

1. Rule of Law
2. Fundamental Human Rights,
3. Equality and Social Justice
4. Equality of All before the Law

### **1.4.1.2 Values**

1. Ethical and Fair conduct by Law Enforcement Officers
2. Accessibility and Affordability of Legal Services for All citizens
3. Efficient and timely resolution of disputes
4. Transparency and Accountability

## **1.5 Vision**

1.5.1 The vision that will inspire and sustain the reform and development of the legal and judicial system in the 21<sup>st</sup> Century and beyond will be: “Accessible and Timely Justice for All.” This vision is characterised by: -

1. Speedy dispensation of Justice;
2. Affordability and access to justice for all social groups;
3. Integrity and professionalism of legal officers.

## **1.6 Scope of the Study**

1.6.1 “Justice delayed is justice denied” is an age-old adage. Conceptually this saying is linked to the flow of justice in any country. It is the flow of justice that would determine the delayed

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<sup>3</sup> Ibid. p. 6

<sup>4</sup> op.cit.

resolution or otherwise of court cases. It is therefore imperative for law reformers to review the justice system in their respective countries after every now and then. The main objective for undertaking this mammoth project is to lay a strong framework for the improvement of the performance of institutions involved in the delivery of justice, and thereby promoting fairness, cost-effectiveness, accessibility and progressiveness in the Tanzania legal system. The guiding instruments in this task will be the mission and vision as described above. If we can provide for all that is contained in the mission we will have every reason to feel satisfied because then such a system of justice will be able to catapult, as it were, the whole nation forward towards happiness, prosperity and success.

- 1.6.2 The Commission had three goals to achieve by undertaking this project. One is identification of trends; that is to say, to identify the process of justice from the commission of a crime to the stage of sentencing and sanctions or acquittal. For civil matters it will be from the time a matter is brought to court to the stage of judgment and decree. Secondly, it is to identify the barriers that slow down or impede the flow of justice in criminal and civil matters. Finally the Commission will have to review the legal framework of the institutions involved and to come up with a remedy for success. The views expressed by the public during our visits to the regions will be of great assistance in giving USA solutions to all three goals.
- 1.6.3 The expected outputs of this undertaking will in the long run be what are contained in the vision which is mentioned above namely, accessible and timely Justice for All. This is our vision. It may be difficult to get to it but any success which leads USA near to our vision will be a great achievement for the Commission.

## **1.7 Methodology**

- 1.7.1 The main activity areas which will be covered in this project will be in the following order. First a review of the current state of the law in respect of the administration of law and the dispensation of justice will be carried out. Secondly we will look at comparative systems of justice to try and discover what is lacking in our system. Then the data collected by the Commission from the public on what is wrong with our system and how to improve it will be analysed. This data will be useful in guiding the Commission on

what ideas are practical and acceptable to the public. Finally proposals for improvement of the law and the dispensation of justice will be made. Such proposals will have to pass the test of practicability, acceptability and reasonableness.

## CHAPTER TWO

### 2.0 CURRENT STATE OF THE LAW

2.1 A survey of the current state of the law will have to touch on at least four areas which are: -

1. The Criminal and Civil Justice System,
2. The Police Force,
3. The Prisons Department, and
4. Other bodies and schemes in the Justice System.

2.1.1 It is pertinent to note at the outset that since all these four areas are interwoven in the sense that they cannot be dealt with in isolation, a survey of the current state of the law will entail a reference to two or more of these areas as the discussion proceeds in order to have a meaningful survey of the current state of the law. The outlining of these areas is done only in order to ensure that every area is adequately covered in this survey.

### 2.2 The Criminal Justice System

2.2.1 The system first begins to operate when an offence is committed and either the victim or the Police detect it or it is reported to the Police. There is no doubt that many offences go undetected and unreported and therefore unpunished. For serious offences, it does not matter for how long the offence remains undetected since, once detected and evidence unearthed, the offender would be taken to court and prosecuted. Once charged, the offender will be known as the accused person or simply the accused.

- 2.2.2 Once an offence has been committed and a report made to the Police Station, the Police will undertake investigations which will determine if an arrest can be made or not. If investigations reveal a potential offender, the offender will normally be arrested, in case of a cognisable offence. Otherwise, the offender may be arrested only through an arrest warrant issued by the court or the offender may be summoned to appear in court at a particular time and date mentioned in the summons.
- 2.2.3 The arrest may even be made by a private person who in his/her presence any of the offences in section 14 of the Criminal Procedure Act is committed by any person. Indeed, any magistrate may at any time arrest or issue a warrant directing the arrest of any person whom s/he reasonably believes to have committed an offence within the local limits of his/her jurisdiction. If investigations do not disclose the offender, the case remains unresolved.
- 2.2.4 The investigation stage would reveal whether the offender is a juvenile or an adult. If the offender is a juvenile, the matter would appropriately be referred to a juvenile court. It is also at this stage that one may be released without prosecution if there is no enough evidence to prosecute. If the Police decide to prosecute then charges are filed and the accused makes his/her first appearance in court where a plea is taken and matters of bail resolved.
- 2.2.5 In Tanzania the investigation stage very often comes after the arresting stage. It is common for Police prosecutors to ask courts for adjournments on the grounds that investigations are not complete. The powers of arrest by Police Officers without a warrant are provided for in s. 14 of the CPA. It is very seldom that a Police Officer who takes an accused person to court will be ready for the hearing of the case, because in most cases investigations will follow after such court appearance.
- 2.2.6 The law applicable in criminal matters is mainly the Criminal Procedure Act, No. 9 of 1985. There are of course other laws with their procedures which complement and supplement the Criminal Procedure Act. However, the Act does not apply to Primary Courts which have their own procedures.<sup>5</sup> Furthermore, the Act does not apply to the High Court, a District Court, or a Resident Magistrate's

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<sup>5</sup> 3<sup>rd</sup> Schedule to the Magistrate Court Act, 1984.

Court in the exercise of their respective appellate, revisional, supervisory, or other jurisdiction and powers under Part III of the Magistrates' Courts Act, 1984 i.e. jurisdiction and powers of, and appeals etc. from Primary Courts.<sup>6</sup>

- 2.2.7 The Primary Courts apply the Code which is contained in the third Schedule to the Magistrates' Court Act, 1984. The criminal justice system in the Primary Court starts with a complaint to a Primary Court Magistrate who may issue a summons or a warrant of arrest to compel the appearance of the offender. For serious offences the suspect may be arrested without a warrant and taken to the Primary Court to be charged. Criminal jurisdiction of the Primary Courts is mainly for offences appearing in the First Schedule to the Magistrates' Courts Act, 1984. In this schedule Part I contain offences under the Penal Code and Part II contains offences under other laws.
- 2.2.8 In all its court sessions the Primary Court sits with two assessors whose opinions of the case are binding on the Magistrate. Trials in the Primary Courts are prosecuted by the complainant mainly, except in urban areas where a Police Sergeant, a Corporal or even a Police Constable may do the prosecution. No lawyers are allowed in the Primary Courts. Just like in the District Court and the High Court the accused person may be released on bail during the trial or from the time when the accused appears in court. The case is normally finalized within a very short time and judgment delivered. It is always the judgment of the majority which carries the day. If convicted the sentence will range from imprisonment to a fine or even to a lesser punishment.
- 2.2.9 In the District Court and the Court of the Resident Magistrate, the position is different as observed above. Almost invariably the Police will be involved in the prosecution of the offender. Normally, a Police officer of the rank of assistant inspector upwards would prosecute the case as a Public Prosecutor. But there are cases where Police Sergeants have appeared to prosecute as Public Prosecutors. There are no assessors or jury in the District Court or Resident Magistrate's Court. It is a single Magistrate who tries cases in these courts except where the Chief Justice assigns two or more Magistrates to try a particular case.

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<sup>6</sup> Section 3 of CPA

- 2.2.10 The District Court and the Resident Magistrate's Court are courts of more or less the same jurisdiction. In the court system in Tanzania there is at the bottom the Primary Court headed by a Primary Court Magistrate. Then you come to the District Court which, as the name suggests, is the Court of the District with jurisdiction over the whole district. It is headed by a district magistrate, a term which includes a Resident Magistrate. On more or less the same level there is the Resident Magistrate's Court which has jurisdiction in the whole region where it is established and is headed by a Resident Magistrate. The difference between a Resident Magistrate and a District Magistrate is now clear. Whereas a District Magistrate will have had some legal training but is not a graduate in law, the Resident Magistrate holds an LL.B degree or equivalent qualifications. In the 1960s, graduates of the University of London (now University of Dar es Salaam) began working as District Magistrates although they were holders of LL.B degrees.
- 2.2.11 The next ladder is the High Court where Judges sit to conduct trials. The last ladder is the Court of Appeal where justices of Appeal sit. Trials in the High Court cannot commence before a Preliminary Inquiry (PI) is held in the District Court or Court of a Resident Magistrate. The Judge sits with assessors in the High Court whose opinions are not binding. In the case of Economic Crimes Offences, the Judge sits with two members whose opinions as to the guilt of the accused are not binding to the Judge. Their opinions are binding as to sentence and other orders. Only State Attorneys may appear as prosecutors in the High Court.
- 2.2.12 Trial in the District Court is conducted by a single Magistrate or a panel of Magistrates as the case may be. It is possible to have a State Attorney prosecute a case in the District Court. Judgment would be prepared and delivered at the conclusion of the trial and a sentence passed in case of conviction. If there is an acquittal then the accused will be discharged and set free.
- 2.2.13 In the High Court, for serious offences such as murder and treason, the accused must have legal representation. But even in other offences which are tried in the High Court, some legal representation is necessary. At the conclusion of the trial sentence is passed. Sentences in the High Court range from capital punishment for murder and treason to absolute discharge if the situation so warrants.

## **2.3 Appeals**

- 2.3.1 The set-up of criminal appeals follows a certain procedure whereby appeals from Primary Court go to the District Court and appeals from the District Court go to the High Court. Similarly, appeals from a Court of the Resident Magistrate go to the High Court. Appeals from the High Court go to the Court of Appeal.

## **2.4 The Civil Justice System**

- 2.4.1 Civil cases in the Primary Court commence with the plaintiff going to the Court and stating his/her claim orally which is then reduced into writing by the Magistrate. The fourth Schedule to the Magistrates' Courts Act, 1984 contains Provisions relating to the Civil Jurisdiction of Primary Courts. The fifth schedule contains Powers of Primary Courts in administration of deceaseds' estates cases. In case of admission of the claim, judgment will be for the plaintiff with costs. Otherwise there will normally be a trial. Again assessors have to sit with the Magistrate whose views are binding.
- 2.4.2 Once there is judgment entered either for the plaintiff or defendant, execution process may be commenced in case of judgment debtor failing to pay the decretal amount. The execution process may involve the attachment of the judgment debtor's property to be sold later on to satisfy the decree.
- 2.4.3 In the District Court and Court of Resident Magistrate the procedure is more elaborate than in the Primary Court. Proceedings are commenced by filing a plaint or some other pleading. This will cause summons to be issued. Summons for orders or summons for disposal of suit may be issued. That is when the defendant will appear in court and file his/her defence. Of course the defendant may appear and admit the claim, in which case judgment will be entered for the plaintiff. After the pleadings, a trial follows and judgment given at the end of it.
- 2.4.4 The High Court has a more elaborate procedure than the lower courts dealt with above. Like in the District Court and Resident Magistrates' Court it is the Civil Procedure Code, which governs proceedings in the High Court. Likewise in the Commercial court

assessors termed as experts of certain professionalism they can sit with the judges to assist in the determination of matters.

- 2.4.5 Cases may of course be disposed of without trial. There are in the Civil Procedure Code amendments of the Rules in the first schedule to the Code. Immediately after Order VII, Orders VIIIA, VIIIB and VIIIC have been added. The requirement of Order VIIIA is for a First Pre-trial Settlement and Scheduling Conference to be held unless a court is exempted from the application of any rule in this Order. Then there is a final Pre-trial Settlement and Scheduling Conference in Order VIIIB. In Order VIIIC you have Arbitration negotiations and Mediation procedure. This is what is known as Alternative Dispute Resolution (ADR).
- 2.4.6 This process of ADR only operates in the District Court, Resident Magistrates' Court and the High Court. It does not operate in the Primary Court and indeed the Civil Procedure Code does not apply to Primary Courts.

## **2.5 Appeals**

- 2.5.1 Just like in the case of the criminal law system, in civil law system also appeals lie to the next higher court. An appeal from the Primary Court will go to the District Court and if necessary all the way up to the Court of Appeal. Similarly an appeal from the District Court or Resident Magistrate's court will go to the High Court and possibly to the Court of Appeal. An appeal from the High Court will go to the Court of Appeal. There are of course elaborate rules of how to file an appeal and when to do so and what the appeal document is supposed to contain. Also there are statutory provisions setting out what may be appealed against.
- 2.5.2 An appeal from the Primary Court to the District Court has no restrictions on the points to be appealed against. But if there is a further appeal to the High Court, it will not be entertained unless it is on points of law or mixed law and facts. Finally if there is a third appeal to the Court of Appeal, the High Court is required to certify to the Court of Appeal points of law of public importance before the Court of Appeal would entertain such an appeal. Similarly an appeal from the District Court to the High Court has no restrictions but a second appeal to the Court of Appeal can only be on points of law or mixed law and fact. An appeal from the High Court to the

Court of Appeal has no restrictions on the matters appealed against.

## **2.6 General Observations on Justice System**

- 2.6.1 The process in the Criminal Justice System is long and a cause of delays in determining cases. A case will not be ready for hearing until after some time has gone by due to the fact that the Police after arrest have to do investigation on the case. The case may remain pending for some time until the Police say that they are ready to proceed with the trial or until they withdraw the case for lack of evidence.
- 2.6.2 Furthermore, the case might go on appeal after the trial is completed. This is also a long process because there are requirements which have to be satisfied first before the appeals can be heard. There is the requirement of a copy of judgment to be available, notice of intention to appeal to be served on the other party and the petition of appeal and then the appeal itself.
- 2.6.3 Investigation of cases could be done before arrests in some cases where there is no danger of the accused disappearing. It may not be feasible to delay the arrest of someone in a homicide case but there may not be any harm to investigate on theft of public funds by an official before eventually arresting him/her and charging him/her accordingly. In such a case, there would not be any delay because investigation would have been completed.
- 2.6.4 Appeals are delayed by technicalities such as a copy of judgment notice of intention to appeal and the format of the petition of appeal. Solutions to such problems should be found as such technicalities are barriers to justice
- 2.6.5 In the civil system there are also unnecessary technicalities which tend to delay the dispensation of justice. There is a lot of emphasis on procedural law than the substantive law. This study should enable USA to find solutions to such barriers to justice in civil matters.

## **2.7 The Criminal Procedure Act, No. 9 of 1985 (**

- 2.7.1 Police may during investigation require any person to furnish his/her name and address for purposes of inquiries. Police may intervene to prevent breaches of the peace or commission of an arrestable offence. Police may interview a suspect i.e. they may ask him/her questions or take other investigative action. Periods available for interviewing the suspect is only 4 hours but the period may be extended to a further 8 hours. The periods spent doing something else are excluded from the interview time of 4 hours and 8 hours respectively. Police are supposed to inform persons under restraint of their rights which include the right not to answer any question, the right to have a lawyer or to see a relative.<sup>7</sup>
- 2.7.2 Treatment of a person under restraint is also provided in the CPA, namely treatment with humanity, respect and dignity. Police have special duties while interviewing children, namely to inform the parents that the child is under restraint.<sup>8</sup>
- 2.7.3 The records of the interview must be there. When there is a confession it must also be recorded in a prescribed manner and signed by the interviewee and the Police Officer who certifies as to what has taken place. An interviewee may want to make a statement. In that case s/he will be furnished with paper and pen. The suspect is also asked if s/he has been cautioned in accordance with s. 53 of the CPA. If the suspect refuses to read any statement or sign it, the Police Officer conducting the interview will certify as to what has taken place and sign accordingly. Similarly if the suspect complies with the request the Police officer will certify accordingly.<sup>9</sup>
- 2.7.4 Other investigative actions include power to take fingerprints, photos etc. of suspects, and identification parades where these are necessary. A medical officer may examine or take for analysis any specimen taken from a suspect and produce a report for the purpose of further evidence. Such report however would be taken to the court.<sup>10</sup>
- 2.7.5 Police must release a person on bail if there is belief that s/he did not commit the offence or in the case of mistaken identity or after

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<sup>7</sup> *ibid.* Ss. 46-53

<sup>8</sup> *ibid.* ss 55-56

<sup>9</sup> *ibid.* ss. 57-58

<sup>10</sup> *ibid.* ss. 59-61

24 hours if no formal charge has been preferred against him/her unless the Police Officer believes that it is a serious offence. Even after being charged the suspect may be released on bail after executing a bond with or without sureties. There are some criteria for granting bail which are essentially that s/he will in all probability appear in court in respect of the offence. There are also conditions for Police bail. But Police may refuse to grant bail on reasons to be recorded. Even after bail has been given it can be revoked for a variety of reasons.<sup>11</sup>

2.7.6 The Director of Public Prosecutions appoints Public Prosecutors such as wildlife, forestry, customs, immigrations and Police Officers of a particular rank. Such Police Officers will normally prosecute any case before a magistrate unless a State Attorney is appearing. In this process of trials, witnesses have to be served with summonses and it is the Police Officers who serve such summonses on any person or company. Indeed even when a warrant of arrest has been issued it is executed by the Police. Such warrant may be issued after a summons has been disobeyed. Police will also charge an accused person unless the State Attorney does prepare information in very serious cases. Then after conviction the Police would examine their records to see if the convict has previous convictions. The Police will then give more previous convictions to the court before sentence.<sup>12</sup>

## **2.8 Police Force Ordinance, Cap. 322**

2.8.1 The police generally perform duties which have been conferred upon them by law and also follow directives issued to them by their superior officers. They are also expected to collect and forward to their superior officers intelligence affecting public peace, to detect and bring offenders to justice. The police officers may also without warrant enter any premises at any hour of day or night when they suspect that illegal drinking and gambling are taking place.<sup>13</sup>

2.8.2 The provisions of s. 28 of the Police Force Ordinance allow police officers to carry out the duties of prison officers and confer upon

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<sup>11</sup> *ibid.* ss. 64-68

<sup>12</sup> *ibid.* ss. 95-96

<sup>13</sup> S.27 of the Police Force Ordinance, Cap. 322

them the same powers, protections and privileges as those conferred upon prison officers.

- 2.8.3 The police officers are also authorized by law to use arms to stop from escaping or attempting from escaping every person in lawful custody charged with or convicted of a felony. Moreover, the police may Use arms to stop any person who wants to rescue or attempts to rescue by force any person in lawful custody or any person who uses force to prevent or attempts to prevent the lawful arrest of any person.<sup>14</sup>
- 2.8.4 The law also empowers a police officer to lay any lawful complaint or information before a magistrate and to apply for summons, warrant, search warrant or any other process to be issued against any person.<sup>15</sup>
- 2.8.5 S.32 authorizes a police officer to interrogate a person whom s/he suspects may have committed a serious offence or s/he believes that information has been received by the police which may implicate a person in the commission of a serious offence. Before the police officer questions the suspects, s/he should warn him/her that s/he may refuse to answer any question asked by the police and thereafter sign or thumb print the acknowledgment in a prescribed form, indicating the time when s/he was so informed. If during the interrogation, the police believe that there is sufficient evidence to charge the person with an offence, s/he shall charge him/her but caution him/her in writing or orally that an adverse inference may be drawn against him/her if s/he fails or refuses to disclose at that stage any matter which is material to the charge.
- 2.8.6 The police officer may interview orally or in writing any person to ascertain whether s/he has committed an offence and where the person makes a confession, the police officer may during the interview or as soon as practicable after the completion of the interview record in writing statements made by the person orally, whether s/he wrote any statement, the time s/he commenced to write the statement and the time s/he completed and whether he was cautioned before she made the confession.

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<sup>14</sup> *ibid.* s. 29

<sup>15</sup> *ibid.* s. 30

- 2.8.7 The police officer shall ask the interviewed person to read the record and make any alterations, corrections or addition and then to sign the certificate. If the person refuses to sign the certificate, the police officer who conducted the interview will certify, stating what had taken place and sign accordingly. In case a person being interviewed cannot read the record or refuses to read, the police officer shall read or cause it to be read to him/her and request him/her if s/he wants to make any corrections, alterations or additions to the record and then to sign a certificate. The police would also certify what s/he had done.<sup>16</sup>
- 2.8.8 The law empowers the police officer to require the attendance of a person under s. 32 and also to require that person to execute a bond to appear and give evidence before a magistrate and if s/he fails to comply with such requirement s/he shall be guilty of an offence.<sup>17</sup>
- 2.8.9 S. 34 of the Police Force Ordinance provides that a police officer in-charge of a station may search or issue a written authority to any police officer to search any building, vessel, carriage box, receptacle or place in which s/he suspects an offence has been committed or in which there is any thing intended to be used for purposes of committing any offence and thereafter report the result to the magistrate. But no prosecution will be commenced without the leave of the DPP.
- 2.8.10 The law allows the police to take fingerprints, measurements of prints of the hand, feet or toes or recordings of the voice or photographs or samples of the handwriting of the accused. The police may use reasonable force against the accused who refuses to comply in order to secure such specimens.<sup>18</sup>
- 2.8.11 Under s. 35A of Police Force Ordinance a magistrate may authorize a medical officer to examine a person in lawful custody or allow him/her to analyse any specimen taken from the accused as extra evidence. The report prepared by the doctor would be forwarded to the court. The law provides also for the medical examination of any person who is a party to or witness in any court proceedings and the medical doctor is required to send the report to the court, which ordered the examination.

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<sup>16</sup> *ibid.* S.32A

<sup>17</sup> *ibid.* S.33

<sup>18</sup> *ibid.* S.35

- 2.8.12 The police have powers to hold a parade to identify a suspect. The police may order the attendance of the suspect to attend and participate in the parade. No person who is required under subsection (2) to attend and participate in an identification parade shall be entitled to refuse or object to attend and participate in an identification parade or where a person without just cause or unreasonably refuses to attend the identification parade such person shall be punished.<sup>19</sup>
- 2.8.13 A police officer is authorised by the law to detain any person who is performing any act or who is in possession of anything for which a licence is required under the law and request him/her to produce such licence. The law also empowers a police officer to stop a motor vehicle s/he suspects to be used in committing an offence and impound it at the police station.<sup>20</sup>
- 2.8.14 The police officers have also been given power to regulate and control traffic along the public roads, streets and thoroughfares. They can direct all or any particular kind of traffic when it is deemed to be in public interest to do so, and also to keep order and prevent obstruction on public roads, streets and thoroughfares.<sup>21</sup>
- 2.8.15 The provisions of s. 38 of Police Force Ordinance empower the superintendent or any officer in-charge of police to erect or place a barrier in or across any road and street to maintain law and order or for the detection of crime. Any person who does not stop at the road barrier when commanded to do so by a police officer would be arrested without a warrant and the police would not be liable for any damage to any vehicle or injury to the driver or any other occupant of the vehicle.
- 2.8.16 Any person wishing to hold a public assembly or procession is required to inform the police where and when s/he would like to hold such assembly or procession so that the police officer may provide officers to keep peace at such assembly or procession.

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<sup>19</sup> *ibid.* S.35B

<sup>20</sup> *ibid.* S.36

<sup>21</sup> *ibid.* S. 37

2.8.17 The provisions of s. 41 of Police Force Ordinance authorise the police officer or the magistrate to stop or prevent any assembly or procession in any place if in the opinion of such officer or magistrate the holding or continuance of such assembly or procession is likely to cause a breach of peace, prejudice public safety or the maintenance of public order or is for unlawful purposes.

## **2.9 Police General Orders (PGOs)**

2.9.1 The procedure used for the recruitment of the police officers is prescribed in PGO No. 54 and reference is made to the age, education, physical fitness and criminal record.

2.9.2 PGO No. 103 provides for the procedure or mode of dealing with complaints against the police officers.

2.9.3 PGO No. 104 deals with corruption in the Force. It provides among other things that the police officers who are aware of the corrupt officers but do not report them should be related as accessories to corruption. Any victimisation of persons who assist in the detection of the corruption would result in instant dismissal from the Force.

2.9.4 The police officer whether on or off duty is required to be courteous to the public, therefore if a police officer is discourteous or rude to any member of the public, his/her leaders are expected to take immediate action against such an officer once the incident is reported to them. Moreover, the witnesses or members of public who visit the police station should be attended as soon as possible or else they should be requested to go back later if the officers are busy at that particular time.<sup>22</sup>

2.9.5 The provisions of PGO No. 354, deal with the question relating to the escort of prisoners. The police escorting prisoners are expected to carry guns and they are also responsible for conveying the prisoners by police transport. Disciplinary action would be taken

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<sup>22</sup> PGO No. 107.

against any police officer who by carelessness or lack of vigilance permits a prisoner to escape.

## **2.10 Prisons Act, No. 34 of 1967**

2.10.1 The Prisons Department is part and parcel of any justice system of a country. In some Jurisdictions the Police and Prisons Departments are under the Ministry of justice. In Tanzania it is the Judiciary which is under the Ministry of justice together with a few other departments. But in those jurisdictions where the Police and Prisons are under the Ministry of justice the Judiciary is left as an independent organ which does not fall under any Ministry because the three organs of any Government are the Executive, the Legislature and the Judiciary.

2.10.2 The Prisons Department is responsible for the keeping of prisoners whether convicted or not. It is headed by the Principal Commissioner of Prisons. The Prisons Act, 1967<sup>23</sup> was enacted with the purpose of consolidating and amending the law relating to Prisons, and to provide for the Organization, Discipline, Powers and Duties of Prison Officers, and for matters incidental thereto and connected therewith.<sup>24</sup> The Act classifies prisoners into various categories. There is the "adult prisoner" who is a prisoner of the apparent age of twenty one years or more and the "young prisoner" who is a prisoner between the apparent ages of sixteen and twenty-one years. You have also the "civil prisoner" who is a debtor, or a lunatic or a detainee under the Preventive Detention Act. On the other hand there is the "criminal prisoner" who is under sentence of a court or court-martial or other bodies with similar authority.

2.10.3 The Prisons Department is known in the Act<sup>25</sup> as the Tanganyika Prisons Service which consists of the members of the service appointed under the Act. These members have different ranks ranging from senior to subordinate prison officers.<sup>26</sup> The Act permits the usage of police officers to do prison duties where there

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<sup>23</sup> Act No. 34 of 1967

<sup>24</sup> Prisons Act, 1967 heading

<sup>25</sup> op.cit

<sup>26</sup> *ibid.* s. 3(1) and (2)

are insufficient prison staffs.<sup>27</sup> Prison officers are vested with powers and privileges of Police Officers in some cases.<sup>28</sup>

- 2.10.4 Gratuities are payable to non-pensionable prison officers of or below the rank of Prison Officer Grade I who have served for twelve years or more at the rate of two-thirds of a monthly pay for a maximum period of twenty years. But proportional gratuities are also payable in certain circumstances even when the period of service is less than twelve years.<sup>29</sup>
- 2.10.5 There is a provision for a medical officer responsible for every prison that shall be responsible for the health of all prisoners in a prison who shall be medically examined regularly but in particular on admission and prior to discharge such prisoner has to be examined. Also every prisoner in solitary confinement and sick prisoners have to be examined daily.<sup>30</sup>
- 2.10.6 Prisoners are admitted accompanied by a remand warrant, certificate, warrant or other order of detention or warrant of conviction or of committal. Also an infant child of a female prisoner may be received into prison with its mother. Any prisoner may be detained in a police lock-up for not more than seven days in an area where there is no prison. Convicted prisoners are classified by the officer in charge.<sup>31</sup>
- 2.10.7 The Act also makes provision for offences by prisoners both minor and major offences and their punishment. Such offences are known as prison offences. There is a right to apply for review of a prisoner's case by the Principal Commissioner. There is also the right to take a persistent offender to a Magistrate to be arraigned and charged for those prison offences and the Magistrate may impose up to 6 months imprisonment.
- 2.10.8 There are certain privileges to prisoners and remission of sentence in some cases. Each prisoner is given the right to worship according to his religion. Prisoners may also receive and send letters and receive visitors. Prisoners may talk to visiting justice. Furthermore convicted criminal prisoners sentenced to

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<sup>27</sup> *ibid.* s. 4(4)

<sup>28</sup> *ibid.* s. 10

<sup>29</sup> *ibid.* s. 18

<sup>30</sup> *ibid.* s. 2- and 21

<sup>31</sup> *ibid.* s. 27

imprisonment may by industry and good conduct earn a remission of one-third of their sentence(s).<sup>32</sup>

2.10.9 Such remission may be lost due to misconduct. There may be additional special remission. The Principal Commissioner is required to submit a report to the President on the general condition and conduct of young prisoners, adult prisoners who have served 4 years of their sentences and those with indeterminate sentences. Furthermore prisoners may be removed from one prison and taken to another for a variety of reasons.<sup>33</sup>

2.10.10 The Act makes provision for training and treatment of prisoners. Prisoners are supposed to be employed, trained and treated in prison as determined by the Principal Commissioner. Prisoners may even be paid gratuities. There are provisions for women prisoners to be kept at prisons for female prisoners, employment of prisoners and training, clothing, bedding and dietary scales. Then there are isolation cells for solitary confinement where the need arises. There are also cells or wards for prisoners sentenced to death.<sup>34</sup>

2.10.11 Prisoners sentenced to short term may opt for extra mural penal labour in lieu of imprisonment. All they have to do is to declare to the court or to the officer in charge of the prison that they desire to undertake public work outside the prison.<sup>35</sup>

2.10.12 The Act also provides for the detention and treatment of unconvicted and civil prisoners. Such unconvicted persons are to be delivered to such court of competent authority at the time named and according to the terms of the remand warrant. Civil and unconvicted prisoners should not be kept with other classes of prisoners if conditions allow such separation. An unconvicted prisoner may be permitted to maintain himself and purchase or receive from private sources at proper hours, food, bedding, clothing, or other necessities but subject to examination and to such other conditions as the Principal Commissioner may direct. No civil or unconvicted prisoner shall be given or be compelled to

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<sup>32</sup> *ibid.* ss. 44-49

<sup>33</sup> *ibid.* ss. 49-60

<sup>34</sup> *ibid.* ss. 61-71

<sup>35</sup> *ibid.* ss. 74-77

wear prison clothing unless certain conditions exist. Employment of civil and unconvicted prisoners may be given at their request.<sup>36</sup>

2.10.13 There is provision for the release and discharge of prisoners whenever they become entitled. In some cases they may be released before expiration of sentence. The prisoners are supposed to be supplied with a travel warrant to their home and subsistence allowance for the period of the journey.<sup>37</sup>

2.10.14 There is provision for offences in relation to prisons and prisoners and penalties for certain specific offences. Penalty for unauthorized wearing of uniforms, aiding escapes, loitering in the vicinity of a prison, trafficking, prohibited articles, unlawful possession of prison articles, incitement and abetting of desertion, mutiny and sedition, desertion, receiving or demanding money or other consideration from a prisoner, selling or supplying articles to prisoners, issuing unauthorised testimonial, giving unauthorised information and general penalty is provided under the Act.<sup>38</sup>

2.10.15 Finally the Act provides for General Provisions such as treatment and conduct of prisoners to be made available to prisoners, Evidence of age, limitation of actions, rewards for apprehension of escaped prisoners, prison officers, Rewards and Fines Fund, Appointment and powers of visiting justices, disposal of deceased's estate, and powers of Minister to make regulations.<sup>39</sup>

## **2.11 Probation of Offenders Ordinance, Cap 247**

2.11.1 The law provides that where a primary court, District Court or Resident Magistrate's Court which tries an offender is satisfied that the charge has been proved, it may before it convicts him/her or even after having convicted him/her when it is of the opinion that having regard to the existence of the conditions prescribed in the law, release the offender on probation provided that s/he is willing to comply with the provisions of the order. The High Court has similar powers under the law to release an offender on probation. But the court cannot make any probation order in respect of any person who has been charged with or convicted of any offence

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<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.* ss 78-80

<sup>38</sup> *ibid.* ss. 81-93

<sup>39</sup> *ibid.* ss. 97-104

under the Minimum Sentences Act, 1972. The law also provides that the probation order will remain in force for not less than a year and not more than three years from the date it is made. The probationer would be required during that time to report and to be under the supervision of a probation officer who is named in the probation order. The court may also include in the order provisions which it deems necessary to secure the supervision of the offender so as to prevent a repetition of the same offence or the commission of other offences.<sup>40</sup>

2.11.2 The law also requires the court to sentence the probationer for the offence s/he committed in respect of which a probation order was made when s/he commits an offence while the probation order is still in force.<sup>41</sup>

2.11.3 The law also empowers the court to sentence the probationer when s/he fails to comply with the conditions of a probation order. Once a probationer is sentenced for the offence in respect of which a probation order was made then the probation order would cease to have effect.<sup>42</sup>

## **2.12 Ward Tribunal Act, No. 7 of 1985**

2.12.1 The Ward Tribunal Act. No. 7 of 1985 established Ward Tribunals and provided for their jurisdiction, powers, practice and procedure, and other related matters.<sup>43</sup> In every ward a tribunal was established. The Minister is however empowered to establish two tribunals in a single ward.<sup>44</sup> The composition of each tribunal is at least four but not more than eight members elected by the Ward Committee plus the Chairman and a Secretary appointed by the appropriate authority and the local Government respectively. Members and Chairman of the Tribunal must be residents of the ward in question but that is not so for the Secretary. The quorum is half of the total number of members and the decision of the majority shall be the decision of the Tribunal and in the event of an

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<sup>40</sup> s. 3 of the Probation of Offenders Ordinance, Cap. 247

<sup>41</sup> *ibid.* s. 6

<sup>42</sup> *ibid.* s. 8

<sup>43</sup> Short title of Act No. 7/1985

<sup>44</sup> *ibid.* s. 3

equality of votes the Chairman shall have a casting vote in addition to his original vote.<sup>45</sup>

2.12.2 S.5 (1) sets out the qualifications of members and s.5 (2) provides for the qualifications of the Secretary. S. 6 provides for the tenure of office of members to be 3 years but eligible for re-election.

2.12.3 The primary function of the Tribunal is to secure peace and harmony by mediating and endeavouring to obtain just and amicable settlement of disputes. The exercise of the Tribunal's compulsive jurisdiction shall be only after attempting to reach a settlement. The jurisdiction of the Tribunal shall be in relation to all matters and disputes arising under all laws and directives passed by the appropriate authority, and laws and orders for the time being in force in relation to or affecting the business and affairs of the ward made or passed by a local Government authority or any competent legislative authority within the area of the Tribunal's jurisdiction.<sup>46</sup> "Appropriate authority" has been defined in s. 2 of the Act to mean the district council or the urban authority within whose area the Tribunal is established, and includes any person appointed by the appropriate authority to perform any of its functions under the Act.

2.12.4 Besides the jurisdiction under s. 8, the Tribunal shall have jurisdiction to enquire into and determine disputes relating to the offences and civil disputes specified in the schedule to this Act. The schedule under the Act contains minor offences under the Penal Code and the maximum penalty is provided. Also in Part II of the schedule the civil jurisdiction of the Tribunal is provided.<sup>47</sup>

2.12.5 An order of a Tribunal for imprisonment shall be in the prescribed form but it shall have no force of law or effect unless endorsed by the Primary Court Magistrate. The Primary Court Magistrate is required to endorse such order without delay unless s/he has reason to believe that the Tribunal acted without jurisdiction or in excess of its powers, in which case s/he shall revise the order. If the order is endorsed, it shall have the same effect as any sentence of imprisonment imposed by the Primary Court. If the order remitted to the Primary Court is beyond the pecuniary jurisdiction

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<sup>45</sup> *ibid.* s. 8

<sup>46</sup> *ibid.* s. 8

<sup>47</sup> *ibid.* s. 9

of the Primary Court, the Magistrate shall refer the same to a higher court of appropriate jurisdiction.<sup>48</sup>

2.12.6 Appeals may be made within a certain period to the Primary Court. But where the amount of fine or award is not too big (500 fine in criminal cases and 800/= award in civil cases) leave of the Primary Court to appeal would be required. Decisions of the Primary Court shall be final and conclusive except on points of law where the final appeal lies to the district Court.<sup>49</sup>

## **2.13 Magistrates' Courts Act, No. 2 of 1984**

2.13.1 Under Part II, provisions are made for the establishment of different kinds of courts, their area of jurisdiction, and their mode of operation. The provisions also prescribe the procedure to be used in courts, the language to be used in courts and the appointment of such magistrates including the appointment of resident magistrate in-charge to perform supervisory administrative and all functions of such office. Other matters in connection with courts and hearing of cases are also provided in the Act.<sup>50</sup>

## **2.14 Parole Boards Act, No. 25 of 1994**

2.14.1 The parole system is the letting out of prisoners from prison before the legal period of their imprisonment has ended. The parole system is expected to reduce the overcrowding of prisoners in prisons. Since independence the crime rate has gone up thus increasing the numbers of inmates in prisons. A recent report of Human Rights Commission (T) shows that for the prisons inspected there were 26,078 inmates against Prison capacity of 12,540 inmates, indicating excess of 13,538 prisoners. One way of dealing with such a situation was to enact the Parole Boards Act, 1994, to provide a system for releasing prisoners before their terms of imprisonment ended. The National Parole Board and the Regional Parole Boards were established under the provisions of s. 3.

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<sup>48</sup> *ibid.* s. 19

<sup>49</sup> *ibid.* s. 20

<sup>50</sup> Ss.3, 4,5,10,and 15 of the Magistrates' Court Act, 1984

2.14.2 The proceedings for parole begin with the officer in-charge of a prison who proposes the name of a prisoner who meets the conditions for parole and forwards it to the regional Prison Officer for necessary compilation of the documents, which thereafter are forwarded to the Regional Parole board. The law also allows a prisoner who meets the conditions of s.4 of the Act, to send his/her application for release on parole to the Regional Parole "Board. The Regional Parole Board may after perusing, scrutinizing and considering the particulars and records of the prisoner and if it is satisfied that the prisoner is eligible for parole, forward the prisoner's documents to the national Parole Board. Once the National Parole Board receives such documents and scrutinizes them and forwards the recommendations to the Minister for Home Affairs for his/her consideration and evaluation of the recommendations forwarded to him/her and if s/he is satisfied, s/he may grant to the prisoner the release on parole.<sup>51</sup>

2.14.3 Also the prisoner is no longer eligible for parole if s/he commits an offence by failing to comply with the conditions laid down under the Regulations made under s. 9 of the Act, or if s/he commits an offence under any other written law and if s/he is convicted s/he will be required to go back to prison to serve the remainder of his/her sentence for which he was released on parole. S/he would also be required to serve the sentence for the offence which caused him/her to forfeit his/her parole.<sup>52</sup>

## **2.15 Community Service Act, No. 6 of 2002**

2.15.1 This is an Act to make provisions for the introduction and regulation of community service on offenders in certain cases, and for connected and incidental matters.

2.15.2 Where any person is convicted of an offence punishable by: -

- (a) imprisonment for a term not exceeding three years with or without the option of a fine; or
- (b) imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be

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<sup>51</sup> S.6 of the Parole Boards Act, 1994

<sup>52</sup> *ibid.* s. 5

appropriate, the court may, subject to this Act, make a community service order requiring the offender to perform community service.<sup>53</sup>

2.15.3 Community service is unpaid public work within a community, for the benefit of that community.

2.15.4 The court determines the type of public work after consultation with the community service orders committee.

2.15.5 Before a community service order is made the court may direct a community service officer to conduct an inquiry into the circumstances of the case and of the offender.

2.15.6 Management and enforcement of Community Orders is under the National Committee consisting of a chairman and 11 other members.<sup>54</sup>

2.15.7 The Minister is required to establish community service order committees at Regional, District, Ward and village levels.

2.15.8 Probation officers shall be community service officers under the Act.

2.15.9 This scheme is for the purpose of reducing congestion in prisons and also to involve the public in the reformation of offenders.

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## **2.16 Advocates Ordinance, Cap. 341**

2.16.1 This Ordinance regulates the business of advocates on mainland Tanzania.

2.16.2 S. 4 establishes the Advocates Committee which consists of a Judge of the High Court nominated by the Chief Justice, the Attorney General or the Deputy Attorney General or Director of Public Prosecution and a practicing advocate nominated by the Executive Council of the Law Society.

2.16.3 A High Court Judge shall be the Chairman of the Committee and shall preside at all meetings. In case the Judge is absent then the

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<sup>53</sup> Section 3 of community service Act No. 6 of 2002

<sup>54</sup> *ibid* s.7

Attorney General or the Deputy Attorney General or the Director of Public Prosecution shall be the Chairman of the meeting.

2.16.4 S. 5A establishes the Council for Legal Education which consists of:-

- i. the Chief Justice or his representative who shall be the Chairman of the Council;
- ii. the Attorney General or his representative;
- iii. the Dean of the Faculty of Law of the University of Dar es Salaam or his representative and
- iv. two practising lawyers elected by the Law Society.

2.16.5 The function of the Council shall be to exercise the functions conferred upon it by or under this or any other law and to exercise general supervision and control over legal education in Tanganyika for the purpose of this Ordinance and to advise the Government in relation thereto.

2.16.6 In s. 6 the Registrar of the High Court is required to keep in accordance with the provisions of this Ordinance a Roll of all advocates. S/he is required in s. 7 to enter upon the Roll the name of every person who is qualified to practise as an advocate in Tanganyika.

2.16.7 Section 8 provides for the admission and enrolment of advocates. The procedure is to apply to the Chief Justice to be admitted as an advocate. Those who apply must be holders of a degree of law granted after an examination by the University of Dar es Salaam or by such other University or other institution as may be recognized by the Council or if a person is a legal practitioner by whatever name called and thereby has a right of audience before any court having unlimited jurisdiction in civil and criminal matters in any Commonwealth country or in any other country designated by the Minister. Total number of Practising Advocates in Tanzania as of December 2003 is estimated at 658. The Council of Legal Education may exempt any person from all or any of the requirements specified under sub-paragraph (i) of paragraph (b) of subsection (1) of section 9.

2.16.8 S. 10 talk of meetings of the Advocates Committee which are convened by the Attorney General for the purpose of enquiring

into any allegation of misconduct made against an advocate. This may be due to information brought to his notice in any manner (s. 11). The Attorney General may, instead of or in addition to summoning before the Committee any person who makes such allegations of misconduct, require him to support such allegations by an affidavit.<sup>55</sup>

2.16.9 An advocate aggrieved by the decision of the Committee may appeal to the full bench of the High Court.

## **2.17 Arbitration Ordinance, Cap. 15**

2.17.1 The Ordinance makes provision for settlement of disputes by arbitration. It applies to disputes triable by the High Court only. The President (then Governor) may with the concurrence of the Chief Justice however extend such application to subordinate court cases.<sup>56</sup>

2.17.2 When a party submits to arbitration such submission shall be irrevocable unless by leave of the court.<sup>57</sup>

2.17.3 Parties to a submission may agree that the reference shall be to an arbitrator or arbitrators to be appointed by a designated person.<sup>58</sup>

2.17.4 The court has power to stay proceedings where there is a submission. But the party who wants a reference to arbitration should apply to the court before filing a written statement or taking other steps in the proceedings for such stay.<sup>59</sup>

2.17.5 The court may extend the time for commencing arbitration proceedings.<sup>60</sup> Also the court has power in certain cases to appoint an arbitrator, umpire or third arbitrator in certain cases.<sup>61</sup>

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<sup>55</sup> s. 12 of the Arbitration Ordinance, Cap. 15

<sup>56</sup> *ibid.* s. 3 and proviso

<sup>57</sup> *ibid.* s. 4

<sup>58</sup> *ibid.* s. 5

<sup>59</sup> *ibid.* s. 6

<sup>60</sup> *ibid.* s.6A.

<sup>61</sup> *ibid.* s. 7

2.17.6 S. 9 give power to appoint arbitrators to the parties and the court. S. 10 provides for the power of an arbitrator or umpire which is to administer oaths to parties and witnesses, to state a special case for the opinion of the court, on any question of law involved and to correct in an award any clerical mistake or error arising from accidental slip or omission.

**2.18 Commission for Human Rights and Good Governance Act, No. ... 2001**

2.18.1 This Act applies to mainland Tanzania as well as to Tanzania Zanzibar by virtue of Section 3 and it is to be read together with the Constitution. The functions of the Commission according to section 6 include: -

- a) to promote within the country the protection and the preservation of human rights and of duties to the society in accordance with the Constitution and the laws of the land,
- b) to receive allegations and complaints in the violation of human rights,
- c) to conduct enquiries into matters involving the violation of human rights and the contravention of the principles of administrative justice,
- d) to conduct research into human rights, administrative justice and good governance issues and to educate the public about such issues,
- e) to visit prisons and places of detention
- f) to promote ratification of or accession of treaties or conventions on human rights, harmonization of national legislation and monitor and assess compliance, within the United Republic by the Government and other persons, with human rights standards provided for in treaties or conventions or under customary international law to which the United Republic has obligations.

2.18.2 The composition of the Commission is: -

- a) a Chairman who shall be a person qualified for appointment as Judge of the High Court or Court of Appeal;

- b) a Vice-Chairman who shall be appointed on the basis of the principle that where the Chairman hails from one part of the United Republic then the Vice-Chairman shall be a person who hails from the other part of the Union;
- c) not more than five other Commissioners
- d) assistant commissioners.

2.18.3 Representation by advocates is allowed or by any suitable person when a matter is before the Commission.<sup>62</sup>

2.18.4 The procedure after investigations is provided for in section 28. It is this that where after making an investigation the Commission is of the view that the decision, recommendation, act or omission: -

- a) amounts to a breach of any of the fundamental rights and freedoms provided in the Constitution or in any international instrument to which the United Republic is a party;
- b) appears to have been contrary to law; or
- c) was unreasonable, unjust, oppressive, discriminatory or was in accordance with a rule of law or a provision of any Act or a practice that is unreasonable unjust, oppressive, or discriminatory or
- d) was based wholly or partly on a mistake of law or fact; or
- e) was based on irrelevant grounds or made for an improper purpose, or
- f) was made in the exercise of a discretionary power and reasons should have been given for the decision; the Commission shall report its decision, recommendation and reasons for it to the appropriate authority concerned.

2.18.5 The appropriate authority is required to take the necessary steps within 3 months, otherwise the Commission may bring an action before any court or recommend to any competent authority to bring an action and seek such remedy as may be appropriate for the enforcement of the recommendation of the Commission.

2.18.6 Offences and penalties are in part VI.<sup>63</sup>

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<sup>62</sup> S.23 of the Commission for Human Rights and Good Governance Act, 2001

## **2.19 Courts (Land Disputes Settlements) Act No. 2 of 2002**

2.19.1 This Act is enacted to provide for the establishment of Land dispute settlement machinery and for matters incidental thereto

2.19.2 Part II provides for establishment and jurisdiction of Land Courts. It makes it mandatory for every dispute or complaint concerning land to be instituted in the court having jurisdiction to determine land disputes in a given area. The court of jurisdiction includes.

- (a) The village Land Council
- (b) The Ward Tribunal
- (c) The District Land and Housing Tribunal
- (d) The High Court (Land Division)
- (e) The Court of Appeal of Tanzania.

## **2.20 The Village Land Council**

2.20.1 The village Land Council is empowered to:

- (a) receive complaints from parties in respect of land
- (b) convene meeting for hearing of disputes from parties; and
- (c) mediate between and assist parties to arrive at a mutually acceptable settlement of the disputes on any matter concerning and within its area of jurisdiction.

## **2.21 The Ward Tribunals**

2.21.1 The Ward Tribunals have general jurisdiction to enquire into and determine disputes arising under the Land Act, 1999 and the Village Land Act 1999. The Ward Tribunal shall apply mediation in performing its functions/jurisdiction<sup>64</sup>

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<sup>63</sup> *ibid.* s. 37

<sup>64</sup> Section 13(1) of the Courts (Land Disputes Settlement) Act No.2 of 2002

## **2.22 The District Land and Housing Tribunal**

2.22.1 The Tribunal is composed of one Chairman and not less than two Assessors. The chairman takes into account the opinion of the assessors' and is required by law to give reasons for differing from assessors' opinion. The proceedings before the Tribunal shall be conducted in English or Kiswahili except for the record and judgment that shall be in English.<sup>65</sup>

2.22.2 Sections 33-36 provide for general jurisdiction and powers of the Tribunal which among other things have original jurisdiction in all proceedings under the Land Act, 1999 and Village Land Act, 1999. Customary Leaseholds (Enfranchisement) Act, 1968 and Rent Restriction Act, 1984, the Regulation of Land Tenure (Established Village) Act 1992; and powers conferred, on it by any written laws, powers of hearing of appeals and revisional jurisdiction by examining the record of proceedings of the Ward Tribunal.

## **2.23 The High Court (Land Division)**

2.23.1 The court has original jurisdiction on proceedings for recovery of possession of immovable property whose value exceed fifty million shillings; where the subject matter when estimated at a money value, whose value exceeds forty million shillings; proceedings under the Tanzania Investment Centre Act, 1977, the Land Act, 1999 and the Land Acquisition Act, 1967 in respect of proceedings involving the government; proceedings involving Public Corporations specified in the Rent Restriction (Exemption) (Specified Parastatals) Order 1992 and other dispute of National interests which the Minister may by notice published in the Gazette specify and any other proceedings relating to land as conferred by any written law.<sup>66</sup>

2.23.2 The court is also empowered to exercise appellate, supervisory and revisional jurisdiction on matters originating from the District Land and Housing Tribunal.

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<sup>65</sup> (Sections 23, 24 and 32 of Courts (Land Disputes Settlements) Act No. 2 of 2002.

<sup>66</sup> Op.cit ( Footnote No.2 section 37-47)

## **2.24 The Court of Appeal of Tanzania**

2.24.1 This court shall have jurisdiction to hear and determine appeals from the High Court (Land Division). The Appellate jurisdiction Act, 1976 shall be applicable to proceedings in the court of Appeal.<sup>67</sup>

## **2.25 The Evidence Act, No.6 of 1967**

2.25.1 This Act was made to apply to all judicial Proceedings in Tanganyika in or before the High Court and all Magistrates Courts except Primary Courts.

2.25.2 The Act is divided into Five Chapters, Chapter I deals with short title and Commencement, Application, Interpretation, Permissible inferences, Presumptions and conclusive proof.

2.25.3 Chapter II deals mainly with the Relevancy of facts, among other things it also provides for facts in issue and relevant facts which forms part of the same transaction, facts showing existence of state of mind or of body or of bodily feeling, and admission of statements by party to suit or agent or by Persons whose position must be proved as against party to suit.

2.25.4 Furthermore it provides for confessions, for admissibility of confessions to Police officers, Confessions before a Magistrate and confessions caused by inducement threat or promise.

2.25.5 S.27 (2) provides that, the onus of proving confession made by an accused person was voluntarily made by him lies on the prosecution and if the court believes that the same was induced by threat, promise or other prejudice held out by the police officer to whom it was made or by any member of the police force or by any other person in authority, the said

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<sup>67</sup> Op.cit (Footnote No.1 section 48(1) and (2))

confession is held to be involuntary hence subject to be rejected, as provided under s.27 (3).

2.25.6 Chapter III deals with proof it provides for facts judicially noted, Oral evidence and Documentary evidence.

2.25.7 Chapter IV deals with the production and effect of evidence, burden of proof, on whom it lies and estoppels.

2.25.8 Chapter V provides for competency, Compellability and Privilege of witnesses, who may testify, on this part the law clearly provides under s.127 that all persons shall be competent to testify unless the court considers that they are prevented. Furthermore it provides for examination of witnesses such as questioning of witnesses.

2.25.9 Chapter VI provides for improper admission and rejection of evidence that there would be no new trial for improper admission or rejection of evidence. Chapter V Provides for miscellaneous.

## CHAPTER THREE

### 3.0 COMPARATIVE STUDY ON JUSTICE SYSTEM

**“The tide of history has not only produced a system. It has resulted in a culture, which affects all those working within the system: Judges, lawyers, and administrators. Any attempt to reform the justice system must take that culture into account, not as an inseparable obstacle to reform but as something that is deep seated and changing which is a long term process”**

**Source:** Consultation Drafts on the Review of the Criminal and Civil system in Western Australia p. 6.

#### 3.1 Introduction

3.1.1 In order to clearly understand the kind of change that the Tanzania legal system needs for its improvement one must look at other successful legal systems for guidance in terms of best practice. In this study we have chosen Western Australia, Canada Scotland, the USA, and the UK. We have also looked at the East African Countries and South Africa for purposes of close comparison. For this comparison to be more uniform let USA have a uniform understanding of what is a justice system? The Western Australia Law Reform Commission in its report defined a Justice system in the following words: -

*“The Justice system comprises the courts and tribunals, other forms of dispute resolution, the legal profession, public and private, and investigative bodies, principally the Police Force”<sup>68</sup>*

- 3.1.2 In the Common law this definition of a Justice system would apply. It would also apply in civil as well as criminal Justice systems. Again the Western Australian Law Commission had this to say on the uniformity of rules: -

*“While maintaining the distinction between civil and criminal matters and in so far as possible, uniformity of rules for different courts and plain English should be implemented, when revising or drafting new legislative and procedural provisions in response to recommendations in this report”<sup>69</sup>*

- 3.1.3 In Tanzania the use of plain language and Kiswahili in courts has yet to attain the levels ideally required. The English language is still the language of the courts with the exception of the primary court. Furthermore the English used in courts is the “lawyers English” which needs interpretation even for lawyers themselves. Certainly this is inimical to the interest of justice, the courts or the people themselves. There is need for courts to use plain language and the language of the majority of the population. In the case of Tanzania the use of Kiswahili must be encouraged in legal matters beginning with our legislators who must legislate in Kiswahili and thus forcing the courts to adhere to the use of Kiswahili. After all the Parliament is legislating for Tanzanians whose majority can hardly stammer the English language. It is an irony that in a country where less than 5% of its people speak English that its Parliament should legislate in English!

- 3.1.4 The Justice system obtaining in Tanzania in both civil litigation and criminal matters is the adversarial system, which is based in the common law system. A trial under this system does involve the pursuit for truth, but rather the best presentation of arguments, facts, evidence and the law with the magistrate or judge sitting as an umpire occasionally ruling on disputed points of procedure and evidence. The magistrate does not take an active part in the proceedings. It can be strongly argued that in a country like Tanzania where the majority of litigants are ignorant of the law,

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<sup>68</sup> Report on the Review of the Criminal and Civil Justice System in Western Australia. p. 3

<sup>69</sup> *ibid.*

there is greater need to depart from the passive stance of the court especially where self-represented litigants appear so that justice is not defeated. It is of course desirable for a judge or magistrate to take a more active role when either none or one only of the parties is represented. But it does not help justice for a judge to sit passively waiting to rule as to who has more forceful arguments.

- 3.1.5 A publicly funded justice system should be, in the words of Lord Wolfe "... just, fair, comprehensible, certain and reasonably expeditious."<sup>70</sup> As is the case in Western Australia, it is also in Tanzania. The long-term vision of the justice sector and indeed the Law Reform Commission of Tanzania is "to have a timely, fair, cost effective and accessible Justice to all."<sup>71</sup> The legal system must therefore provide just results as between the parties to litigation, civil and criminal, and socially just in terms of community values. It is not easy to ensure the above. The difficulty lies in reforming the system namely the adversarial system. But if nothing is done towards that end then there is no point in having an accessible system.
- 3.1.6 There are many types of justice: social, political, economic, moral or legal. We are familiar with the Justice according to law predetermined and publicly known principles and rules. Nevertheless, it is not only the principles and rules however defined which matter; it is the exercise of discretion by a decision maker and the facts of the particular case that will determine whether the results are just. Certainly, the procedure and process of the legal system is the driving force to how the legal system will address issues or wrongs and resolve disputes. It is the procedure of the legal system that is the focus of everything.
- 3.1.7 The procedure will determine whether and how soon a matter is disposed of. However, you cannot sacrifice Justice for efficiency by say, removing the right of appeal. Certainly, the system would be more efficient in that it would save money and time but litigants would be denied Justice. Furthermore, a system cannot be described as "just" if it is too expensive, but a system that is not properly funded cannot be said to be satisfactory. Therefore, one

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<sup>70</sup> Consultation Drafts vol. I Law Reform Commission of WA

<sup>71</sup> Vision of Accessible and Timely Justice for all in the New Millennium. Pg...

has to balance between public funds to support a court system and the kind of cases being brought to the court for adjudication. It would not be worthwhile to fund a court system that is dealing with petty litigation best left to other bodies. What is important is that not only the wealthy get access to the court system but also the poor.<sup>72</sup>

3.1.8 The role of lawyers in a Justice system is well known. However, not everyone can afford a lawyer – a good lawyer. If an individual cannot get the assistance of a lawyer while another can easily do so, this may be described as impeding or denying access. The poor litigant in our adversarial system may find that s/he is unable to present all the relevant evidence of his/her case leading to his/her losing the case more so because of the passivity on the part of the judges and the heightened role of lawyers.<sup>73</sup>

3.1.9 The presence of self-represented litigants has the potential of increasing costs for all court Users in that: -

1. You get more pre-trial procedures,
2. You get poor issue definition and clarification,
3. Greater time and expense may be spent to respond to unclear or irrelevant evidence; and
4. Excessive time spent in hearing sessions.<sup>74</sup>

3.1.10 Indeed self-represented litigants have the capacity to unbalance or take off the track the adversarial nature of the Justice system and in the process to undermine efforts at impartiality by judges and magistrates. Judges and Magistrates would then have to intervene in many cases in order to address the shortcomings and lack of familiarity of self-represented litigants in pre-trial and trial procedures. The judge or magistrate inadvertently becomes a manager while continuing to be the adjudicator. This may make him/her lose neutrality and be required to make decisions before all facts are known. This so-called judicial activism would not be for the benefit of the adversarial system.<sup>75</sup>

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<sup>72</sup> Report on the Review of the Criminal and Civil Justice System in Western Australia.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

- 3.1.11 There is also the problem of vexatious proceedings. There is no definite legislation to counter such proceedings. A person may file a civil suit or get a criminal charge filed against another with the sole purpose of annoying, embarrassing or putting the other party to shame or ridicule. We are aware of the sanctions that exist but we think they are not enough more so because they only appear at the end after the damage has been done.
- 3.1.12 The Criminal Justice System of Sri Lanka, formerly Ceylon is based on the Indian system, which in turn the Indian system is based on the English system. The Justice systems in the East African Countries are based on the English system and some of the laws like the Penal Code emanated from the Indian legal system. If there are any differences these will be based purely on adaptation. While the Sri Lankan system has a fully-fledged juvenile Justice system Tanzania does not have such a system. Instead the juvenile processing is integrated within the normal Justice system. Apart from this aspect the legal systems in almost all Commonwealth countries, which include Canada, UK, India and South Africa, are similar with minor local adaptations of the same principles.
- 3.1.13 **The American legal system is based on the power of the people through their Constitution. In the USA only the people have rights under the Constitution and the entities such as an organization like a business or Government agencies have no rights. Titles have no rights. A person who has been given a title has been given responsibilities. It is not a grant of superior right over others. Only individuals have rights. It is on this basis that the American legal system has been developed. All laws made in a state are subordinate to the state Constitution. The state Constitution is subordinate to the Federal Constitution, which in turn is based on the rights and duties of the individual. These are written. In America the law is nothing but written words of common meaning that all can understand. They are words that if not enforced mean nothing. Law is not a person of title. Law is not a policeman, a Government Agency a judge or even a panel of judges. Anything other than the written word is arbitrary, and discriminatory. It is contrary to the American Constitution, which is the foundation of the American nation.**
- 3.1.14 **The decision making process through the American legal system is based on superiority of the law making organ. It is simply the matter of giving recognition and honour to the hierarchy of laws**

and it goes as follows. Step one: what does the Constitution say regarding the matter i.e. what are the rights of the individual involved? Step two: asks what the state Constitution says regarding the matter further reiterating the rights of the individual. If the State Constitution conflicts with the federal Constitution then the dictates of the federal Constitution must be followed. Step three: the adherence to federal laws and if they conflict with the USA Constitution then it should be disregarded and the plain words of the Constitution take precedence. If the state Constitution infringes on the rights of the individual then it must be declared unconstitutional. The fourth step is to look at the state statutes and the same hierarchy is followed. The same procedure is followed when dealing with lesser laws created by Federal agencies, State Agencies, Counties or cities. The final part of the decision making process in the American legal system is to look to court rules of procedure as a policy that the court may request the parties follow and sanction the parties if they do not follow the procedures of the court. Rules of the court are not law. They are procedural policies for which a party to litigation can be held in contempt and can be punished by a fine. It is objectionable to jail people for contempt in America. It is considered abusive!

- 3.1.15 The courts in America may look to *stare decisis*, i.e. precedent set by other courts in similar cases and circumstances for guidance in making a ruling. *Stare decisis* is not law but merely a source of reference and guide. This then is the flow of decision-making, the flow of Justice in the American legal system.
- 3.1.16 In Tanzania the state as an institution has rights that do sometimes conflict with the rights of the individual. This has historical background emanating from the Ujamaa era where the state acquired a prominence above the individual. Instead of merely having duties the state actually had rights against an individual. The right to detain an individual without having to explain to anyone why the state has acted so. The State in the form of the President could declare war without consulting the people through Parliament. The declaration of war could easily be inimical to the rights of an individual. The American system and the Tanzanian system however coincide in their hierarchical recognition of the law. Superior courts always override the lesser courts. Likewise superior laws always subordinate inferior ones made at district or lower levels.

- 3.1.17 The Commission is hopeful that with the recognition of international Human Rights, Tanzania will eventually put the rights of the individual at the centre of all law making.
- 3.1.18 Having given a brief background to the legal systems of Tanzania and compared it to systems of a few other countries let USA now systematically examine each step in the flow of Justice and see where Tanzania could effectively exchange best practices with the more successful legal systems.

## 3.2 Investigation

**“The rule of law is the glue that strengthens and holds firm the Justice system of a democratic country. It is an ideal, which all countries can strive. It is often compromised and undermined, frequently with the best of intentions. Without rule of law delicately balancing the rights of individuals and the demands of the state, though all would be lost.”**

**Source:** Criminal Justice Centre - Crime and Justice International 2003

- 3.2.1 This is the very first step in the flow of Justice and it normally starts when a crime has been committed and either discovered by the Police or a complaint has been filed with the Police Authorities. The Police would normally conduct investigations and decide whether or not to make an arrest. If they make an arrest then they also have to decide whether to charge, who to charge, and what to charge the person/s with. The question of Police bail or judicial bail also is decided at this stage.
- 3.2.2 The process described above applies to most judicial systems including those of Western Australia, the USA, the UK, most commonwealth countries and those countries that are within the practice of common law. In Singapore, as a rule, the police deal with the investigation of offences. Besides the police officers, there are also customer officers, immigration officers and narcotic officers who are empowered to investigate limited offences in

contravention of customs, immigration and narcotic laws. The police operate under the supervision of the Ministry of Home Affairs.

- 3.2.3 In Tanzania the above process is theoretically applicable although the practice is far from the theory. In many instances arrests are made before any meaningful investigation is conducted. It is standard practice to conduct investigations after arrests no matter how petty the supposed crime or flimsy the complaint. This bad practice has led to prisons and remand jails and homes for juveniles to be highly congested.
- 3.2.4 The Commission therefore recommends that arrests should not be made if it is merely based on a complaint that prima facie does not have any concrete evidence or if the police have not detected the crime. For minor offences, arrests should be made only after thorough investigations have been conducted and evidence gathered. Arrests may be made where the police have detected the crime or potential commission or omission of the crime is detected.

### 3.3 Arrest

**“Law, absent enforcement, is nothing but words. The ability to enforce law gives it authority.”**

**Source:** <http://www.informed.org/flow%20%Authority.htm>

- 3.3.1 A police officer or even a civilian may make an arrest if s/he sees a crime being committed. This circumstance applies to almost all legal systems. It is different however, for arrests that are made upon receipt of a complaint or upon completion of investigations. The procedures in this case vary from country to country. Arrests take place when the law is breached. An arrest is the first step to giving law its authority and as such, it must be carried out with the utmost care as it involves the basic right of an individual to free movement. An individual should not be restrained without a just cause.
- 3.3.2 In Japan, before a police officer an arrest a person suspected of committing a crime, that police officer must first obtain an arrest warrant issued by a judge. However, it is possible in some occasions, to arrest a suspect if s/he is caught doing the criminal

act, or, as the law provides, on special circumstances. There are mainly three reasons a judge must consider when deciding to detain a suspect, these are, first, the person must be suspected with commission of an offence, second, to prevent a suspect from escaping and third to prevent him from destroying evidence. When arresting a suspect, the arresting officer is required to inform the suspect of the essential facts justifying the arrest and the right of the suspect to select a defence.

- 3.3.3 After arresting a person suspecting him/her of committing an offence, the police officer has 48 hours to detain the suspect after which s/he must transfer the arrested suspect to the prosecutor. The prosecutor has 24 hours within which to decide whether to detain the suspect. Further, the public prosecutor receiving the suspect again informs the suspect of the essential facts justifying the arrest and the right of the suspect to select a defence. The prosecutor shall then hear the suspect's explanation and examine the evidence sent from the police. If the prosecutor will find it necessary to detain the suspect, s/he must ask the judge for detention. The Judge will then hear explanations from the suspect and evidence from the police and decide whether to detain the suspect or not. The detention of the suspect from a decision of the Judge can last for not more than 10 days.
- 3.3.4 Suspects are prosecuted within the detention period of not longer than 20 days. The public prosecutor must release suspect when prosecution has not been initiated within the detention period. A defendant under prosecution may be allowed release on bail if s/he fulfils specified conditions.
- 3.3.5 A suspect may be detained either in a detention house or police custodial facility. In most cases police custodial facilities are selected until prosecution is instituted. The Judge, at his/her discretion, may chose whether a suspect is to be detained at the police custodial facilities or the detention house. The Judge must consider the capacity and location of the facility, convenience for speedy and appropriate investigation, convenience for detainees, defence counsels, family members, etc. for visits and other circumstances. Of course, all the time the assumption is that the suspect is innocent until proven guilty in a court of law.

- 3.3.6 The process described above is similar to that being practised in most American states. The process is markedly different from the one practised in Tanzania. In Tanzania, a police officer may arrest a suspect if s/he detects him/her in the process of committing an offence. S/he may also arrest a suspect upon securing a warrant of arrest from a court of law. Once a police officer has made an arrest, s/he is required to take the suspect in front of a magistrate within twenty-four hours of the arrest being made, however if this is not practicable then s/he shall cause him/her to appear before a magistrate “as soon as practicable.”<sup>76</sup> In cases of murder, the time is said to be “as soon as practicable,” which can vary from 24 hours to one week! This is also the situation in the other two East African States of Kenya and Uganda.
- 3.3.7 The practice in Tanzania is very different from the requirements of the law. One may be held in Police custody for as long as the police take to be ready to prosecute or even to drop the charges. Admittedly section 32 and section 14 (3) (*sic*) of the CPA allows a police officer to continue to keep under restraint a suspect s/he has arrested without warrant for so long as s/he believes on reasonable grounds that it is necessary to do so while investigations on a crime s/he has not yet been charged with are going on.
- 3.3.8 These powers of the police are obviously too vast and without accountability lead to corruption on a grand scale. The provision of section 14(3) of the Criminal Procedure Act is not clear because section 14(3) refers to subsections (1) and (2) of section 14 whereas there are no such subsections in section 14. The Commission was not able to find out the reasons for further detention of accused persons which reasons are supposed to be in subsection (1) and (2) of sections 14.
- 3.3.9 The provision of section 14(3) of the CPA is not clear because section 14(3) refers to subsection (1) and (2) of section 14 whereas there is no such subsections in section 14. The Commission was not able to find out the reasons for further detention of an accused which reasons are supposed to be in subsection (1) and (2) of section 14. Therefore, the Commission recommends for the ratification of the printing error in section 14.

## 3.4 Charging

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<sup>76</sup> S. 32 of the Criminal Procedure Act

- 3.4.1 The issues of charging as referred to above is decided at the stage preceded by investigation and the police who have already decided on an arrest will decide on whether or not to proffer charges against a suspect. Depending on the nature of the suspect the police will decide on the appropriate court. Juveniles will be tried in juvenile courts and adults will be tried in normal courts of law.
- 3.4.2 In Tanzania individuals may file complaints against each other in primary courts where the state does not play any role in terms of prosecution. The complainant carries out prosecution to the end whereupon the magistrate assisted by assessors enters a verdict and metes out an appropriate sentence.
- 3.4.3 In Western Australia Police commence prosecution by either issuing complaint and summons or after arresting the suspect. At this stage the Western Australian police will then decide to charge or not to charge and if they decide to charge then they will decide who is charged and what the charge should be. They will also decide on matters of bail i.e. whether it should be police bail or judicial bail. The charging will normally take place in what they call Court of Petty Sessions (CPS). These are equivalent to Tanzania's courts at district level. In the USA this process will differ from state to state, while in most commonwealth countries this process will be more or less similar.

### **3.5 Initial Appearance in Court**

- 3.5.1 In Western Australia as is the case in the UK and the USA, the first appearance is done in the junior most court and depending on the crime it will then be moved gradually into the higher courts. This is also the situation in most commonwealth countries.
- 3.5.2 Subsequent appearances in Western Australia as in most commonwealth countries including the UK will very much depend on the seriousness of the crime. In Tanzania a suspect may be charged in the District court or Resident Magistrates' court. At this stage a charge will be read out to him/her and pleas taken. In Western Australia pleas may be taken often after legal advice has been taken. This is not the case in Tanzania. In Tanzania only pleas to charges such as those involving murder are taken after seeking legal advice and in the High Court only; in all other cases pleas

may be taken without any legal advice being offered. The Commission is of the view that ideally pleas must be taken after legal advice has been sought.

- 3.5.3 The Commission is of the view that ideally pleas must be taken after legal advice has been sought or offered by the state where the accused is not a person of substance. Too often we have had innocent people convicted on their own pleas of guilty when in fact they did not understand the charges they face. Obviously the question of language contributes to this lack of understanding of charges. Even Kiswahili may be difficult to understand for people in Tanzania and thus the need for legal advice being offered before the plea is taken.

### **3.6 Bail**

- 3.6.1 Once an individual has been arrested s/he is not yet guilty and therefore his/her rights must continue to be respected. When being arrested the suspect will be informed of his/her rights and particularly the right for representation by a lawyer, a friend or a relative. Depending very much on the nature of the offence, the suspect may be granted police bail or will have to wait until s/he is presented to a court where s/he can get judicial bail. Bail is a right to all persons. This principle holds sway in almost all democratic entities within the Commonwealth and the USA.
- 3.6.2 In Tanzania as in Britain and most other Commonwealth countries, murder is not bailable. One cannot get bail of any type for the offence of murder, because of the seriousness of the offence. When bail is granted there are many conditions attached to it. According to the CPA Section 64, an arrested individual may be released on police bail if the offence s/he is suspected of having committed is not a serious one. Further when a formal charge has been proffered against a suspect who is under police restraint, s/he may be released on bail if his/her arrest was done without a warrant of arrest. Whenever police bail is granted, the suspect must execute a bond with or without sureties to appear before a magistrate on the appointed day and time. The most important aspect worth noting in this process is that the arresting police officer is also the prosecutor. This is also the position in Kenya and Uganda.

- 3.6.3 The practice of always charging a person with murder whenever a homicide occurs even when the prime facie evidence clearly shows that the offence is manslaughter is prevalent in Tanzania. The Commission recommends that in appropriate cases a charge of manslaughter rather than murder should be proffered against an accused person to enable him to be considered for bail.
- 3.6.4 The American system has de-linked the function of prosecution from the police and public prosecutors who are civilians do it. This is a major departure from the Common law system and it may be worth our while to examine the American system in this regard and see what can be learnt.
- 3.6.5 After arrest, law enforcement agencies present information about the case and about the accused to the prosecutor, who will decide if formal charges will be filed with the court. If no charges are filed, the accused must be released. The prosecutor can also drop charges deciding not to prosecute, legally known as *nolle prosequi*, even after proceedings have commenced.
- 3.6.6 A suspect charged with a crime must be taken before a judge or magistrate without unnecessary delay. At the initial appearance, the judge or magistrate informs the accused of the charges and decides whether there is probable cause to detain the accused person. If the offence is not very serious the determination of guilt and assessment of penalty may also occur at this stage.
- 3.6.7 Often, the defence counsel is also assigned at the initial appearance. All suspects prosecuted for serious crimes have a right to be represented by an attorney. If the court determines the suspect is indigent and cannot afford such representation, the court will assign counsel at the public's expense.
- 3.6.8 A pre-trial release decision may be made at the initial appearance, but may occur at other hearings or may be changed at another time during the process. Pre-trial release and bail were traditionally intended to ensure appearance at trial. However, many jurisdictions permit pre-trial detention of defendants accused of serious offences and deemed to be dangerous to prevent them from committing crimes prior to trial.

- 3.6.9 The court often bases its pre-trial decision on information about the defendant's drug Use, as well as residence, employment, and family ties. The court may decide to release the accused on his/her own recognizance or into the custody of a third party after the posting of a financial bond or on the promise of satisfying certain conditions such as taking periodic drug tests to ensure drug abstinence.
- 3.6.10 In many jurisdictions, a preliminary hearing may follow the initial appearance. The main function of this hearing is to discover if there is probable cause to believe that the accused committed a known crime within the jurisdiction of the court. If the judge does not find probable cause, the case is dismissed; however, if the judge or magistrate finds probable cause for such a belief, or the accused waives his/her right to a preliminary hearing, the case may be bound over to a grand jury.
- 3.6.11 A grand jury hears evidence against the accused presented by the prosecutor and decides if there is sufficient evidence to cause the accused to be brought to trial. If the grand jury finds sufficient evidence, it submits to the court an indictment, a written statement of the essential facts of the offence charged against the accused.
- 3.6.12 Where the grand jury system is used, the grand jury may also investigate criminal activity generally and issue indictments called grand jury originals that initiate criminal cases. These investigations and indictments are often used in drug and conspiracy cases that involve complex organizations. After such an indictment, law enforcement tries to apprehend and arrest the suspects named in the indictment.
- 3.6.13 Misdemeanour cases and some felony cases proceed by the issuance of information, a formal, written accusation submitted to the court by a prosecutor. In some jurisdictions, indictments may be required in felony cases. However, the accused may choose to waive a grand jury indictment and, instead, accept service of information for the crime. In some jurisdictions, defendants, often those without prior criminal records may be eligible for diversion from prosecution subject to the completion of specific conditions such as drug treatment. Successful completion of the conditions may result in the dropping of charges or the expunging of the

criminal record where the defendant is required to plead guilty prior to the diversion.

3.6.14 From the above it is clear that the American system is no different to the Tanzania system in that the issuance of bail exists as long as there is adequate bondage and depends on the nature of the offence committed. Bail indeed becomes the right of the suspect only if s/he has money or good family connections. Tanzania can learn from the American system by making bail a right in all offences. After all when s/he is charged the suspect is exactly that, a suspect. S/he is not guilty of any offence and is entitled to his/her constitutional right of freedom of movement. One should not be restrained merely because s/he is suspected of having committed a crime.

### **3.7 Prosecution**

3.7.1 In Tanzania Police prosecutors on the whole undertake prosecution, although the Director of Public Prosecutions also undertakes prosecution depending on the nature of the offence. All appeals are handled by the DPP through state Attorneys. The danger of police officer prosecuting is that they may arrest a suspect in the evening and in the morning prosecuting the individual in court. In such a situation Justice will not be seen to have been done at all.

3.7.2 Criminal prosecution in Singapore is instituted by the state, which is represented by the Attorney General's Department; with some exceptions like private summons that are brought by individuals for certain minor offences or nuisances. The Attorney General's Department is headed by the Attorney General, assisted by the Solicitor General and a staff of deputy public prosecutors, all of whom are legally qualified and recruited through the Legal Service Commission. The Attorney General is appointed by the President on the advice of the Prime Minister from among persons qualified as Supreme Court judges.

3.7.3 The prosecuting department of each investigative agency mentioned above is also empowered to prosecute only minor cases not involving points of law or complex legal issues under its

jurisdiction. The Attorney General, who is also the Public Prosecutor, controls and directs prosecutions in Singapore, with the assistance of several Deputy Public Prosecutors. The Attorney General initiates proceedings and can also terminate proceedings at pre-prosecution stage and even during the trial, if for good reasons, he deems it unnecessary to proceed further with the case. Proceedings can also be terminated or discontinued by the Attorney General even though he did not initiate the proceedings in the first instance.

- 3.7.4 In this regard Tanzania can learn from the legal system of the USA and Singapore where the police do not undertake the prosecution task. The Commission strongly recommends that the function of prosecution be de-linked from the Police and instead a public prosecutor who is not a police officer should undertake prosecution.
- 3.7.5 During the course of hearing there are many processes involved such as presenting witnesses, tendering evidence, examination and cross-examination. Let us now turn to these processes and examine what other legal systems do. We may be able to borrow a leaf from these jurisdictions.
- 3.7.6 An essential feature of our legal system is the right of a defendant, whether in criminal or civil proceedings, to challenge the opposing party's case. However, excessive or abusive examination and cross-examination clearly should be prevented wherever possible. It increases the time and expense of litigation without assisting Justice to be done in the particular case. It also affects each trial participant, other litigants, and the general interest of the community in having legal proceedings resolved fairly and as less expensively and expeditiously as possible. The key to curbing abuse is to determine what is excessive and what is appropriate examination and cross-examination.<sup>77</sup>
- 3.7.7 Reasons for excessive examination may be incompetence or ill preparedness on the part of counsels. Counsel may be afraid to stop cross-examination or examination because of the danger of leaving an issue uncovered. Therefore, greater judicial intervention

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<sup>77</sup> p. 177, para 21 of Final Report

may hold the key to limiting excessive or abusive questioning of witnesses

3.7.8 Also self-represented litigants may or may not question witnesses excessively because: -

1. They do not appreciate what is considered relevant at law;
2. They are unaware of evidentiary rules;
3. They are less constrained by any duty to the court; and
4. They may Use the opportunity to vent frustrations or engage in personal attacks.

3.7.9 In criminal proceedings, the situation is even worse for self-represented defendants or accused. When alleged offenders are not legally represented, they are entitled to personally cross-examine witnesses, including victims of the crime. Where the victim is a child especially in sexual offences the judge or magistrate should exercise more control of the situation in the interest of Justice but at the same time ensuring that Justice is done in the questioning process by giving the accused a fair chance of putting his/her case across.

3.7.10 One way of cutting down questioning of witnesses is to have witness statements in a written form. Then there could be exchange of witness statements that would reduce trial time in a variety of ways: -

1. The statement may be ordered to stand in place of examination-in-chief so that only a small number of questions would be permitted when necessary to meet new and unanticipated issues or in the interest of Justice generally;
2. Objection to the admissibility of evidence-in-chief could be dealt with prior to trial; and
3. The exchange of witness statement also could enable better preparation for cross-examination.<sup>78</sup>

3.7.11 The only snag with this arrangement of exchanging witness statement is the right to silence. There are three headings here: -

1. A suspect's right to silence in the police station;

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<sup>78</sup> Report on the Review of the Criminal and Civil Justice System in Western Australia, para. 21.7, p. 179

2. The limits on the pre-trial process of disclosure enjoyed by both the prosecution and the defendant in criminal cases; and
3. A defendant's right to silence at trial.

### **3.8 Alternative Criminal Charge Resolution**

- 3.8.1 Alternative resolution to criminal charges may involve a defendant being given an opportunity to take part in formal diversionary scheme rather than the usual process of adjudication and/or sentence.<sup>79</sup> The diversionary scheme based on family group conferencing should cover juvenile offenders as well as young adults who are not recidivists and first offenders of any age for appropriate offences. In Western Australia the pre-conviction diversion process is a type of family group conferencing known as the Juvenile Justice Team. The offender attends together with a supporter and/or members of his/her family, victim and support person, a police officer and a member of the Ministry of Justice, all of whom must agree to the implementation of a proposed diversionary program. The plan of action may include an apology, reparation, community work and so on. Offenders may be referred directly by police or by children's court provided the offender accepts his/her responsibility for the offence and agrees to make amends. If the agreed plan is carried out the charges are withdrawn. The children's court also has discretion to refer offenders after they have been convicted. There does not appear to be any reason why the availability of such a scheme needs to be confined to young offenders.<sup>80</sup>
- 3.8.2 Pre-trial negotiations between prosecution and defence should be formalised into a process known as Alternative Criminal Charge Resolution.<sup>81</sup>
- 3.8.3 The purpose of ACCR should be to reach agreement between parties about: -
  1. Which charges will continue to hearing and in which jurisdiction;
  2. Whether these charges can be heard concurrently;

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<sup>79</sup> *ibid.* para 25.1, p. 209 of Final Report.

<sup>80</sup> *Ibid* p.10 and Recommendation 256 of Final Report

<sup>81</sup> Resolution 257.

3. Evidentiary issues, including disclosure of copies of statements of non-expert witnesses whom the defence proposes to call, if the defence wishes to do so;
  4. Notice of which prosecution witnesses will be required to be present, if the defence wishes to do so; and
  5. The possibility of other admissions.<sup>82</sup>
- 3.8.4 Victims of crime the subject of charges to be negotiated, if any, should be informed of the pre-trial negotiation process and be entitled to provide a written statement for consideration by the parties. Irrespective whether victims submit statements or wish to be consulted about the negotiations they should be notified of the outcome and the reasons for the outcome.<sup>83</sup>
- 3.8.5 ACCR negotiations and any information available only because of the process, including victim statements and advice of outcomes and reasons, should be 'without prejudice'.<sup>84</sup>
- 3.8.6 All parties involved in the ACCR process should be made aware of their obligations to maintain confidentiality and the reasons for those obligations, and be required to sign an undertaking to that effect. Signed undertaking to maintain confidentiality should not have 'without prejudice' status. Confidentiality should be clearly stated to apply so long as the charges subject of negotiation may be tried or re-tried.<sup>85</sup> The media should be prohibited from publishing the contents of any ACCR negotiations or any information available because of that process so long as there remains a risk that it may prejudice the trial or retrial of any of the charges subject to negotiation.<sup>86</sup>
- 3.8.7 In the USA, the stage after first appearance in court is as follows. Once an indictment or information has been filed with the trial court, the accused is scheduled for arraignment. At the arraignment, the accused is informed of the charges, advised of the rights of criminal defendants, and asked to enter a plea to the charges. Sometimes, a plea of guilty is the result of negotiations between the prosecutor and the defendant.

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<sup>82</sup> Resolution 259 of Final Report

<sup>83</sup> *ibid.* Resolution 263

<sup>84</sup> *ibid.* Res. 264

<sup>85</sup> *ibid.* Res. 265)

<sup>86</sup> *ibid.* Res. 266

- 3.8.8 If the accused pleads guilty or pleads *nolo contendere* (accepts penalty without admitting guilt), the judge may accept or reject the plea. If the plea is accepted, no trial is held and the offender is sentenced at this proceeding or at a later date. The plea may be rejected and proceed to trial if, for example, the judge believes that the accused may have been coerced.
- 3.8.9 If the accused pleads not guilty or not guilty by reason of insanity, a date is set for the trial. A person accused of a serious crime is guaranteed a trial by jury. However, the accused may ask for a bench trial where the judge, rather than a jury, serves as the finder of fact. In both instances the prosecution and defence present evidence by questioning witnesses while the judge decides on issues of law. The trial results in acquittal or conviction on the original charges or on lesser included offences.
- 3.8.10 After the trial a defendant may request appellate review of the conviction or sentence. In some cases, appeals of convictions are a matter of right; all States with the death penalty provide for automatic appeal of cases involving a death sentence. Appeals may be subject to the discretion of the appellate court and may be granted only on acceptance of a defendant's petition for a writ of certiorari. Prisoners may also appeal their sentences through civil rights petitions and writs of *habeas corpus* where they claim unlawful detention.
- 3.8.11 Through this process, Tanzania could cut down on the number of court cases and possibly the number of remandees and prisoners thus alleviating the chronic problem of congestion in prisons and remand centres. The Commission recommends that Alternative Criminal charge Resolution should be employed as described from page 48 to 49 of our report.

### **3.9 Court Processes and Practice**

#### **3.9.1 In-Court Protection of Privacy and Identity**

- 3.9.2 In some jurisdictions, courts have established ways and means of providing protection to witnesses or even accused persons on the basis of their age or for security reasons. Provisions have been made for the exclusion of the press or public from the courtroom to protect identification of witnesses. In terms of identification by the

defendant, measures such as screen, blurring or voice distortion have been used.

- 3.9.3 The European Convention on Human Rights under Article 6(1) allows discretion to individual jurisdictions to exclude members of the public including the press from courts where this is seen to be necessary, for example, moral, public order or security reasons, or to protect the interests of juveniles or the private life of a "victim" or witness. There is also a more general assumption that the public can be excluded where publicity would compromise the interests of Justice. Reid (1998), however, notes that these measures have not yet been the subject of much scrutiny by the European Court.
- 3.9.4 In the USA, courts work on the principle of openness, but the courts can be closed to the press and public, with decisions made on a case by case basis. (In a paper by the New Zealand Law Commission, however, it is suggested that there is a need for a threat to life in the USA before the courts will allow anonymity). As is set out later, there are substantial difficulties in the USA in terms of protecting the privacy of witnesses in both court proceedings and in terms of wider publicity in the face of the 1<sup>st</sup> Amendment.
- 3.9.5 In Canada, members of the public can be excluded from the court on the basis of interference with "the proper administration of Justice". In 1993, it was specifically added that the judge (in taking a decision about whether to exclude the public) must safeguard the interests of witnesses under the age of fourteen. In the Criminal Code, S486 (3), it is also stated that publication or broadcast can be prohibited where the case relates to a sexual offence or violence, and S442 (3) can also provide for anonymity.<sup>87</sup> An application for anonymity must be made to the court in each case.
- 3.9.6 In Australia, the same principle applies, and the court can be closed when children or other "special witnesses" give their evidence. MacFarlane and Keating (1999) suggest that there has been an increasing recognition of the importance of taking account of "victims'" concerns. The opportunity for closure is not provided, however, in all jurisdictions or in all courts (e.g. in the Northern Territories) there can be closure at committal proceedings, but not in trials in the Supreme Court, while in Tasmania it depends on the circumstances of the case.

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<sup>87</sup> Chinkin, 1996

- 3.9.7 The New Zealand Law Commission (1997) notes that there has been no common law jurisdiction which has definitive legislation on the issue of anonymity, with most practice based on case law. In New Zealand, however, the Evidence (Witness Anonymity) Amendment Act 1997 (NZ) allows orders to be made to permit witnesses to give evidence anonymously. This has been experimental and unique legislation, stemming from the intimidation of witnesses in some cases (particularly by organized gangs) and the decision that the law to permit anonymous evidence could only be given by Parliament.
- 3.9.8 New Zealand courts generally operate on the principle of open Justice, but the new Act allowed judges to permit anonymous evidence. Applications are heard in chambers for pre-trial orders and there is a detailed test which must be applied. A similar test is conducted for an anonymity order for witnesses at trial, relating to the safety of the witness or property, the credibility of the witness and the balance with the right of the accused to a fair trial. The judge can ask for the view of independent counsel in determining these issues. The witness anonymity order can also be supplemented by additional provisions such as the Use of screens or CCTV and the clearing of the court. The judge must advise the jury not to draw any inference from the anonymity order.
- 3.9.9 There are also restrictions on naming the "victims" of sex crimes. The Criminal Justice Act (1954) (NZ) allows the suppression of names, and the Crimes Act (1961) (NZ) allows the court the power to clear the public to allow the complainant to give evidence in sexual crimes. The Criminal Justice Act of 1985 also allowed the publication of names of witnesses to be forbidden in the interests of Justice or "reputation of the victim".<sup>88</sup> Other provisions include that the names and addresses of witnesses can be withheld where there is a need for their protection. A prosecutor or defendant can apply for a witness anonymity order and this can be granted in a number of circumstances, including if the safety of the witness or another is likely to be endangered. There must, however, be no reason to believe that the witness will not be truthful and their credibility can be tested without knowing their identity, and the making of the order must not deprive the accused of a fair trial.
- 3.9.10 In Poland, the Provincial Prosecutor's Office has been able to request witness anonymity since 1995. There is also provision to

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<sup>88</sup> New Zealand Law Commission 1997

protect witnesses in the former Yugoslavia under Article 22 of the Statute of the International Tribunal for the Prosecution of Persons responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia. Chinkin (1996) notes that, in these cases, there is also provision for the removal of witnesses' names from the court record to avoid reprisals.

- 3.9.11 Beijer *et al* (1995) note that, since 1980, courts in the Netherlands have had wide ranging powers to protect the anonymity of witnesses. For example, they note that hearings can be entirely in camera if required, witnesses can be granted anonymity and, where it is viewed as necessary by the court, the defendant can be removed from the court and will be provided with a summary of the evidence presented. As is noted later, there have been challenges to the Use of these powers under Article 6 of the European Convention.
- 3.9.12 In South Africa, non-disclosure can be allowed under the Criminal Procedure Act No. 51/1977 where it seems that harm will come from the testimony. The courtroom can also be closed during testimony relating to sexual assault.
- 3.9.13 In Switzerland, in relation to sex crimes, the law states that the identity of the "victim" cannot be publicized if the "victim" requests this or if it is necessary for the prosecution. While the "victim" is testifying, the court can be closed. Similarly, in Denmark, if a "victim" of incest or rape requests this, there will be no publicity and the trial will take place in camera. The Greek Constitution also allows exclusion in rape cases. In Germany, there are provisions which allow the police to give the testimony on behalf of a "victim" (which is, in effect a variation of the hearsay principle), with cross-examination questions also being handled in this way. In this case, the defence has no opportunity even to meet or to view the witness (Chinkin, 1996).
- 3.9.14 In Scotland, a judge has discretion to clear the court and in England and Wales, the judge also has a general power at common law to clear the court when a witness is giving evidence and now has a statutory power under the Youth Justice and Criminal Evidence Act to do this when it is: -

*"likely to improve the quality of the evidence given by the witness".*

3.9.15 This does not, however, enable the judge to exclude the press, and applies only in sexual cases and cases involving intimidation. There are also provisions for the non-disclosure of identifying information in sexual assault cases. Chinkin (1996) notes that *R vs. Taylor* (in 1994) set the following tests for anonymity in England and Wales: -

1. real grounds to fear consequences;
2. unfair to make the crown proceed without anonymity being granted;
3. no *undue* prejudice to the accused (although some may be inevitable);
4. the court must be satisfied that the witness is credible.

3.9.16 Comment in the Cambridge Law journal (1999) suggested that continental jurisdictions are much more favourable to allowing privacy for witnesses to give evidence.

### **3.10 The Application and Effectiveness of the Measures**

3.10.1 There is some information in relation to the use of measures to protect anonymity, both in terms of the level of use and the impact of the measures.

### **3.11 The Use of Closure**

3.11.1 It seems that there is an overall reluctance to Use measures to protect anonymity which involve the removal of the public or the press from the court in many jurisdictions, given the importance of a public trial. Bala (1999), for example, suggests that: -

*"Canadian judges are reluctant to clear the court because of the Constitutional presumption in favour of public trial ... there is an onus on the Crown to satisfy the Court that it will be more difficult for a witness to testify in the presence of members of the public or that the presence of too many persons may cause the witness to be unable to testify".*

3.11.2 The Commission recommends that in appropriate cases the law should be enacted to protect witnesses and victims of crimes by not disclosing their identity.

3.11.3 The same issues have been raised in other jurisdictions. In the USA, there are some examples of closure or partial closure being allowed

(noted in the "Decision on the Prosecutor's Motion" in relation to protective measures in the International Tribunal) in some sexual assault and narcotics cases, but Myers (1996) notes that open trials are "the norm" and closure "the exception".

3.11.4 Where there is to be closure, however, the Supreme Court has ruled that "sensitivities" are not enough and MacFarlane and Keating (1999) report that: -

*"the burden of displacing the general rule of openness lies on the party making the application, usually the [Crown]"*.

3.11.5 The variation in the Use of measures has also been identified, for example in Australia, where there are differences between states in how far they will Use these.

3.11.6 In terms of the publication of identifying information in cases in the press, this has been the subject of much debate in the United States. O'Brien (2001) notes that it is difficult to develop workable schemes to protect the anonymity of "victims" and witnesses in the face of 1<sup>st</sup> Amendment freedoms of the press. The author notes that courts have taken the view that, providing information was obtained legally (from a police report or court record, or even from another report of a case), and does not represent a contempt of court, then the media has freedom to publish information of this kind.

### **3.12 The Use of full Anonymity**

3.12.1 In terms of actually keeping the identity of the witness anonymous (rather than using measures to prevent face-to-face identification), the New Zealand Law Commission (1997) found only two cases in the Australian state courts where there had been consideration of keeping the identity of the witness from the defence. In one case, this had not been allowed and in the other an undercover police witness was allowed to remain anonymous.

3.12.2 The Canadian Supreme Court has not directly considered the issue, although it was reported that there have been some examples in England and Northern Ireland of fully protecting the identity of intimidated witnesses by granting them anonymity.

3.12.3 The New Zealand Law Commission reports that, in Poland, courts do not have the equipment to enable witness anonymity, but may locate the witness in a separate room. In South Africa, the issue of protection has often been in relation to former ANC members,

where there have been variations in whether or not anonymity has been allowed.

3.12.4 In New Zealand, the Law Commission (1997) suggest that there has not been consistency in the ways in which the applications which have been made to allow witnesses to remain anonymous have been dealt with. It is also suggested that most jurisdictions tend only to allow this in "serious criminal offences".

3.12.5 The discussion paper relating to the "Decision on the Prosecutor's Motion" in relation to protective measures in the International Tribunal noted a growing acceptance of the need to allow some witnesses to remain anonymous, but there is still clearly variation in the Use of these measures.

### **3.13 The Types of Questions and the Conduct of Staff**

3.13.1 The impact of the nature of questioning and the conduct of staff in court has also been identified as having a major impact on evidence-giving by "vulnerable" witnesses and there are a number of ways in which accommodations can be made to this process for "vulnerable" witnesses giving evidence. These provisions may be particularly relevant to children, people who have experienced sexual abuse and people with intellectual disabilities, as well as people using interpreters. Davies, Henderson and Seymour (1997) express the view that, while substantial resources are being deployed to set up for example, CCTV and pre-trial videotaping, the "real" issue, in their view, is the absence of effective safeguards to protect children from defence solicitors. This is compounded, in their view; by the fact that many prosecutors and judges are inexperienced in working with children and often do not appear to understand the ways in which a child may experience trauma in a court situation.

3.13.2 The Commission recommend the training in management of all who taking part in juvenile justice system

### **3.14 The Nature of Provision**

3.14.1 Support of this type may include the provision of guidance about how questioning should be carried out and the type of questioning which is permitted. In most jurisdictions, the judge has some control in the courtroom over the ways in which questions are asked and the authority to intervene and to control cross-examination. Richards (2000) notes that the court can take steps to

protect witnesses in relation to the conduct of the staff and can make sure that the questions Used are delivered in an appropriate way and that the Use of jargon is avoided. Staff training can also be an important part of this process in terms of increasing their understanding of the issues facing witnesses who have been identified as "vulnerable" in order to allow them to identify the appropriate measures that should be provided.

3.14.2 In addition to this discretion, some USA states have laws that forbid or allow particular forms of questioning of children. In California, for example, the court has to protect the child from harassment and embarrassment, and in order to do so must ensure that the questions asked are age appropriate and understood, as well as restrict unnecessary repetition. Myers (1996) notes that in New York State, statute requires that: -

*"the judge presiding should be sensitive to the psychological and emotional stress that a child witness may undergo when testifying"*

3.14.3 While Californian law states that in sex abuse cases: -

*"the court shall consider the needs of the child victim and shall do whatever necessary, within existing budgetary resources, and Constitutionally permissible to prevent psychological harm to the child victim"*

3.14.4 Californian law also specifies that children can only be in court during school hours and must have regular breaks. In Connecticut, attorneys have to remain seated while questioning children, and must make objections in a "non-threatening" way (Myers, 1996).

3.14.5 In New Zealand, Davies and Seymour (1997) note that the Evidence Amendment Act 1989 (NZ) S23 (5) requires the judge to make sure that none of the questions are "intimidating or overbearing" when the age of the witness is considered. Section 21b (1) of the Evidence Act of the Northern Territories (Australia) allows courts to disallow questions which are: -

*"confusing, misleading or phrased in an inappropriate language",*

3.14.6 Not only in relation to the age of the witness, but also to their levels of understanding and culture. In Australia, similar provisions exist, for example, in New South Wales (Evidence Act 1995), which also disallows: -

*"unduly annoying, repetitive, intimidating, offensive, oppressive or repetitive questions".(sic)*

- 3.14.7 There is also very specific restrictions on the types of questions which can be asked in rape cases and these are discussed separately later. Not only are there ways in which questions can be excluded, there are also examples of amendment to the types of questions which can be asked to accommodate particular witnesses. In the USA, for example, Richards (2000) identifies that Alabama allows leading questions to be asked of a child under the age of 10 where this is seen to "further the interests of Justice", based upon an acknowledgement that, without such questions, it will not be possible to identify all of the information.
- 3.14.8 There may also be controls on who can ask the questions, and the Criminal Justice Act of 1988 in England and Wales specified particular types of offence (sexual abuse, violence, cruelty) where the defendant's right to conduct their own defence was limited and they could not examine child witnesses in person. The more recent Youth Justice and Criminal Evidence Act 1999 extend this provision to additional offences (including kidnapping) and to adult witnesses in certain cases (including those who have been raped). Similarly, in Canada, Bill C-126 made it impossible for an unrepresented defendant to cross-examine a child under 14. In 1999 this was extended to those under 18. In New Zealand, defendants in sexual abuse cases are prohibited from questioning children aged 17 or under. In this case, questions must be delivered by a person appointed by the court (and the court has the power to disallow any questions it thinks are inappropriate). A similar provision applies in Western Australia (although the age here is 16). In New South Wales, as well as provisions to prevent defendants questioning children, the judge can, at their discretion, disallow the entire cross-examination in the interests of Justice. There are variations between jurisdictions in terms of who is covered by such legislation, and in some cases (e.g. New Zealand) it is only "victims", whereas in New South Wales and Western Australia, this extends to any child witness (Queensland Law Reform Commission, 2000). In most jurisdictions, these provisions cover only sexual abuse cases, although in Western Australia, *all* cases are covered.
- 3.14.9 Ellison (1998) notes that, in general terms, judges in non-adversarial systems (such as Germany and the Netherlands) have substantially

more scope to protect witnesses. She notes that, in these jurisdictions, it is the judge, rather than prosecutor, who undertakes the primary questioning role, and, where lawyers do ask supplementary questions, the judge has greater freedom to intervene to restrict lines of questioning. One benefit of this, noted by Ellison, is that the number of irrelevant or improper questions is likely to be reduced. Spencer and Flin (1993) note that, even although children in Germany generally have to attend court and give evidence orally, this "seems to be much less harrowing" for the child than in the UK.

### **3.15 The Application and Effectiveness of the Measures**

3.15.1 A general point to arise consistently in the literature in relation to the nature of questioning is that many legal professionals are relatively poor, and often untrained in questioning children and other "vulnerable" witnesses. Fuhrinan (2000), in setting out examples of this, makes the point that poor questioning transcends and potentially undermines all of the available forms of special measures, making attention to questioning an essential component of support to witnesses. The author also notes that many legal professionals assume unwisely that they understand why a child has done or said something, and that this leads to both misunderstanding and potential miscarriages of Justice. The New South Wales Law Commission (1994), referring in this case to people with intellectual disabilities, notes: -

*"A lack of training may lead to inadequate representation, misapplication of (or non-application of) relevant legislation, and discriminatory treatment at all stages in the criminal Justice process".*

### **3.16 The Use of Inappropriate Questions**

3.16.1 Evidence from Australia (Leippe *et al*, 1989) suggests that some lawyers Use language and cross-examination which will undermine children who are witnesses, and this has been the experience of some children who have reported their own court experiences in other jurisdictions.

3.16.2 Cooke (1999) points to "poor compliance" by judges in the UK with the Bar Council recommendation of good practice in relation to disallowing aggressive and repetitive cross-examination of witnesses with an intellectual disability. Cooke suggests that there

have, as a consequence, been examples of witnesses who have been too distressed to continue with their evidence giving.

3.16.3 In Bala *et al's* study (2001), victim-witness workers reported few attempts to respond to children of different ages and abilities. When Bala *et al* surveyed judges in Ontario, almost half of these suggested that the defence counsel would often or always ask questions that a child would not be able to answer and a further 41% said that they sometimes did. A fifth believed that prosecutors also often or always ask questions that children cannot understand. They also reported apparent deliberate attempts to confuse children (and 65% of victim-witness workers believed that defence counsel expected accurate answers about dates, times and the nature of multiple instances of abuse from children aged 7-9). They also reported children being asked embarrassing or humiliating questions, in a manner which is repetitive and intrusive, even during sexual abuse trials.

3.16.4 Bala *et al* suggest that these findings are supported in work by Park and Renner (1998) and Walker (1999). Sas (1997) also points to the inappropriate nature of some questions and cross-examination which can be Used with children who experience sexual abuse: -

*"despite our current knowledge of the power balance that exists between an adult abuser and a child victim, the level of fear and intimidation that can be Used to secure compliance and secrecy and the nature of psychological entrapment".*

3.16.5 There are also arguments (e.g. from New Zealand in Davies, Henderson and Seymour, 1997) that lawyers knowingly breach their own codes of ethics (as well as, for example, the UN Convention on the Rights of the Child) in relying on myths and stereotypes (e.g. in relation to child abuse and rape) and in placing witnesses under undue pressure in order to secure a collapsed trial or a not guilty verdict. Davies (1991) reports a celebrated case where a leading QC employed the tactic of repeatedly intimidating an abused 8-year-old girl to secure the acquittal of a TV actor, who subsequently admitted his guilt to a national newspaper. Gyles and McNamara (1996) note that, in a survey of attorneys in Ohio, although they found a low level of apparent acceptance of what they describe as "myths" about rape, this was not reflected in improvements in court practice.

3.16.6 Milne *et al* (1999) indicate that both defence and prosecution lawyers rarely understand enough about intellectual disabilities to be able to ask appropriate questions. They note that there is "very little" literature available on interviewing both adults and children with intellectual disabilities. Sanders *et al* (1996) note that, in England and Wales, both lawyers and police officers appeared to rarely ask for the advice of experts in terms of framing appropriate questions. They also note that responses (verbal and non-verbal) can be misinterpreted by those with little or no experience in working with adults with intellectual disabilities (citing the example of types of questioning, for example, persistent repetition, being perceived as aggressive and threatening, leading to particular responses in some witnesses).

### **3.17 Judicial Interventions**

3.17.1 Where these issues have arisen, there has also been found to be some variation in the Use of judicial interventions, and Cashmore and Bussey, for example, in their 1996 Australian study, found variation in whether or not judges were willing to ensure that children understood questions and to prevent their intimidation. Sas (1991) also identified variation between judges in terms of how they treated child witnesses. Meyer (1996) also notes that judges in the USA are not keen to intervene to protect child witnesses, preferring to leave the attorney to carry out their questioning as they wish.

3.17.2 Similar findings emerge from New Zealand, where Pipe and Henaghan (1996) note that judges have tended to allow cross-examination (in this case along with videotaped evidence) in pursuit of a fair trial. It is up to the trial judge to decide if and when a question is "intimidating or overbearing with respect to the age of the child" and when the authors examined 26 trial transcripts of cross-examinations, they found that the judges involved did not intervene on any occasion.

### **3.18 Effects on Testimony**

3.18.1 In terms of the effect of questions on children's testimony, it has been suggested (e.g. Graffam Walker, 1999) that: -

*"the child's testimony will be more reliable, complete and effective if the attorney understands the fundamentals of child development and follows age-appropriate guidelines in formulating questions".*

- 3.18.2 Davies, Tarrant and Flin (1989) also found that the style of questioning Used with children has an important impact, echoing work from other North American jurisdictions. Brennan (1993) notes that the effect of inappropriate approaches is that children's credibility is undermined by the inequalities in the Use of language and the specific expertise of those in the legal system.
- 3.18.3 The Commission recommends for the introduction of psychology studies to the law students in Universities, colleges as well as police officers to manage children psychology.

### **3.19 Staff Training**

- 3.19.1 There is some literature providing evidence of training provision to relevant staff (e.g. in Canada) particularly in relation to child abuse which can also have an impact on their approach to questioning. Sas *et al* (1996) note that the National Judicial Institute developed training for judges on child sexual abuse. Bala *et al* (2001) also suggest that staff now have better training and a "more victim-oriented approach".
- 3.19.2 Richards (2000) also points out that training has taken place in some parts of the USA and that in Illinois, for example, state attorneys, assistant attorneys, law enforcement officers have received some specific training in relation to ways of reducing or removing trauma. In Canada, the Ministry of the Attorney General also noted that there had been a criminal harassment training conference for the police, Crown Counsel and victim workers.
- 3.19.3 In South Africa, Louw and Olivier (1996) note that the Law Commission report of 1991 led to specialist training courses being offered to prosecutors to help them to deal more effectively with child witnesses.
- 3.19.4 A survey undertaken by Hafemeister (1996) showed that attending educational programmes appeared to influence judges' Use of approaches to special measures. In 2000, the French Government introduced guidelines for training for judges who would have specialist skills in dealing with children and who can collect evidence before the hearing away from the court (Scotsman, August 2001). In the USA, Warren and McGough (1996) have also

found that the provision of training to those carrying out interviewing with children can improve fact finding, reduce stress for the children and help to ensure that the children who require services can be given the opportunity to get these.

3.19.5 The lack of training, however, is seen to undermine the effectiveness of measures to protect children generally. There are arguments (from a range of jurisdictions) that prosecution teams and the judiciary are not yet sufficiently knowledgeable about issues facing "vulnerable" witnesses to provide proper protection to them. There remain a range of instances of protection and support measures being undermined where the measures require the Use of discretion and where there are examples of the failure to address the combative or confrontational approach of defence lawyers, or the Use of inaccurate or outdated stereotypes and myths. Similarly, Kebbell and Hatton (1999) also note that a lack of training in effective questioning techniques may be undermining the work which is being done to make it easier for "victims" with an intellectual disability to testify.

3.19.6 In Tanzania commendable efforts at the protection of the identity of the witnesses and of the complainant particularly under the Sexual Offences Special Provisions Act no. 4 of 1998 where cases involving rape are heard in camera. Likewise, in politically sensitive cases such as treason, the names and identities of state security personnel are not disclosed. In all cases, involving children magistrates may empty the court of all people with the exception of the key parties. It is the Commission's belief that given adequate means and technological advancement, Tanzania could be at the same level as those developed countries discussed above.

## **3.20 Sentencing and Sanctions**

3.20.1 After a conviction, sentence is imposed. In most cases, the judge decides on the sentence, but in some jurisdictions, the jury, particularly for capital offences, decides the sentence. In arriving at an appropriate sentence, a sentencing hearing may be held at which evidence of aggravating or mitigating circumstances is considered. In assessing the circumstances surrounding a convicted person's criminal behaviour, courts often rely on pre-sentence investigations by probation agencies or other designated authorities. Courts may also consider victim impact statements.

3.20.2 The sentencing choices that may be available to judges and juries include one or more of the following: -

1. The death penalty;
2. Incarceration in a prison, jail, or other confinement facility;
3. Probation - allowing the convicted person to remain at liberty but subject to certain conditions and restrictions such as drug testing or drug treatment;
4. Fines - primarily applied as penalties in minor offences;
5. Restitution - requiring the offender to pay compensation to the victim.

3.20.3 In some jurisdictions, offenders may be sentenced to alternatives to incarceration that are considered more severe than straight probation but less severe than a prison term. Examples of such sanctions include boot camps, intense supervision often with drug treatment and testing, house arrest and electronic monitoring, denial of Federal benefits, and community service. In many jurisdictions, the law mandates that persons convicted of certain types of offences serve a prison term. Most jurisdictions permit the judge to set the sentence length within certain limits, but some have determinate sentencing laws that stipulate a specific sentence length that must be served and cannot be altered by a Parole board.

### **3.21 Corrections**

3.21.1 Offenders sentenced to incarceration usually serve time in a local jail or a State prison. Offenders sentenced to less than 1 year generally go to jail; those sentenced to more than 1 year go to prison. Persons admitted to the Federal system or a State prison system may be held in prisons with varying levels of custody or in a community correctional facility.

3.21.2 A prisoner may become eligible for parole after serving a specific part of his/her sentence. Parole is the conditional release of a prisoner before the prisoner's full sentence has been served. The decision to grant parole is made by an authority such as a parole board, which has power to grant or revoke parole or to discharge a parolee altogether. The way parole decisions are made varies widely among jurisdictions.

3.21.3 Offenders may also be required to serve out their full sentences prior to release (expiration of term). Those sentenced under determinate sentencing laws can be released only after they have served their full sentence (mandatory release) less any "goodtime" received while in prison. Inmates get goodtime credits against their sentences automatically or by earning them through participation in programs.

3.21.4 If released by a parole board decision or by mandatory release, the release will be under the supervision of a parole officer in the community for the balance of his or her unexpired sentence. This supervision is governed by specific conditions of release, and the release may be returned to prison for violations of such conditions.

### **3.22 Recidivism**

3.22.1 Once the suspects, defendants, or offenders are released from the jurisdiction of a criminal Justice agency, they may be processed through the criminal Justice system again for a new crime. Long-term studies show that many suspects who are arrested have prior criminal histories and those with a greater number of prior arrests were more likely to be arrested again. As the courts take prior criminal history into account at sentencing, most prison inmates have a prior criminal history and many have been incarcerated before. Nationally, about half the inmates released from State prison will return to prison.

### **3.23 The Juvenile Justice System**

3.23.1 Juvenile courts usually have jurisdiction over matters concerning children, including delinquency, neglect, and adoption. They also handle "status offences" such as truancy and running away, which are not applicable to adults. State statutes define which persons are under the original jurisdiction of the juvenile court. The upper age of juvenile court jurisdiction in delinquency matters is 17 in most States. The processing of juvenile offenders is not entirely dissimilar to adult criminal processing, but there are crucial differences. Many juveniles are referred to juvenile courts by law enforcement officers, but many others are referred by school officials, social services agencies, neighbours, and even parents, for behaviour or conditions that are determined to require intervention by the formal system for social control. At arrest, a decision is made either to send the matter further into the Justice system or to

divert the case out of the system, often to alternative programs. Examples of alternative programs include drug treatment, individual or group counselling, or referral to educational and recreational programs.

- 3.23.2 When juveniles are referred to the juvenile courts, the court's intake department or the prosecuting attorney determines whether sufficient grounds exist to warrant filing a petition that requests an adjudicatory hearing or a request to transfer jurisdiction to criminal court. At this point, many juveniles are released or diverted to alternative programs.
- 3.23.3 All States allow juveniles to be tried as adults in criminal court under certain circumstances. In many States, the legislature statutorily excludes certain (usually serious) offences from the jurisdiction of the juvenile court regardless of the age of the accused. In some States and at the Federal level under certain circumstances, prosecutors have the discretion to either file criminal charges against juveniles directly in criminal courts or proceed through the juvenile Justice process. The juvenile court's intake department or the prosecutor may petition the juvenile court to waive jurisdiction to criminal court. The juvenile court also may order referral to criminal court for trial as adults. In some jurisdictions, juveniles processed as adults may upon conviction be sentenced to either an adult or a juvenile facility in those cases where the juvenile court retains jurisdiction, the case may be handled formally by filing a delinquency petition or informally by diverting the juvenile to other agencies or programs in lieu of further court processing.
- 3.23.4 If a petition for an adjudicatory hearing is accepted, the juvenile may be brought before a court quite unlike the court with jurisdiction over adult offenders. Despite the considerable discretion associated with juvenile court proceedings, juveniles are afforded many of the due-process safeguards associated with adult criminal trials. Several States permit the Use of juries in juvenile courts; however, in light of the U.S. Supreme Court holding that juries are not essential to juvenile hearings, most States do not make provisions for juries in juvenile courts.
- 3.23.5 In disposing of cases, juvenile courts usually have far more discretion than adult courts. In addition to such options as

probation, commitment to a residential facility, restitution, or fines, State laws grant juvenile courts the power to order removal of children from their homes to foster homes or treatment facilities. Juvenile courts also may order participation in special programs aimed at shoplifting prevention, drug counselling, or driver education. Once a juvenile is under juvenile court disposition, the court may retain jurisdiction until the juvenile legally becomes an adult (at age 21 in most States). In some jurisdictions, juvenile offenders may be classified as youthful offenders that can lead to extended sentences.

- 3.23.6 Following release from an institution, juveniles are often ordered to a period of aftercare, which is similar to parole supervision for adult offenders. Juvenile offenders who violate the conditions of aftercare may have their aftercare revoked, resulting in being recommitted to a facility. Juveniles who are classified as youthful offenders and violate the conditions of aftercare may be subject to adult sanctions.
- 3.23.7 In Tanzania at the conclusion of the hearing process the magistrate or judge would then convict or acquit. Apart from a magistrate in a primary court who is bound by assessors' verdict; the magistrate or judge will reach his verdict on the basis of the arguments, facts and the law as presented by the two parties. After a conviction sentence would be imposed. Depending on the severity of the offence the punishment will vary from conditional discharge, corporal punishment, fine, imprisonment and undetermined imprisonment at the Presidency pleasure. This process is similar in most democratic and Commonwealth countries including Western Australia, the USA and Canada. In Tanzania, once a sentence has been imposed, an individual is then handed over to the prison services if the sentence involves; corporal punishment or a jail term or capital punishment because of a murder conviction or in case of a under 18 convict on undetermined imprisonment at the Presidency pleasure.
- 3.23.8 The individual has a right of appeal. The appeal is made to a higher court or organ depending on the institution that has meted out the sentence. The appeal is normally made to next higher level of the court or tribunal. It is not acceptable to jump the next level and proceed to a higher level than the next one. The appeal may be against conviction, or sentence or both. While the appeal is

pending, a convict may apply for bail pending appeal. In Tanzania, it is rare for this kind of bail to be given. The basis for success in this kind of application is that the appeal has a very big chance of succeeding otherwise it is indeed very rarely granted.

3.23.9 The flow of Justice in Tanzania ends with the prison and other corrective institutions such as juvenile homes for those underage convicts. The Parole System has been introduced and is now functioning reasonably well. The National Community Service Committee has already been formed where the Regional and District Community Service Committees are in process of being formed in six pilot regions. The situation in Tanzania jails and other remand institutions is a subject of another Commission report on Police and Prisons. We have therefore limited this report to the actual flow of Justice. Generally, this flow could be improved by adding speed to investigations, and hearings. Further, it could be improved by reducing the powers of the police in making arrests. The Police in Tanzania have too much powers of arrest that are prone to misuse. Improvement in these two areas and curtailment of police powers of arrest and detention will make the flow of justice better.

### **3.24 Capital Punishment**

3.24.1 There is also the problem of execution of death sentences which takes too long before any action is taken. This trend not only causes overcrowding but also it causes psychological torture to the convict.

3.24.2 The Law Reform Commission considers that taking of a human life is morally and ethically wrong, the intentional killing by the state of its own citizens is barbaric and blameworthy. The death penalty has no legitimate place in the penal system of modern civilized societies, and its application may well be compared with torture and be seen as inhuman degrading punishment. The following are among the reasons that make the punishment to be not favoured:-

#### **3.24.3 Cruelty**

3.24.4 No execution can be carried out painlessly and all available methods; for instance electrocution, lethal injection, hanging gas

etc can make many minutes for the person to die. John Lewis Evans was electrocuted in Alabama in April 1983 after being convicted of murder in 1977. According to the eye-witness accounts, it required three separate jolts of 1,900 volts over a 14-minute period before he was officially pronounced dead. During the first electrical charge, the electrode in his leg burned through and fell off. Prison guards repaired it after doctor said he was not dead. During the second charge, smoke and flame erupted from his left temple and leg. The third was given after doctor put a stethoscope to his chest and said there were still not certain he was dead.<sup>89</sup>

### 3.24.5 Discriminatory

3.24.6 The poor and member of minority groups suffers disproportionately from the death penalty. Evidence of racial discrimination has been revealed in Republic of South Africa, United State of America and Jamaica. Statistics conducted by United States Bureau of research from the 1980's show that in California 42% of blue collar workers charged with first degree murder were sentenced to death, whereas only 5% of white collar workers so charged received a death sentence.

*"because I have no money, I get no Justice and I am executed just because of that."*<sup>90</sup>

### 3.24.7 Irrevocability

3.24.8 Execution is an irrevocable act and can be inflicted on the innocent person. There have been many established cases of conviction of innocent persons. A good example is one of Timothy Evans who was hanged in 1950 for murder of his daughter; the murder was probably done by John Christie who was hanged in 1952 for the murder of seven people, in the house he shared with Timothy Evans. Since both have been executed it can never be proved whether there has been miscarriage of Justice. The Queen posthumously pardoned Evans in 1966, and an announcement was made in the House of Commons.<sup>91</sup>

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<sup>89</sup> ([http. Canada online, about.com/library /weekly](http://Canada online, about.com/library /weekly))

<sup>90</sup> *Neville carter, shortly before he was hanged In Jamaica 1987*)

<sup>91</sup> [http//members.magnate.ai/dornbirn/cp.sum.htm](http://members.magnate.ai/dornbirn/cp.sum.htm)

3.24.9 It is the firm stand of the Commission that there should be no death sentence in the penal system of our country

## CHAPTER FOUR

### 4.0 RESEARCH FINDINGS

#### 4.1 Introduction

4.1.1 A good legal system is that which reflects the aspirations of the people. Therefore in gathering views of the public, the Commission visited a total of nine regions of Tanzania Mainland and one region of Zanzibar, namely Tanga, Arusha, Dodoma, Mbeya, Songea, Rukwa, Iringa, Mwanza, Tabora and Mjini Magharibi respectively. The areas that have to do with the flow of Justice were itemized to be: -

- 1 The Police Force,
- 2 The Prisons Service,
- 3 The Courts, Tribunals, and
- 4 Advocates, PCB and DPP's office or State Attorneys.

#### 4.2 Criminal Justice System

##### 4.2.1 Police Force: Triple Function of Police

4.2.2 In respect of the triple function of police, the question was whether it is proper for the same authority to have the power of arrest, investigation and prosecution. It was observed that in many cases suspects in criminal cases are arrested by the police who then keep them in custody and eventually charge them and take them to court. In all the regions and places that were visited there were complaints about such powers which the public saw as creating enough room for the Police to frame up, harass, torture and humiliate suspects. When the triple function of the police was brought before the Court, in *Petro s/o Salilo Vs Republic, High Court Criminal appeal No. 145 of 1996, Lugakingira, J (as he then was)*, held that: -

*“ ... Learned counsel for the Republic also wondered whether it is proper for the arresting officer to prosecute the case, but I see no difficulty in this. There is no rule really against this, and in view of the prompt and unequivocal pleas in this case, I think there was no failure of Justice. This Court has in fact had the occasion to say that there was no bar for a prosecutor to be a witness in the case he prosecutes...”*

4.2.3 Despite the decision of the Court on the matter, the public still sees the importance and necessity of separating those powers. It is also the view of the Commission that for the purpose of ensuring that Justice is done; police have to remain with only two functions (i.e. Arrest and investigation)

#### 4.2.4 **Investigation**

4.2.5 In the field research it was strongly argued against delay of investigation. Even where a person is caught red-handed committing an offence, Police do not take the case to court to be heard forthwith on the mere reason that investigation is incomplete. In case the accused is in custody s/he has to remain there for a long time, which in turn leads to overcrowding in the prisons. It was pointed out that there is a need for a time limit to investigate any offence so as to get rid of the unwarranted delays which may lead to corruption.

4.2.6 The Police on their part pointed out that delay in investigation is the result of inadequacies on staffing, funds, working tools and training at times. They also argued that there are many cases that need be investigated while the investigators are few. They added that in the old days there was a Criminal Investigation Fund (CIF) for investigation purposes but it is no longer there. The Police further mentioned the system of taking a Police case file to the State Attorney before prosecution to be a source of delay. Furthermore the police said that they have to take some exhibits to the Government Chemist that takes a very long time to come back.

4.2.7 The Commission is of the view that delay of investigation has a lot of negative impact to Justice. It is therefore important to equip with

all necessary tools the Criminal investigation institution for the purpose of speeding up hearing of cases.

4.2.8 The police were of the view that if branches of the Government Chemist could be in every region, the speed of investigation by way of analysis of exhibits would improve.

4.2.9 The Police further complained that every post-mortem examination forms were no longer easily available. The Commission sees that there is a need to have many branches of Government Chemist as many as possible. But it is necessary to give a time limit to the Government Chemists in dealing with exhibits from the police and also a time limit to the police in investigating serious offences such as murder.

#### 4.2.10 **Abuse of Police Powers**

4.2.11 The participants blamed the police for re-arresting the accused persons after having been discharged under section 225 of the Criminal Procedure Act. Also the participants said that a person ought to be re-arrested when the prosecution side is able to proceed with the trial.

4.2.12 According to participants, another area where the powers of the police are abused is where police hide their inefficiency in unbailable offences whereby they charge a person with murder or armed robbery and do nothing about the case for a very long time. Participants also complained that such offences has not time limit for investigation and such the accused person will remain in custody for a long time. The Commission is of view that all offences should have a time limit within which to complete investigations.

4.2.13 Complaints were also made against police for taking action against someone reported to have committed an offence without proper investigation. It was alleged that a person may be the offender but if s/he gets to the Police Station first before the person against whom s/he has committed the offence, the police will arrest and take steps against the innocent person. Participants said that it is important to make a proper preliminary investigation before making an arrest so as to avoid prosecuting innocent persons.

4.2.14 It was alleged during the field study that Police are vested with too many powers for they are allowed to arrest with or without a warrant and with or without reasonable cause. They said that the police arrest youths and charge them as rogues and vagabonds who are thereafter discharged by the court for no case to answer.

4.2.15 The conditions for a case on rogues and vagabonds to succeed were clearly explained in *Juma Bakari versus USA Republic, Criminal Appeal No. 20 of 1980, High Court of Tanzania (Sisya, J)*. In that case the trial court convicted the accused for being a vogue and vagabond, on appeal the High Court stated that: -

*“ For a conviction to stand for the offence of being a rogue and vagabond contrary to section 177(2) of the Penal Code it must be established, beyond all peradventure, that the convict was going about as gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under false or fraudulent pretence. Not even a grain of evidence was adduced towards this end in the instant matter...”*

4.2.16 From these findings of the High Court, it is clear that, just going about the streets does not constitute the offence of being vogue and vagabond.

4.2.17 Participants complained that the police arrest persons for minor offences. It was also alleged that sometime police prosecutors give to the court false previous record of an accused convicted because s/he did not offer them a bribe. It was claimed that this was another cause of congestion in prisons and that it is inhuman.

4.2.18 Another complaint was that the Police would not let a person write his/her statement instead they make one and make the person sign. The Commission is of the view that since a large number if not the majority of Tanzanians can read and write, it is therefore proper to allow persons who wish to write statements on their own to do so. This is because a person can write freely on his/her own rather than a police officer writing for him/her. Also s/he cannot further deny his/her statement that easily.

4.2.19 There were also blames thrown on the Police for keeping a person in custody for a long time and then releasing him without any trial. Furthermore, there were complaints against Police notifications which are higher than what one would pay as a fine if taken to

court. It was also pointed out that Police notification was a source of corruption because of the big fine imposed on notification.

- 4.2.20 Blames were made against the police for denying the PF3 to persons whom they have injured however this claim was vigorously denied by the police. This allegation if true reflects aspect of human rights, and the Commission finds that access to medical treatment for the protection of life is a matter of right. In any case training of police on issues of human rights is essential. However, this blame was vigorously denied by the police.
- 4.2.21 Some members of the public strongly demanded National Identity Cards so as to avoid harassment without cause by the Police who, it is alleged arrest some people whose features resemble those of refugees even if such people are citizens in fact.
- 4.2.22 It was alleged that sometimes in some areas police do require a complainant to bring the suspect to the Police Station instead of the Police going to arrest the suspect. .
- 4.2.23 Concern was raised on searches conducted by the Police in the absence of the local leader in that area and the plight of arrested women who are sometimes raped by the police. It is the view of the Commission that in every search activity there should be a local leader to witness the search unless it is not practical to get such leader.
- 4.2.24 Police are blamed for teasing complainants who come to report at the Police station. It was alleged that sometimes they are asking annoying or teasing questions. For example a person would go to report a theft at a Police Station; instead of the Police taking the matter seriously they ask teasing questions. The Commission observes that such a tendency does not only discourage people to report matters to police but it also encourages people taking the law in their hands.
- 4.2.25 There was hue and cry at the way the Police are recruited. They said that the process is not transparent hence attracting corruption and recruitment of unqualified persons. The Commission however was informed that there is an Independent Board which deals with this recruitment of the police.

4.2.26 There is the question of issuance of a certificate for the property of a person to be detained. It was alleged that some times the police did not issue such certificate although the law require them to do so

4.2.27 It was alleged that sometimes the Police do not issue such certificate although the law requires them to do so. The commission recommended the enforcement of this law.

#### 4.2.28 **Problems Facing the Police**

4.2.29 The Police lamented that where the police have to use force to arrest hard-core criminals, they cannot arrest an escapee by shooting him/her because they would have a case. The police were therefore demanding immunity in their work. They further proposed that whoever is found with a SMG or SAR should be taken as a bandit.

4.2.30 Some police officers lamented at the fact that when they are dismissed they are not given travel allowances and that some are transferred but not paid even transport money let alone other allowances. The Police also complained of retirement procedure, which takes a long time before one realizes the benefits of his/her retirement. Junior police officers alleged that they found themselves alone whenever something goes wrong in the course of execution of their duties, because the senior police officers would not assist them in case they have to face charges.

4.2.31 Whenever the police are suspected of an offence, they are court-martialled and then dismissed and later charged again in the ordinary courts where they could be punished again, and even if they won their cases, they would not be returned into service. This is double punishment which is against the principle of natural Justice which forbids a person to be charged twice for the same 'crime' committed, they complained.

4.2.32 The police alleged that they were not encouraged to give police bail because if the accused (suspect) escapes there are no sanctions or remedy against him/her apart from re-arresting him/her if at all that can be managed. The Commission was not satisfied with allegation because section 69 of CPA provides for the sanctions in such instances.

- 4.2.33 The police complained that *nolle prosequi* may be issued by a State Attorney without giving reasons for such move discourages police in their work especially where evidence has been gathered. The Commission however thinks that the law on non-disclosure for reasons once *Nolle Prosequi* has been entered is very clear.
- 4.2.34 There was an allegation that a police officer who is doing his/her work properly could be victimised by his/her boss who prefers things to be done differently for his/her benefit.
- 4.2.35 The Government was blamed for not giving the police adequate working tools for their work, thus rendering their duties to be very difficult leading to unnecessary delays when performing their duties.
- 4.2.36 Another complaint by the police was on the period of 24 hours within which to take the accused to court because it was considered to be too short for serious offences which may need more time, for example, where the accused wants to take the police to the place where s/he has hidden a gun in fire arm cases.

### **4.3 Judiciary**

#### **4.4 Congestion of Pending Cases in Courts**

- 4.4.1 Many views were expressed concerning the Judiciary about pending cases. However it was pointed out that the said congestion of pending cases is the result of inadequacy of the Judiciary personnel not to mention that some do not perform well. Their proposal was that more magistrates should be employed, and that they should receive regular training to make them more competent.
- 4.4.2 It was found further that there is a misuse of the provisions of section 214 of the CPA where the exercise of trying a case starts afresh where a Judge or Magistrate gets transfer or dies after having partly heard a case. The Commission notes that starting afresh of the partly heard case results into unnecessary delays. We are of the view that another magistrate/judge should proceed from where the last magistrate ended as it is in civil cases.
- 4.4.3 The participants said that the delay is also caused by technicalities of the court, where an accused is taken for trial. They pointed out

that the court might fail to hear the case although there are witnesses and exhibits because the accused may come up with an idea of getting an advocate. The Commission notes that this is a Constitutional right for an accused person to be represented in a court of law; however there is no right without limitation.

#### **4.5 Magistrates' Misconduct**

- 4.5.1 The participants alleged that some magistrates give oral judgment s only hence no copies of judgments would be available. Other, it was said do not take down correctly the evidence of the parties as required and a judgment is written at the end of the trial that would be the reverse of what was adduced in court. Furthermore, there was a suggestion of restoring the supervisory magistrate cadre as it was before the present structure wherein the RM in charge also acts as a supervisory magistrate. Supervision was a full time job and a supervisory magistrate was just supervising and not hearing cases as well. It was suggested that sometimes misconduct of Magistrates was caused by a long stay in one station without a transfer.
- 4.5.2 Court clerks came under fire from the public for demanding bribes before giving out forms for bail purposes. Participants claimed that there were too many clerks in the courts, most of whom were just going for bribes and that only a few were doing the office work. They said that the result of the magistrates and clerks misconduct is that people who are well off are not convicted, they said. Their suggestion was that instead of leaving it to the clerks, the Magistrates themselves should process the bail forms and get them filled in.

#### **4.6 Procedure**

- 4.6.1 Cumbersome court procedure was alleged to be source of problems that cause inconvenience to parties. Such as the use of excessive injunctions in civil case.
- 4.6.2 Another area pointed out by participants was on transfer of cases from Primary Courts to the District Court whether criminal or civil. It was alleged that this is problematic because it requires an application to be made to the High Court, which would then agree or refuse such transfer. In criminal matters it was said such

transfer would necessitate the involvement of the Office Commanding CID District because the Office Commanding District would have to file a charge and then carry out investigations before the matter could be tried by the District Court. To simplify the procedure it was started that a notice for transfer should be made to the Primary Court Magistrate and an application for the same lodged with the Resident Magistrate In charge.

- 4.6.3 The requirement by the courts of presenting a plaint and a written Statement of defence (WSD) in English is said to cause serious problems to an ordinary person who does not understand the language and the law. The law requires that pleadings in all courts save the primary courts to be in English although parties can argue their cases in Kiswahili, this is an acceptable phenomenon, and perhaps it can change in the future. Since that is the requirement of the law, Commission articles the litigants to seek consultation of lawyers, paralegals and NGOs in drafting pleadings.
- 4.6.4 Since that is the requirement of the law, the Commission advice the litigants to seek consultation of lawyers, NGOs and/paralegals in drafting pleadings.
- 4.6.5 It was pointed out that “notice of intention to appeal” should not be required by law because an accused person once convicted may be confused so much that s/he cannot think of appealing until later in which case s/he will be time-barred. They suggested that there should be an automatic extension of time to appeal in such a case. Furthermore it was intimated that copies of judgment should be typed to enable the appellate court to read more easily. Proceedings and judgment should be typed.
- 4.6.6 There were further complaints against the courts for delaying appeals and revisions under the pretext of no copy of judgment. The case of Dibagula<sup>92</sup> which was finalised fast was given as example of how a matter can move fast if there is pressure from some circles. It was pointed out that there is no systematic way of dealing with appeals on first come first served basis and that not only was it difficult enough to get a copy of judgment but even if one got it and prepared the appeal grounds, there was no guarantee of when the case would be heard. It was suggested that Swahili should be used. Another point raised with regard to

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<sup>92</sup> find dibagula citation

procedures was that appeal grounds should be sent to the High Court without the copy of judgment, which takes too long to be provided.

- 4.6.7 It was argued rather than the wife or husband be asked whether they want to give evidence, it was argued that the accused should be asked whether he or she allows his/her spouse to give evidence. This, it was said, for the purpose of maintaining the marriage that might otherwise be damaged by such evidence of non-compellable but competent spouse. They also argued for restoration of the corroboration evidence in sexual offences on the reason that somebody could be wrongly convicted.<sup>93</sup>
- 4.6.8 Participants argued that in civil matters, there would be need of preparing and filing a plaint which is in English and which is written in a legal language. They said that that is a great bother. They suggested that Primary Courts should be open to lawyers so that lawyers can appear in Primary Courts because some cases starting in the Primary Courts were messed up so much that it was difficult to manage them when they came to higher courts on appeal. In addition thereto they said that the Judiciary is making some reforms where the Primary Court will be manned by the magistrate holding a Diploma in Law, therefore making it possible for a lawyer to appear in the Primary Court.
- 4.6.9 The proceedings and Judgment from District Courts upwards are recorded in English whereas Magistrates and Judges know Swahili very well. This was pointed out to be a problem to non-lawyers and especially villagers. It was suggested that Swahili should be used. Primary Court Magistrates who do not read the law and want parties to look for the law for them were the subject of attack by participants.
- 4.6.10 Complaint was raised against the court in cases of divorce whereby the wife would be busy getting a copy of the judgment and the husband would be selling the matrimonial property without any restraint from the court.
- 4.6.11 Concern was raised in regard to procedural laws. For example an accused person charged with murder cannot come before a Judge

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<sup>93</sup> Section 130 of the Law of Evidence Act.

for trial unless PI is conducted even if he/s is ready to plead guilty. It was suggested that there is no need for PI and that Preliminary Hearing is enough.

- 4.6.12 It is the view of the Commission that murder cases should be taken straight before the Judge because it takes too long to finish the PIs which are meaningless since whether there is a case to prosecute or not is decided by the State Attorney and not the Court conducting the P.I.

#### **4.7 Facilities**

- 4.7.1 Lack of funds to run the court was pointed out to be a source of injustice to the public. It was said that sometimes courts could not pay witnesses' expenses due to inadequate funds. Another issue raised was that Case Flow Management Committees were found to be not working so well because of lack of funds. It was said that there is delay of the process because summonses cannot be served due to lack of funds and that Magistrates are unable to proceed because they have no stationery. There was concern over the lack of motor vehicles for the courts whereas there are plenty for the politicians and other Government officers as a result of which magistrates cannot do supervisory work because they have only defective vehicles. It was highly recommended that there should be a retention scheme for the Judiciary of the fees and fines collected so that the same can be ploughed back for official use by the courts.

#### **4.7.2 Assessors**

- 4.7.3 Assessors in the Primary Courts were said to be powerful because they have equal votes with the magistrates. The issue of assessors was also said to be a source of delays and corruption for assessors are lowly paid. It was suggested that assessors could be used where there are issues of local customs, or Islamic law, otherwise they should not be there. It was further pointed out that sometimes a matter on Islamic religion would be dealt in a court where assessors are not Moslem themselves. It was proposed that if one assessor cannot attend one should suffice for the purpose of quorum.

- 4.7.4 The Commission observed that case law suggests differently. In a civil case in Ujiji Primary Court of *Mwanaidi d/o Rashid and Ally s/o*

*Nyembwe* The Primary Court Magistrate differed in opinion with two sitting assessors and, entered a judgment contrary to assessors views. The judgment of the Primary Court Magistrate was later quashed by The High Court, (Chipeta, J) on grounds that the trial Magistrate: -

*“... erred in overruling the unanimous opinions of the assessors...”*,

4.7.5 And further that: -

*“... the error was such a fundamental breach of statutory provisions...”*

4.7.6 Honourable Judge concluded that,

*“... the learned primary court magistrate, therefore, had no authority to overrule the unanimous opinions of the two gentlemen assessors **however perverse** their opinions might have appeared to him...”*

4.7.7 **Time Limit for Hearing of Case**

4.7.8 The participants observed that the time taken for the hearing of a case to the time of decision is too long in many cases and at the moment it seems there is no limit. However, they said this problem can be solved if there is adequate staffing and other facilities. Other voices stated that the 60 days as provided by s. 225 of the Criminal Procedure Act is too short. It was suggested that the period should be 4 months in all cases. The general suggestion was that the case should be finalized within 4 month.

4.7.9 Another suggestion was that a case should not be taken to court before investigation is completed. It was also emphasized that the complainant should be present even in cases in the District Court so that the matter can be heard instead of only the Public Prosecutor being present.

**4.8 Independence of the Judiciary**

4.8.1 It was pointed out that section 219 of the CPA is concerned with the powers of the Minister to deal with cases involving a person with a mental disease instead of the court. It was suggested that the matter

should end with the Court only. Furthermore participants referred to the issue of execution of decisions of the courts. Especially when the losing party is the Government. They said that on many occasions, the Government does not seem to respect such decisions which conduct appears to undermine the independence of the judiciary.

4.8.2 It was pointed out that Regional Commissioner and District Commissioner are members of the judicial board and that these are part of the executive who chair these Boards, which normally discipline magistrates. Participants complained that since the District Commissioner is a member of the Executive Committee of Chama Cha Mapinduzi, a complaint by a Chama Cha Mapinduzi Secretary to a Primary Court Magistrate was not to the District Commissioner the Primary Court Magistrate would be disciplined. This would defeat the principle of separation of powers and the independence of the Judiciary.

4.8.3 Generally the Regional and District Judiciary Boards were said to be problematic. It was alleged that the public do not know how to Use these boards. A suggestion was made that there should be a way of managing them properly and that funds should be availed to them in needs.

#### **4.9 Investigation Follow-ups by Courts**

4.9.1 It was urged that courts should have power to inquire into the state of investigation of a case and take action rather than waiting for the Police to complete their investigation.

4.9.2 As to court fees someone lamented that they were too high because you could pay up to 120,000/= fees for filing documents only.

#### **4.10 Trials**

4.10.1 The trial of economic crimes in the High Court only was challenged and it was suggested that trials should be even in Magistrates' Courts so as to reduce congestion of cases in the High Court.

#### **4.11 Corruption**

4.11.1 On corruption, it was suggested that the Government should scrutinize each magistrate in order to see his/her integrity or otherwise.

4.11.2 There was also the issue of unstamped documents i.e. documents not bearing the seal of the court. It was submitted that since this would be the fault or inadvertence of the court and a party had no control over the court which stamps the document, such document should be admitted in any transaction or proceeding.

#### **4.12 Bail**

4.12.1 Someone thought that there was no reason why a person charged with murder should be denied bail more so because it takes too long before a murder case is tried. Injustice was also found to be there in a case where someone who has travelled to a place is arrested and taken to court because such person cannot easily get bail since s/he knows no one in that area. Courts were urged to exercise power over bail issues instead of leaving it to the Police to derail the bail process. There were complaints at hearing in most areas visited that a police prosecutor would bring a suspect to the court of law and make demands to the magistrate that the suspect should be denied bail, and the Magistrate would follow the wishes of the prosecutor.

4.12.2 Those who spoke on this issue were of the view that cash bail should be preferred in such situations as it may be useful for the purpose of protecting the accused right to bail and assurance of the accused appearance in court.

4.12.3 Bail conditions were attacked as being too harsh for poor Tanzanians. It was suggested that a surety with a proper address was enough.

#### **4.13 Level of Education of Magistrates**

4.13.1 Participants advocated for the removal of lay Primary Court Magistrates on the reason that there are enough lawyers who can work as magistrates. It was further said that due to low level of education, Primary Court Magistrates abuse their powers. On the other hand advocates said that there is a need of training the primary court magistrates to the level of diploma.

#### **4.14 Sentencing**

- 4.14.1 Some concern was expressed on the rather absurd situation of fining Shs.50, 000/= a person who has failed to pay development levy of 5000/=.
- 4.14.2 There was a complaint against the courts for awarding small sums of money by way of damages in adultery cases when a spouse could have been infected with HIV in the process. It was said that amounts of 4000/= to a maximum of 16,000/= were often awarded against a adulterer who could have caused more serious damage such as an HIV infection to another's spouse.

#### **4.15 Advocates**

- 4.15.1 Participants observed that while Advocates have a vital role of providing legal services to others to ensure justice is done they are very few compared to the Tanzanian population. Most stakeholders contended that the advocates do charge unaffordable fees. It was observed that being very expensive, only a few people who are well off enjoy the right of representation for they can easily hire a lawyer at any cost.
- 4.15.2 The scarcity of advocates was said to result from the system of enrolment, which is cumbersome. Another reason pointed out was that many graduates do not bother to go for the said cumbersome procedures, hence they become civil servants.
- 4.15.3 Participants proposed that proposed that graduates in law should go to a law school and then get admitted to practise.
- 4.15.4 Others said that the scarcity of advocates has resulted to one-advocate contracting too many cases, which s/he eventually fails to handle leading to delay of Justice.
- 4.15.5 It is the view of the stake holders that the Government should consider legal aid as a human rights issue especially to the ordinary person who would find it hard to defend or prosecute.

4.15.6 According to the law, the advocates are not allowed to appear in the primary courts hence representation in the said court is nil. It was proposed by the stakeholders that Advocates should be allowed to appear in primary courts.

4.15.7 However the Commission is of the view that there is a need of establishing a new cadre of paralegals that will assist people in primary courts.

#### **4.15.8 Delay of Cases caused by Advocates**

4.15.9 It was alleged that apart from delay that results from one advocate having too many cases, advocates do Use technicalities to delay and prolong cases which eventually would lead to delay in Justice. Some counsels it was alleged would keep on dilly-dallying in a case if they have not been paid and would try to mislead the court so that their clients are released even by using delaying tactics.

### **4.16 State Attorneys**

4.16.1 These are Civil Servants normally performing legal activities for and on behalf of the Government There were complaints from State Attorneys that they are given an instrument to enable them to appear on behalf of the Attorney General but only in criminal cases. They said that there was need for such instrument even in civil cases.

#### **4.16.2 Delay of Cases by State Attorneys**

4.16.3 There are some cases such as Economic Crimes in which the State Attorney cannot proceed until the DPP consents. From the field it was argued that the said consent is unnecessary.

4.16.4 Participants further said that State Attorneys are poorly paid and they are not enough and that due to the large number of cases it becomes impossible for a State Attorney to handle all such cases, hence delay. They urged the Government to improve the State Attorneys' package so that it becomes an attractive post.

### **4.17 Ward Tribunals**

- 4.17.1 According to the research when a person is brought before a Ward Tribunal once found guilty he can be fined and if the amount of fine exceeds Shillings 1,000/- the matter is referred to the Primary Court Magistrate for endorsement. The complaint of the majority was that once the matter is taken by the Primary Court Magistrate it begins afresh. Moreover, it was revealed that many cases, which could be finalized in Ward Tribunals, are taken up by the Police for their own interest.
- 4.17.2 There were also comments that Ward Executive Officers should not do legal work nor should they be Secretary to the tribunal and that they should not write judgment.
- 4.17.3 Another complaint was that the tribunals do not follow the law, and they proposed that somebody should supervise them. They claimed that most of the members on the tribunal do not know the law.
- 4.17.4 It was shown further that Ward Tribunals do not sit because of the problem of funds and because of that even matrimonial case, which need conciliation certificates, would not be entertained.
- 4.17.5 The tribunals were said to be very important in assisting the Primary Courts to entertain some cases. It was observed that the absence of the tribunals would necessitate all cases to go to Primary Courts. It was argued for revival of the said tribunals. It was proposed that working tools such as stationery should be provided to the tribunals.
- 4.17.6 It was observed that in order to make the tribunals efficient; members of the tribunal should go for short courses. It was pointed out that in sessions of tribunal fines imposed should be retained by the tribunal so that tribunal members may be paid their allowances from those fines.
- 4.17.7 With regard to the laws Used in the Ward Tribunals they were said to be outdated so that some give fines of only shillings 100/=. It was further proposed that the clerks employed to assist the Tribunal should be trained in some laws for better performance of their duties.

## **4.18 Prisons**

### **4.18.1 Overcrowding**

4.18.2 According to the research findings the main problem that faces the Prisons is overcrowding. The causes of the problem are that remandees are kept in prison for a longer period than the sentence they would get after conviction convicts of minor offences are taken to Prison and the size of the Prison buildings. It was said that most of the Prisons were built a long time ago and were not intended to accommodate prisoners with long sentences, as the maximum sentences at that time were seven years imprisonment. As a solution to the problem it was proposed that the construction of more prison buildings to cater for the great number of Prisoners as a result of the present population growth in the Country would alleviate the problem.

4.18.3 Another proposal is on the Use for the extramural penal labour and the other traditional ways of dispute settlement. Furthermore it was observed that where there is an option of a fine the Court should resort to the fine. However from the field it was observed that Primary Courts do not impose fines, because they are too small. i.e. 5 shillings up to 400/=. It was proposed that amendments should be made in this area.

4.18.4 It was also suggested that remand prisons for prisoners committed for trial after a Preliminary Inquiry should be in every region, so as to reduce the problem of overcrowding. It was further found that it would take a very long time before confirmation for execution of corporal punishment. This was also a cause of congestion.

### **4.18.5 Long Sentences**

4.18.6 Apart from being a source of overcrowding, long sentences are said to be a source of indiscipline among prisoners, because a prisoner would lose all hope; and it becomes difficult to rehabilitate them. It is the view of the prison authorities that prisoners serving long sentence should be made to work.

#### **4.18.7 Conditions in Prisons**

4.18.8 It was alleged that Prison conditions in the country defy human rights. There are poor health conditions in prisons. A prisoner suffering from e.g. diabetes or high blood pressure can get lots of problem if not death. Shelter is also a problem. There is insufficient food. Again treatment of prisoners on admission into prison is said to be bad, the prisoner is harassed, beaten, stripped naked and searched thoroughly.

4.18.9 It was further contended that some of the problem i.e. poor diet and poor shelter result from insufficient funds allocated to the prisons. Participants were of the view that the food problems can be solved by prisons producing their own food. The participants further stated that with regard to harassment, the prisons officers should treat prisoners in accordance with the law.

#### **4.19 Problems Facing Prisoners**

4.19.1 Participants observed that the system of depositing all the money with the Treasury appears to cause a lot of problems especially when a prisoner had been transferred a couple of times. It was revealed that many released prisoner fail to get their money back. They advised that it is therefore necessary to devise better ways of dealing with prisoners' money.

4.19.2 Prisoner officers alleged that some remand prisoners when released fail to go home because of lack of funds to transport them. They suggested that there is need for providing the prisons with fund for such purposes. With regard to appeals it was observed that due to delay in availing copies of judgments, it becomes a hard task to appeal particularly to the Court of Appeal whose procedures appear to be complicated.

4.19.3 It was observed that prison officers guarding prisoners are in a dilemma when the prisoners decide to escape, because if they shoot them to death, the prison officer will be charged personally, it was argued that they should have immunity like Magistrates.

4.19.4 Prison Officers also commented that it is a very hard task to have good governance if there are inadequate funds to service the police,

prisons and courts. They argued that the Government should put in more money not only to run the Prisons department but also to provide some training to prisoners.

## **4.20 Civil Justice System**

4.20.1 According to the field research four issues were discussed with regard to the civil Justice system namely; delay in the proceedings, probate issue, execution of decrees, and the Alternative Dispute Resolution issue.

### **4.20.2 Delay in Proceedings**

4.20.3 It was observed that civil matters can take very long due to various reasons, such as interventions by way of objections, preliminary points or applications. These kinds of interventions, they argued are normally used by advocates as some of the delaying tactics. Plaintiff (s) were said to cause delay by failure in giving money for service of summons to the defendant (s). It was argued that counsel, who abuses such rules, should be stopped from the practice for he is an enemy of Justice. It was suggested that plaintiffs who appear to be unable to bear costs of the case should be assisted.

### **4.20.4 Probate and Administration**

4.20.5 With regard to probate and administration cases it was observed that they are normally filed when the deceased had some assets. There were complaints that the deceased's wife is often not made the administrator of her husband's estate and instead a relative of the deceased may be appointed as an administrator. It was further observed that such relative will consider himself to be an heir. Participants observed that probate matters are dealt with by the High Court, but a District delegate can also handle such matters. They said that not every Resident Magistrate is a District delegate unless so appointed by the Chief Justice. It was argued that due to the increase in probate cases it is proper for every Resident Magistrate to be a District delegate automatically. It was also proposed that Moslems should go to courts for probate matters.

### **4.20.6 Execution of Decrees**

4.20.7 On execution of decrees, it was said that its procedures are long and cumbersome. It was alleged that there are 14 days of notice before seizure of the property, and then 30 days after seizure, then proclamation of sale takes another 30 days. Furthermore it was said that in between there might be an application for stay of execution. Execution Warrant from the Primary Court which is normally referred to the District Commissioner should go to the Court broker instead, because the District Commissioners Officer might not even know what to do after seizing property.

#### 4.20.8 **Alternative Dispute Resolution**

4.20.9 It was proposed that ADR it was said that advocates were the stumbling block in the success of ADR. It was also suggested that if parties did not want ADR there should not be a scheduling order because such order would be a waste of time.

#### 4.20.10 **TRA Attachments**

4.20.11 Someone decried the system of attachment of properties by Tanzania Revenue Authority or other body without having recourse to the courts. It was suggested that there should be no attachments, which do not go through the Courts.

## CHAPTER FIVE

### 5.0 CONCLUSION AND RECOMMENDATIONS

#### 5.1 Conclusion

5.1.1 The flow of Justice in any country requires that the administration of Justice is put on a high priority in state affairs. No country can get things moving without the necessary commitment from the executive to do whatever it takes for a proper, well functioning and well-coordinated instruments of the Justice machinery. As mentioned elsewhere in this report, the Judiciary system, the Police force and the Prisons service of any country cannot be run haphazardly if what is aimed at is a smooth flow of Justice. The attitude of the executive towards these organs of the State has to change for the better. In many countries where there has been any degree of success in the country's justice system, great efforts in funds, manpower training and general supervision have been made towards realizing a system of Justice that can be respected and admired. It was once said that democracy is expensive but it is cheaper than civil wars and it can now be said that Justice is expensive and it is available only to the one who is willing to pay. The Government must be willing to pay and pay heavily if it is going to provide a Justice system to the citizens which are worth the name.

5.1.2 Throughout this research the question of funds has dominated our discussions. Funds will ensure proper training for all involved in the Justice system. Funds will ensure that adequate numbers of law enforcers are recruited and funds will ensure that there is provision for working tools, buildings and even the invisible matters such as morale, hard work, good conduct and tolerance will be in place. In short, the key to any meaningful improvement of the Justice system lies in the Government's commitment to provide adequate funds to run the Justice administration in the country. The rest will take care of itself. With funds you can devise

a system wherein advocates toe the line, witnesses are managed and logistics are also managed.

## **5.2 Recommendations**

5.2.1 It may be appropriate at this juncture to list recommendations which emanate from this study.

### **5.2.2 Legal**

1. Advocates are partly a source of delays in court cases. It is recommended that rules and regulations be instituted to remove such delays. Amendments should be considered in the relevant laws such as the CPC, CPA, Law of Evidence Act. Furthermore in order to ensure that advocates do not take advantage of the openness of rules magistrate should trained in order to ensure that they are in full control of their courts.
2. The Judiciary being one of the organs of State should not be under any ministry and it should get its budget approved, by the Chief Justice presenting the budget to the President who in turn passes it over to the Parliament for approval as is the case with Uganda, Japan and Ghana.
3. All measures, which have been employed in other countries in the administration of Justice with good results, should be employed in our system. In particular we are referring to measures taken by courts in disposing of cases faster in other jurisdictions. For instance, plea-bargaining and more summary trials.
4. The paralegal scheme should be introduced in order to facilitate the provision of legal service to the poor.
5. After judgment, trial court should produce a copy of judgment within 1 month

6. Powers of detention of the Regional Commissioner and District Commissioner should be removed.
7. Assessors' views should not be binding on the Magistrate and in case one or both assessors are absent in the course of the trial the magistrate should be able to finalize the case.
8. All Prosecutors should be conducted under the DPP and Public prosecutors should be delinked from the Police Force and any other government institution.
9. Property of the convict should be distrained in order to realize funds for compensation and it should not await the release of the convict from prison
10. New laws being drafted should take into consideration the needs of people with incapacities and in accordance with the UN standards on "differently able" people.
11. It should be a criminal offence for any Police Officer to disclose the identity of an informer.
12. Once a person is released under section 225 of Criminal Procedure Act s/he should not be rearrested and charged again without the permission of the court and under conditions that investigations should be complete before such a person is arrested and taken to court again so that the case can be heard immediately.
13. The Government should look into the possibility of abolishing of capital punishment /penalty. Meanwhile the process leading to commutation of death sentences should be streamlined.
14. The law does not allow every Resident Magistrate to become a District delegate except when the one appointed by the Chief Justice. In order to be able to handle probate matters in more Districts the law should be amended accordingly to allow all Resident Magistrates to be Districts delegates.

15. A should be enacted to provide a mechanism to cater for inflation in order to ensure that fines remain current.
16. In criminal cases the rights of the victims of crime which include freedom from mental torture, abusive cross examination, degrading enunciation as well as fair compensation and restitution should be elaborated in the law, respected and protected by the court.
17. In order to reduce controversy which sometimes appears over the correct of a court record there should be independent means of recording whatever is given as evidence in court.
18. The law should provide that the widow has to be the administrator or one of the administrators of her deceased husband's estate.
19. The criminal and civil procedures have inherent elements of delays. Both procedures should be simplified without compromising Justice. For example, the execution of decrees is delayed unnecessarily in most cases. The trial Magistrate or Judge should regard a particular case as his/her still until execution has taken place.
20. The issue of child offenders is not taken seriously enough especially when it comes to their detention before trial and the length of time Used to complete their cases. Generally child offenders should not be kept in prison and in any case their cases should be completed within a time limit or dismissed once the time limit is reached before conclusion of the case.
21. Sexual Offences (Special Provisions) Act should be re-examined to remove the anomaly of age with regard to age of marriage or marriageable age and age of rape.
22. A document issued from a court which requires the court seal but does not bear one is incomplete and invalid. There should be sanctions on the officer responsible for issuing such a document but the parties should not suffer

because of such an omission because they have no power to order the court to stamp the document.

23. It is time economic crimes were made ordinary crimes triable by the District Court and only where necessary by the High Court.
24. Since Visiting Justices are often of great assistance to prisoners and their guards, those selected to be Visiting Justices should be required to make the visits regularly and there should be incentive measures to make the visits more attractive.
25. There should be a time limit to investigations of any kind, especially when there is a detained suspect, and in any case it should not exceed 2 year.
26. Police who prefer false charges against individuals should be punished and the victim compensated.
27. Petitions of appeal should be filed without the need to attach copies of judgment to enable the cases to be heard on appeal. After all the Judge would call for the file and get the original judgment in the case file.
28. In rape cases and sexual offences cases, the Evidence Act should disallow unduly annoying, intimidating, offensive, oppressive and repetitive questions for the purpose of protecting the victim and making it easier for the victim to report such offences to the Police. The Court should not hesitate to stop such questions and to punish the person who keeps on asking similar questions after such an order of the Court.
29. The Court should disallow confusing, misleading or questions phrased in inappropriate language, excessive or abusive examination and cross examination in both civil and criminal cases and the Evidence Act should provide for that.
30. The Criminal Procedure Act should contain provisions to restrict the naming of victims of sex crimes whether

young or adults. This is done in Many Countries such as Switzerland, Denmark, the Netherlands and Australia.

31. In New Zealand the Evidence (Witness Anonymity) Amendment Act 1997 (NZ) allows orders to be made to permit witnesses to give evidence anonymously. Such legislation could be useful to Tanzania because of the intimidation of witnesses in some cases. Such legislation does exist also in Poland and former Yugoslavia. Therefore such legislation should be enacted in Tanzania.
32. See Page 38 Para 3.2.4
33. See Page 40 Para 3.3.8
34. See Page 42 Para 3.6.3

### 5.2.3 Non-Legal

35. **The Government should provide adequate funds to enable the process of administration of justice to take off. Since it is a process, results can only be discernible after some time. Without the necessary funds it is unlikely that there will be any meaningful improvement of flow of justice. Retention schemes should be introduced in all legal sectors institutions where they non-existent**
36. Notwithstanding the governments efforts in the PSRP. The Commission recommends better benefits to nine years in legal sector institution.
37. Adequate number of law graduates must be recruited and trained to manage the administration of justice.
38. Reform measures such as the Legal Sector Reform Programme in the law enforcing institutions must be implemented fully in order to establish credibility and seriousness on the part of the Government.
39. Human rights of persons in custody must be respected and all impediments must be removed. To that end more funds must be provided to improve the standards of the

Prisons and Police station detention centres. Training of staff must be undertaken.

40. The Government must tackle the question of National Identity Cards forthwith in order to be able to administer the justice system better, since identification of persons is an important element in the administration of justice.
41. In order to remove the probability of adjournments due to non appearance of advocates, in one firm advocates appearing in courts should be required to belong to a firm of three or more advocates and rules to that effect should provide for that.
42. Legal awareness on the part of the public is a necessary step for the success of any justice system. More efforts must be made to make the public aware of their rights and basic laws, including educating them on alternative imprisonment in case of conviction.
43. Legal education must be taught in schools and institutions of higher learning to make everyone aware of the important laws of the country, which affect their daily lives. In this regard civic education causes should be compulsory to all levels.
44. Modern technology must be employed towards better and faster services in the administration of justice. Computers must be used for better and faster services in law enforcing institutions, for instance accepting electronic evidence
45. Important laws touching on the population should be translated into Kiswahili for use of the non-English speaking population. At the sometime the Government should look at the possibility of translating into Kiswahili for use by the majority of the population of Tanzania.
46. Magistrates should not stay in one station for more than 5 years.

47. Police training school and the Faculties of Law in the various universities should make human rights and good governance compulsory subjects in their syllabuses.
48. Exhibits in courts and Police stations should be kept in a proper and safe place to avoid thefts and destruction.
49. More Approved Schools should be established for both sexes.
50. Probation services should be revived and strengthened to assist in the rehabilitation of offenders.
51. In cases involving drugs the punishment should be meted out according to the quantity or value of drugs and/ both.
52. The law reforms by other institutions of the government should be carried out in consultation with the Law Reform Commission in order to avoid duplication of work.
53. Ward Tribunals should be revived by providing fund for them to do their work.
54. There should be limited use of remand in prisons, increased use of release on personal bond, modification of penal sanctions, and active use of alternatives such as probation and community service as countermeasures against prison overcrowding.
55. Community involvement is a necessary crime prevention ingredient. Voluntary organisations, societies, clubs and associations should be encouraged to participate in crime prevention. Vigilante groups and Neighbourhood Watch Group (Sungusungu) and people's militia should be employed to assist the Police Force.
56. Courts should have realistic cause lists for Magistrates and Judges in order for them to handle the cases of the day adequately.

57. The Mandate of the State Attorney should be clearly specified in his/her instrument of appointment both for civil and criminal matters.
58. Since the law is very wide and it is difficult for most Judges to have adequate knowledge in all the branches of the law, Judges should rotate in various divisions of the High Court so as to acquire wide knowledge and experience that will be useful to them when they eventually become judges of the Court of Appeal.
59. Funds must be made available to improve the conditions of our prisons in all respects i.e. space, sanitation, clothing, food, rehabilitation and other human rights aspects.
60. Many appeals are pending in the Court of Appeal. The Court of Appeal has become another cause of delays in the finalization of cases. This has been caused due to scarcity of Appeal judges. More judges of the court should be appointed.