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Commission Chairman's Statement

It affords me a great pleasure to present to you yet another edition of the *Law Reformer Journal*. This journal together with the website of the Reform Commission of Tanzania (registered as http://www.lrct.or.tz) provides one of the many avenues through which the Commission communicates with the rest of Tanzania and beyond.

This edition of the journal discusses such current issues as how laws should keep up with electronic age, investments, application of Human DNA Technology, and Bill of Rights. These areas clearly illustrate some of the challenges facing the laws and Law Reform Commissions of the third millennium. The Attorney General of Kenya[1] has reminded us all that-

> *Laws are an important instrument for economic and social engineering and indeed for political development. The Government's response to the diverse and complex issues of the day such as poverty alleviation and economic recovery, fighting corruption and terrorism, addressing poor governance, the need for increased access to justice by the poor and vulnerable, the promotion and respect for human rights, globalization, liberalization, and other challenges that arise from managing an emerging modern economy must be reflected in an effective and dynamic constitutional and legal framework.*[2]

Instrumental role of the law and law reform is best attained where the general public is well informed of underlying issues requiring law reform and participates from the vantage level of knowledge of underlying issues.

Law Reform Commission of Tanzania would like to extend a special gratitude to Justice A.C. Mrema who agreed to share with us his rich farewell thoughts on occasion of his retirement from the High Court Bench of Tanzania. Sir Charles Newbold, President of the former Court of Appeal for East Africa once described Judges to be policy-makers.[3]Justice Mrema influenced the society through his

1 Statement by *Hon. S. Amos Wako, Attorney General of Kenya- Kenya Law Reform Commission (KLRC) - Five-Year Strategic Plan (2005-2010), June 2005.*

2 Statement by *Hon. S. Amos Wako, Attorney General of Kenya- Kenya Law Reform Commission (KLRC) - Five-Year Strategic Plan (2005-2010), June 2005.*

3 Sir Charles Newbold, in a Seminar titled "Role of a Judge as a Policy Maker" he gave at Faculty of Law University of Dar es Salaam Tanzania on 30th January 1969.

judicial pronouncements. He served the High Court of Tanzania with distinction till his retirement on 25th October 2007. In this edition, Justice Mrema freely shares out his vast judicial experience on the role of judiciary as a fountain of justice; how judicial officers should work diligently and cautiously; and ever present menace of corruption. These are very pertinent issues which law reformers would want grasp.

Finally, this edition of *Law Reformer Journal* is designed to bring out law reform issues to the general public. It is my hope that this journal will continue to provide law reformers with a steady line of collaboration, consultation and co-operation within and outside the United Republic of Tanzania.

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

Editorial Note

Socio-economic and political changes taking place in the world have continued to demand for regular adjustments in the way societies and States are organized. Also scientific developments taking place in the fields of ICT and DNA technologies have similarly called for a re-examination of our legal systems. In the face of the developments taking place around the globe, Tanzania's legal system needs to keep abreast with such developments.

On the economic front, globalization poses a lot of challenges and has brought about intense competition which if not properly regulated, threatens the survival of emerging small and medium local enterprises, which are literally battling it out with giant foreign investors. Some of the negative impacts of the stiff economic competition negate the enjoyment of socio-economic rights, which in Tanzania, their enforceability is not certain.

Moreover, Tanzania's hospitality to its neighbours gives it an increasingly heavy responsibility of maintaining refugees who flee into the country, as a result of political conflicts and civil wars which have repeatedly broken up in the neighbouring countries. Tanzania can not escape from this international obligation of hosting refugees. It is therefore imperative that we asses the extent at which Tanzanians' laws attempt to address challenges imposed by the influx of these aliens (refugees) from her neighbours in the East and Central African region.

Other related aspects which cloud the legal and political atmosphere, are questions of freedom of political associations and the role of the Judiciary and of judicial officials. These aspects have been covered in one Article of our subscriber and in the excerpts of a farewell speech delivered by a retiring Judge. As our readers might be aware, as from this year 2009, Tanzania will start to prepare for the up coming General Elections in 2010. It is important therefore that, the Law Reformer Journal addresses some of the issues pertaining to civil and political rights. It is also the right time for the Journal to consider the duties and responsibilities of the Judiciary and its officers, as fountain of justice and guardian of civil and political rights.

As some of our readers might also be aware, it is the statutory duty of the Law Reform Commission of Tanzania (LRCT) to keep under review, all the laws of the United Republic with a view to its systematic development and reform. In the discharge of this function, the Commission is statutorily required to consult extensively in order to secure public participation in the law reform process. In appreciation of the importance of the consultative process, the Law Reformer has

considered it appropriate to include in this Edition, an Article touching on this process, as a follow up to an earlier Article on the role of the Commission in the law reform process, which appeared in the first edition.

The Articles contained in this edition of the Journal seek to address some of the contemporary issues such as those outlined above. These Articles, as will be seen, are educative in the sense that, relevant laws and policies, including issues of practice have been explored. They are also provocative in the sense that areas for legal improvement have been identified and proposals for necessary review and change have been made. Readers may not necessarily agree with the conclusions made by the authors and may thus wish to react to give their points of view in future editions of the Journal.

This edition, it is hoped, will present an excellent opportunity to readers through these Articles, to understand the participatory concept of law reform applied by the LRCT; to appreciate legal issues relating to ICT; political association; refugees and internally displaced persons; the utility of DNA technology both in criminal and civil matters; protection of SMEs and Investments; enforceability of socio-economic rights in Tanzania and challenges relating to access to justice, judicial duties and the role of judicial officials.

Finally, the Editorial Board wishes to make it clear that the views, opinions, propositions and ideas expressed and contained in these Articles, are of the authors themselves and do not necessarily reflect the policies of the Law Reform Commission of Tanzania. As such, it is the authors of the Articles who remain accountable for the information contained therein; and the Commission can not be held responsible for errors or any consequences arising from the use of information contained in the Articles.

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

PARTICIPATORY APPROACH IN LAW REFORM

By Agnes Mgeyekwa[4]

1.0 Introduction

The word 'reform' is a word of approbation; it tends to connote an improvement, an advance: not just for change but a change for the better. We may oppose change, a particular change for its own sake. But, virtually by definition, reform is desirable because we all desire to advance improvement and change for the better.[5]

Law reform provides an occasion for reflection, about what works; what does not and an opportunity for reassessment. To quote Justice Kirby, 'the basic endeavour of law reform involves three elements. First, the proposal for reform must fit, without anarchy; into the system that is subject of reform. Secondly, it will involve action, movement and advance. Thirdly, the reform will seek to improve issues. Reform and proposals for reform imply the improvement, if not maximization of the performance of the legal system'.[6]

The Law Reform Commission of Tanzania has defined law reform to mean the development of legal framework based on research and review that will ensure the attainment of the nation's development policies and attainment of people's aspirations.[7]

2.0 Establishment of the Law Reform Commission of Tanzania

The establishment of a Law Reform Commission may be done through a country's Constitution or through a pice of legislation an independent statute. In Tanzanian's case, the Law Reform Commission of Tanzania was established by an Act of Parliament through an independent statute. This was a follow-up of the recommendations of the Judicial Review Commission. chaired by Hon. Mr. Pius Msekwa (former Speaker of the National Assembly). The Review Commission presented its Report in 1977. The Judicial Review Commission's Report, 1977

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4 LL.B (Hons.) UDSM; LL.M (Public International Law) Utrecht University, the Netherlands; Legal Officer Law Reform Commission of Tanzania. Areas of expertise International Environmental Law, Human Rights and Good Governance.

5 MD Kirby, **Reform the Law: Essays on the Renewal of Australian Legal System** (1983), Melbourne : Oxford University Press, pg.7

6 *ibid*

7 The Law Reform Commission of Tanzania Strategic Plan of 2007.

observed that, in order to redress past neglect of the law and to ensure constant mobilization of law in the task of development, there is a need to establish an independent body which will constantly monitor the administration and operation of the law with a view of maintaining the relevance of the law according to changing of times; conditions and report on any breakdown or threatened breakdown so that remedial measures can be timely taken.

The Law Reform Commission of Tanzania Act, 1980[8] which established the Commission became operational in October 1983. Its mission is to take and keep under constant review all the laws of Tanzania for the purpose of its development and reform. Thus, the Commission has the unenviable task of not only reforming the national legal framework, but also to develop it.

2.1 Composition of the Law Reform Commission of Tanzania

The Commission consists of nine Commissioners, five of whom, including the Chairman are fulltime Commissioners, the other four are Part-Time Commissioners. Both full time and part time Commissioners are appointed by the President.[9]

The law establishing the Commission requires that Commissioners should be drawn from among persons holding or who have previously held high judicial offices, a person enrolled as an Advocate of the High Court Tanzania for not less than five years and lawyers who have practiced law for not less than five years, or who have been teaching law at University level, with teaching experience of not less than five year, or who by reason of special qualification, training and experience in the social, economic or political affairs of Tanzania, is able to contribute to the proper and effective discharge of functions of the Commission.[10]

The Commission has the office of Secretary to the Commission who is also a Presidential appointee. The Commission Secretary is responsible to the Commission for the day-to-day operations and management of the Commission.[11] The Commission Secretary heads the Commission's Secretariat, which is composed of three sections and four units. Members of these sections and units are drawn from various cadres of public servants ranging from lawyers, accountants and administrators, who together act as supporting staff. The Commission has staff strength of 48 people all of whom are civil servants.

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8 No. 11 of 1980 [Cap. 171 R.E 2002]
9 Section 5(1) of the Act
10 *ibid* Section 5(2), (a),(b),(c),(d) and (e)
11 *ibid* Section 18(3)

2.2 The Functions of the Law Reform Commission of Tanzania

The functions of the Commission are set out in section 4 (1), (2) and (4) of the establishing Act. The Commission is mandated to undertake the review of any law or branch of the law, propose measures necessary for bringing that law into accord with current circumstances of Tanzania; eliminating anomalies or defects; and repealing of obsolete or unnecessary laws or reducing the number of separate enactments.

The Commission may also propose codification and simplification of the law. It may consider and advise on proposal for the adoption of new or more effective methods of the administration of the law and the dispensation of justice.

While performing its statutory mandate, the Commission is guided by a set of values. The Commission seeks to promote fairness; cost effectiveness; accessibility and progressiveness in the Tanzania legal system. Promotion of respect for the rule of law by discouraging arbitrariness and excessive bureaucracy and to promote human rights in accordance with the African Charter for Human and People's Rights and other Human Rights instruments are values that are also cherished by the Commission.

3.0 The Concept of Law Reform Process

The ideal concept of law reform implies that, the introduction of legislation is preceded by some process of public engagement and consultation. It should involve something of significance to public policy which contains choices for future direction; which has been consulted on in a meaningful way, prior to legislation being produced, and results in a noteworthy change of direction. [12] Law reform process in Tanzania is closely guided by these ideals.

The Commission has put in place a law reform process, which gives members of the public an opportunity to express their views on areas of law that affect them as well as expressing their views on the need to enact new legislation in accordance with given situation. This process is implemented through, among other ways, consultation in the course of carrying out law reform projects and public legal awareness programmes.

The Commission can be moved to undertake any project through the following initiatives; the Attorney General can direct the Commission to initiate a law reform project through a statutory reference; the Commission may at its own initiative undertake a law reform project; and members of the public, Non-Governmental

12 Tim Barnett, **A paper for the Law Reform and Politicians**, 2003, New Zealand, pg 1

Organisations, Government Departments may request the Commission to initiate a law reform Project.

The operation of the Commission depends on contribution and co-operation from various stakeholders. Important stakeholders include Ministries' Departments; private bodies; professionals; academicians and individuals. The Commission invites members of the public to express their views or opinion, both with respect to particular references and with the on going agenda of law reform initiated by the Commission suo motu. After receiving the proposals or information from the above mentioned stakeholders, the Commission starts its reform activities by reviewing all relevant legislation related to the subject matter under consideration and where necessary, the Commission embarks on it by conducting research.

The Commission has adopted distinctive research methods such as preliminarily research, which includes library and archival research; field research, which is conducted through consultations with members of the public, Government officials and experts; thereafter, a stakeholders' workshop is convened to thoroughly examine the Commission's Draft Papers. In most stages of law reform, members of the public participate in the process through suggestions and contributions to enrich the Commission's reports.

The Commission also conducts public legal awareness programmes through Non Governmental Organisations (NGOs); networking and through Radio One in its popular '*Kumepambazuka"* programme, with a purpose of creating public awareness on the activities of the Commission and the law in general.

By involving the public, the Commission plays a significant role in redefining the laws of the country to reflect current state of affairs. This has been possible as this procedure allows the Commission to incorporate inputs from all interested parties. The Commission has also been publicizing relevant legal issues, publishing discussion papers, reports, flayers and brochures on various matters of legal interest and therefore promoting public awareness on the current state of the law and law reform activities.

Apart from promoting national participatory approach in law reform, the Commission has also been involved in regional and international law reform activities with other agencies in its law making processes by adopting concepts and practices through exchange of information and visits. The aim of this strategy is to, *inter alia*, harmonize the laws as well as establish a reliable relationship among law reform agencies

4.0 Co-operation with other Law Reform Agencies

In performing its activities, the Law Reform Commission of Tanzania cooperates with various social groups and other Law Reform Agencies. The Commission has established cooperation links with the Association of Law Reform Agencies for the Eastern and Southern Africa (ALRAESA), the Commonwealth Association of Law Reform Agencies (CALRAs) and the East African Community (EAC). The purpose of coordination and communication is to establish and maintain formal links with the said agencies for collaboration on law reform activities as well as establish a reliable relationship among the law reform agencies.

The Commission cooperates with those agencies through exchange of publications, visits and by attending meetings and conferences to discuss matters of mutual interest such as harmonisation of laws.

4.1 Co-operation within ALRAESA

The decision to establish ALRAESA was arrived at a seminar on Best Practices in Law Reform that was held in Dar-es-Salaam; Tanzania in October 2000. The seminar brought together representatives from a number of African countries. ALRAESA was subsequently formally established in Windhoek, Namibia, in August 2003. The meeting in Namibia approved a draft Constitution for ALRAESA. Tanzania, Kenya, Uganda, Botswana, Seychelles, Lesotho, Malawi, Namibia, South Africa, Zambia, Zanzibar and Zimbabwe are the founding members of the association.

4.1.1 The purpose and Objective of the Association

The purpose of establishing the association is to; exchange and share ideas on best practices in law reform, exchange and share ideas on the development of law, within the countries of the member agencies in accordance with the principles of human rights, good governance and the rule of law; and collectively contribute to the attainment of the objectives of member agencies.[13]

The objectives of ALRAESA as set out under Article 4 of the Constitution amplify areas where Law Reform Agencies can construct bridges of cooperation. These amplified areas include:-

(1) facilitation of regional co-operation in the reform and development of the law;

13 Article 3 of the Constitution of ALRAESA

(2) co-operation in the acquisition of knowledge and skills through reciprocal exchange of publications, pooling together research findings, regional conferences and attachment of members of staff of one agency to another;

(3) proposition of regional measures on legislative and administrative action to combat international crimes;

(4) to publish a journal or a bulletin and to encourage members to contribute to it for a wider and more effective dissemination of the work of the Association;

(5) to promote approximation of and harmonization of laws within the region;

(6) to assist in strengthening existing Law Reform Agencies in the Region;

(7) to contribute to protection of human rights, maintenance of the rule of law, constitutionalism and good governance in the region in particular, and in the whole of the African continent;

(8) to observe and contribute to the realisation of gender equality in all processes and generally to promote laws that promote gender equality; and

(9) to promote meaningful and effective approaches to the integration of customary law, common law and civil law and bring them in line with international norms and practices.

ALRAESA has also established a networking of member agencies through communication and exchange visits. The Law Reform Agencies which visited the Law Reform Commission of Tanzania are those of Malawi and Zambia. The Law Reform Commission of Tanzania like other sister agencies of ALRAESA, is circulating its report and journals to other law reform agencies. Discussion Papers and Final Reports are placed in the Commission website, whereby members can download copies. Likewise, the Commission is accessing documents and reports from other law reform agencies by visiting their websites. Other agencies are posting reports directly to the Commission while others are sending their reports through email.

To strengthen the association, members have met to discuss the way forward to improving the performance of the law reform agencies. ALRAESA has so far held eleven Executive Committee meetings and Annual Conferences in Dar es Salaam, Tanzania; Pretoria, South Africa; Entebbe, Uganda and Livingstone, Zambia.

4.2 Cooperation with the East African Community

The Law Reform Commission of Tanzania is a member of the East African

Community Sub-Committee on Approximation of National Laws. As a member, the LRCT attends regular meetings, seminars and workshops of the Sub-committee at which matters concerning the interest of all states are discussed and harmonization of laws considered.

4.2.1 The Role of National Laws and Law Reform

Law is not just a tool for implementing the four stages of integration, law can also be used to effectively create a stable, clear and uniform legal system in East Africa thereby encouraging investment and growth of markets.

4.2.2 The East African Community Treaty

The treaty for the establishment of the East Africa Community recognizes harmonization/approximation of National Laws. Article 126 (2) (b) of the Treaty requires Partner States, "through their appropriate national institutions to take all necessary steps to harmonize all their national laws appertaining to the Community". Customs Union, Common Market, Monetary Union and Political Federation will operate to the benefit of all East Africans if national laws and procedures do not conflict and hinder the integration. Harmonization and approximation of laws are two ways of law reform to be taken very seriously and meticulously as the five East African States progressively cede their respective national sovereignties and move towards ultimate Political Federation.

Harmonization has been defined as the process by which national laws of several states are made similar to accomplish a specific purpose. In the case of economic integration, the purpose of the whole process is the efficient facilitation of economic activity between constituent units.[14]

Tanzania, for the sake of its national interests and the need to prepare its citizens for ultimate goal of the East African Community should treat harmonization and approximation of laws with utmost attention;

4.2.3 Participation of Tanzania in the Task Force on Approximation of National Laws

The process of harmonization of laws in the East African Community is spearheaded by a Task Force on Approximation of Laws. This task force is comprised of representation from:-:

14 Craig. L. Jackson Asil insights – The Free Trade Agreement of the Americas and Legal Harmonization, June 1996.

- The Partner State's Law Reform Commissions.
- Officers of the First Parliamentary Counsel
- Coordinating Ministries (Ministry responsible for East African Community)
- Line Sectoral Department (National Ministry or Government Department responsible for any law subject of harmonization or approximation.)

The Task Force on Approximation of Laws is charged with the following responsibilities:-

(i) Identifying priority areas for the approximation/harmonization of National laws.
(ii) Facilitating exchange of information between the Law Reform Commissions.
(iii) Establishing synergy with other institutions and bodies engaged in Law Reform Programmes.
(iv) Preparing working papers for the Sub-Committee of Approximation of laws; and preparing draft tripartite instruments.
(v) Undertaking research on laws that require to be harmonized at National level and makes recommendations for the enactment of an East African Community law or for amendments or repeal of National laws to conform to global trends or best practice.

5.0 Conclusion

The LRCT supports participatory approach to law reform by involving the public in the whole process of reforming the law, through which members of the public are encouraged to reflect and express their views on how the law can be improved to better fulfil their aspirations.

This participatory approach has been extended through regional and international contacts with other law reform agencies.

The Commission has all the time since its inception, focused its attention on its main function of taking and keeping under review all the laws of the country for the purpose of reforming and developing the same. By designing and undertaking a structured law reform programme, the Commission hopes that it will be fulfilling its role of reviewing the past, reforming the present and anticipating the future, for indeed, that is the role of any Law Reform Commission worth its name.

WHY TANZANIA NEEDS ELECTRONIC COMMUNICATION LEGISLATION? LAW KEEPING UP WITH TECHNOLOGY

By John Ubena[15]

1. Introduction

Information Communication Technology (ICT) in the name of electronic communication as an industry in *stricto sensu,* is unregulated in Tanzania. The country has therefore been running the risk of being a cyber criminals' haven. It is true for instance that, when one decides to spread computer viruses maliciously, he cannot be prosecuted in Tanzania, the reason being that we do not have a legislation in place to govern or address that problem. This is no longer a problem in some countries such as the United Kingdom which have already adopted the Convention on Cyber Crimes and have enacted the computer misuse Act, 1990. Other countries in the whole of European Union, member states have electronic communication legislation.

In Tanzania, it was not until in the year 2000 when for the first time, the question of 'electronic evidence' was entertained by the High Court. In the case of *Trust Bank Ltd v. Le-Marsh Enterprises Ltd and others*[16] where the issue of admissibility of electronic evidence was answered in the affirmative. Consequently, Legislators responded by enacting the provisions[17] for admissibility of electronic evidence through amendment of the Evidence Act of 1967. For that reason, electronic evidence is now admissible in courts of law in Tanzania.

So now that we have electronic evidence legislation in place, is that all that we need? It is high time that we ask ourselves this question. A well founded answer would be 'NO.' for, we need more legislation in this area to regulate electronic commerce, electronic signature and electronic communication generally and not just a small piece of legislation that recognises electronic evidence.

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15 LL.B (Hons) (Mzumbe University), LL.M (Law & IT), (Stockholm University), Assistant Lecturer at Mzumbe University, Advocate of High Court of Tanzania.

16 Commercial Case no. 4 of 2000, High Court Commercial Division at Dar es Salaam (Unreported).

17 Section 33 of the Written Laws (Miscellaneous Amendments) Act, No. 15 of 2007. Under this provision information obtained from computer systems, networks, servers, facsimile machines, electronic transmission, audio or video records and other communication facilities are admissible as evidence.

The object of this Article is to expound in a tentative form, the rationale of enacting electronic communication legislation in Tanzania. Since we have not designed and developed the legal infrastructure to regulate ICT or Electronic Communication, it is important that we devise legislation to that effect.

In the case of Sweden for example, when they were considering the possibility of enacting a law to regulate the use of computers and at a time when the internet was sought to be regulated, the reaction from the ICT industry were amazing and amusing. Some said 'we do not have a law on typewriters, why should we have a law on computers?' Others even went further saying 'don't touch my computer;' 'leave my internet alone.'[18] Nobody thought how useful regulation of this technology could be. The aforesaid reactions show how reluctant people are when it comes to regulating ICT.

2. The Background

In Tanzania, computer application has its own history. The notable one being that of the 1970s when the idea of computerizing the Government accounting system by the Ministry of Finance using the only computer in the entire country was initiated. That project failed and led to the ban on importation of computers in the entire country.[19] It may however be noted that we used to have legislation in the 1960s and 1970s to regulate ICT. Examples of these pieces of legislation include:- The Broadcast Receiving Apparatus (Licensing) Act;[20] the Tanganyika Broadcasting Corporation (Dissolution) Act of 1965;[21] The Tanzania Posts and Telecommunications Corporation Act of 1977.

The process continued when the legislators thought that technological changes have out paced the law regulating ICT. Accordingly the legislature sought and indeed amended, repealed and replaced old pieces of legislation with new legislation such as the Tanzania Posts and Telecommunication Act of 1993; the Broadcasting Services Act of 1993 and the Tanzania Communications Act of 1993. The aforementioned pieces of legislation were no cure to the problem we were and

18 Professor Peter Seipel in his lecture on **IT Law in the Perspectives of Legal Informatics for LL.M in Law and IT Class** at Stockholm University, in November 2007.

19 Eileen P. Drew & F. Gordon Foster (Eds), Information Technology in Selected Countries: Reports from Ireland, Ethiopia, Nigeria and Tanzania; '*Development of Information Technology in Tanzania*' by Klodwig Mgaya, Tokyo, Japan, United Nations University(UNU) Press, 1994, p. 148 available online at http://www.unu.edu/unupress/unupbooks/uu19ie/uu19ie0i.htm visited on 10/08/2008

20 Act No.6 of 1964.

21 Act No. 11 of 1965.

are yet facing. The legislature went further to enact the Tanzania Communications Regulatory Authority Act (TCRA) for the purpose among others, to establish a communication regulatory body.

One may argue without hesitation that, although the TCRA Act of 2003 is a substantive legislation geared at regulating ICT; it is however a legislation which is predominantly intended to establish a body to regulate communication, including but not limited to ICT. As the nomenclature suggests, TCRA connotes the body that regulates the communications sector. TCRA exercises its power under the TCRA Act and under the Tanzania Communications Act. It is important to note that, the TCRA Act never repealed the Communications Act of 1993.

It is equally important to underscore the fact that neither the Communications Act 1993 nor the TCRA Act of 2003 addresses issues of cyber crimes or IT crimes generally. It is also true that matters of convergence of technologies or even development of ICT have not been mentioned in the said legislations. It is therefore clear that these pieces of legislation will be redundant with the lapse of time.

3. Need for Electronic Communications Legislation

ICT legislation in Tanzania has been enacted and placed in various compartments. But Legislature is now at dilemma as a result of technological changes that have taken place and the convergence of technologies. These changes and the convergence are posing a challenge to the legislature. The question which remains to be answered is whether the scattered pieces of legislation so far enacted are sufficiently addressing the changes and convergence of ICT and are they really adequately regulating electronic communications. The impact of these changes and the convergence of ICT is that of legislation becoming obsolete, while in other instances, there are lacunae found in the law. This brings in problems not only in legal interpretation of ICT legislation but also in the administration and enforcement of the law since there is a multiplicity of several pieces of legislation that are scattered in different statute books which are difficult to be comprehended by lay persons.

3.1 The analysis

Looking at the laws regulating communication in the country, one is able to discern that there are several pieces of legislation regulating this sector. As highlighted earlier on, there was the Broadcasting legislation and the Telecommunications Act. However these have since been repealed and replaced by The Communications Act of 1993 and the Tanzania Communications Regulatory Authority (TCRA)

Act of 2003. Policies which gave rise to the enactment of these laws include the ICT policy, the Broadcasting policy, etc and several other regulations.

The legislation in force includes the Universal Communications Service Access Act of 2006, the Tanzania Communications Regulatory Authority Act of 2003, the Tanzania Communications Act of 1993 and the Tanzania Broadcasting Services Act of 1993. The policies being supported by these laws include the National ICT Policy of 2003, the National Postal Policy of 2003 and the National Telecommunications Policy of 1997.

Tanzania has as a well defined regime of regulations including the Tanzania Communications (Consumer Protection) Regulations 2005, the Tanzania Communications (Quality of Services) Regulations 2005, the Tanzania Communications (Broadband Services) Regulations 2005,the Tanzania Communications (Content) Regulations 2005, the Tanzania Communications (Licensing) Regulations 2005, the Tanzania Communications (Importation and Distribution) Regulations 2005,the Tanzania Communications (Installation and maintenance) Regulations 2005, the Tanzania Communications (Interconnection) Regulations 2005, the Tanzania Communications (Telecommunications Numbering the Electronic Address) Regulations 2005, the Tanzania Communications (Radio Communication and Frequency Spectrum) Regulations 2005, the Tanzania Communications (Tariffs) Regulations 2005, the Tanzania Communications (Type Approval of Electronic Communications Equipment) Regulations 2005, the Tanzania Communications (Access and Facilities) Regulations 2005 and the Tanzania Postal Regulations 2005.[22]

The vision of Tanzania Government in regulating ICT is vividly seen in the ICT Policy 2003. This policy aims at addressing the development stage which Tanzania has so far achieved in ICT area. Strange as it may seem, the policy concedes that there is a lack of legal framework to safeguard various interests in ICT which include e-commerce. The policy states that the government will enact a legislation to address cyber crimes and that it will also review existing laws to ascertain if they are in conformity with current development in ICT and will undertake necessary amendments.[23] This review has so far not been done satisfactorily with exception of the TCRA Act of 2003 and a number of other regulations connected with that Act and the so called Written Laws (Miscellaneous Amendments) Act, No. 15 of 2007[24]. This demonstrates that, some remarkable progress has never the

22 www.tcra.go.tz visited on 14/08/2008.

23 Part 3.5 of the Tanzania National ICT Policy 2003.

24 This Act makes admissible any information retrieved from computer systems, networks or servers, records from facsimile machines, electronic transmission, communications facilities,

less been made in as far as regulating technology is concerned.

Although there are many scattered pieces of legislation on ICT in Tanzania; these pieces of legislation have in some instances turned obsolete. It is quite true that a piece meal approach to legislation process is dominant in Tanzania like in many other countries. The legislature is neither visionary nor does it encourage technological neutrality of ICT legislation and sustainability of the said law. This is why when new technology develops at least in ICT, the existing law becomes redundant.

In Tanzania, we had the Broadcasting Act and the Telecommunications Act; and now, we have the Communications Act and the TCRA legislation. These pieces of legislation were and are essentially addressing the problems related with Radio and TV broadcasting and telephone communication. They never regulate computer application nor do they address or cover computer crimes or cyber crimes or IT crimes generally. That is why it is stated elsewhere in this Article that, Tanzania is running the risk of being an IT criminals' haven.

Indeed, if one considers the pace of development of ICT and the convergence of various ICT technologies, he or she would obviously have no doubt that, Tanzania needs electronic communications legislation. The basic factors for such conclusion are in three limbs; one being the pace of ICT development and the convergence of ICT technologies and second, the need for a technological neutral legislation; and likewise, the need for sustainability of the law.

To begin with the pace of ICT development and convergence of technologies, if there is a technology growing at a speedy pace, then, it is ICT. One may think of the invention of telephone communication, the telegraphy and the break through of the internet. These technologies are tremendously convenient and affordable. Internet is above all real time communication. If one looks at these technologies, then he/she may conclude that their development never took a millennium. Say for example, computer was invented in the 20th century, but before it reached 21st century, already internet was invented. While others in the early years of computer application had thought computer will end up being used for mathematical calculation only like a calculator, this has not been the case. Computer science came in to colonize the entire universe and in its' every sector. Who can imagine these days living without internet access.

Surprisingly, there are people who had wrongly thought that the technology (code) particularly the cyberspace for example cannot be regulated.[25] While other academics have clearly stated that technology like internet in its cyberspace can

25 John Perry Barlow, **A Declaration of the Independence of the Cyberspace**, available at http://homes.eff.org/~barlow/Declaration-Final.html last visited on 26/11/2007.

be regulated.[26] It is however not the purpose of this Article to explore how the cyberspace is or can be regulated.

The pace of ICT development turns legislation obsolete. The law ought not only to be flexible but also be proactive to see to it that it neither leaves people unprotected against new technologies nor hamper the development of technologies themselves.

Speaking of convergence of technologies, we have gone very far these days from broadcasting, to web casting. From telephone calls to PC[27] calls. It is no wonder these days that one may capture TV channels using his or her PC. Nowadays, there are pc to pc calls and there is also pc to telephone calls. The technology never rests, this is quite true. It is not surprising these days that one may get many technologies in a single device. One may have for example a cell phone or mobile phone, using this mobile phone he or she can make phone calls, get internet access, TV channels, take photos, etc., the question would be is this really a phone or a camera or a TV set or a computer? The other question would be how can such a mobile phone be regulated, should it be regulated by the telecommunications Act or the broadcasting Act or the computer misuse Act? The worst thing is that, we do not have a legislation which defines even what electronic communication is.

The failures of the legislature to consider convergence of technologies in electronic communications, which have traditionally been regulated by distinct branches of law, which are technologically specific, pose a serious challenge. As stated earlier on, TV and PC these days both have internet, VOIP or Internet calls or web phone.[28] For instance, TV connection via broadband; and PC to PC calls; these use radio waves and therefore subject of Electronic Communication legislation regulation in Tanzania? Even if we say YES they are to be regulated by electronic communications legislation here in Tanzania we do not have such legislation. It is quite challenging. The legislature ought to know this better. Surely, one may recommend that the legislature be advised on these matters, otherwise, we will always have pieces of legislation with short life span or else we will have many laws which are unenforceable.

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26 Lawrence Lessig, **The Code and other Laws of the Cyberspace**, New York: Basic Books, 1999, at pp. 43-60

27 PC means Personal Computer.

28 More explanation and examples of VOIP are found at http://www.voiptalkforless.com/voipglossary.html visited on 08/02/2008).

The danger connected with the aforementioned problem is the increasing risk of hyper regulation.[29] If one considers the examples of principal legislations and the regulations in the area of communications in Tanzania there is a clear problem of hyper regulation. What is hyper regulation anyway? Professor Richard Susskind coining the term hyper regulation:

> …we are all subject, in our social and working lives, to a body of legal rules and principles that is so vast, diverse, and complicated that no one can understand their full applicability and impact. And appreciation of but small subsets of the law is given only to small groups-generally, lawyers themselves. Being hyper regulated means there is too much law for us to manage…[30]

The problem of over legislating may be seen as an obsession that the legislature likes to enact new and specific laws for every change or development of technology.[31] This in turn brings in the problem of having many pieces of legislation which cannot be comprehended by lay persons, unless one is learned in law.

To overcome the challenges posed the changing and converging ICT, we ought to have a law which is technologically neutral. Technological neutrality of law therefore may be defined as a situation or tendency where the legislation is seen to suit the development, changes and convergence of technologies as time goes on. To guarantee the same, the legislature on the one hand has to adopt a legislative drafting technique in which resultant the legislation suits the technological changes and the likely convergence of technologies; a good example is the use of open ended phrases and general clauses.[32] On the other hand, Judges interpret rules in the said legislation in a more liberal way so that the purpose of the legislature in enacting such a rule is extracted and fulfilled.

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29 cf. Richard Susskind in his famous book, **The Future of Law Facing the challenges of IT**, New York, Oxford University Press Inc., 1996 at pp. 12-13; "Hyperregulation" means there is too much law for us to manage.

30 *Ibid.*

31 Peter Wahlgren,(ed) IT Law: **'IT and Legislative Development',** Scandinavian Studies in Law, Stockholm, Stockholm Institute for Scandinavian Law, Stockholm University, Vol. 47 of 2004 at pp. 602-618.

32 Koops *'Should ICT Regulation Be Technology-Neutral?'* in Bert-Jaap Koops *at el* (eds) **Starting points for ICT Regulation. Deconstructing Prevalent Policy One –Liners, IT & Law Series,** Vol.9, Hague: T.M.C. Asser Press, 2006 at pp. 77-108.

One may rightly ask himself whether it is possible to have a sustainable ICT law in Tanzania. It is obvious that nowadays, technology develops faster than law. Therefore, one of the most logical requirements of ICT regulation is that, ICT legislation should be sustainable enough to cope with technological developments over a sufficiently long period of time. If a law is too technology-specific, it is not likely to cover future technological developments, and it will therefore have to be adapted sooner rather than later.[33]

As already pointed out, technology specificity will lead to reactive laws and the approach will therefore be that of enacting new laws for any change of technology which increases the quantity rather than quality of legislation. The law will be changing now and then. As one author put it '…A law that changes every day is worse than no law at all…'[34] one may thus appeal that, the legislature should be more visionary. It should however be borne in mind that, sustainability of a law carries the risk of backfiring if the law abstracts too much away from technology.[35]

Apart form that, technological neutrality[36] of law which may be achieved by having the electronic communications legislation although it makes the law sustainable it may as well bring in the risk that the legislation ignores the current technology or pretends that there is no technology at all, and this renders the law meaningless, uncertain or rather absurd. As the Earl of Northesk commented:

> …One of the many difficulties I have with the Bill is that, in its strident efforts to be technology neutral, it often conveys the impression that either it is ignorant of the way in which current technology operates, or pretends that there is no technology at all…[37]

Since our legislature is not conversant with the changes or convergence of technologies, those trained or experts in ICT and law should be readily available

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33 Koops *'Should ICT Regulation Be Technology-Neutral?'* in Bert-Jaap Koops *at el* (eds) **Starting points for ICT Regulation. Deconstructing Prevalent Policy One –Liners, IT & Law Series,** Vol.9, Hague: T.M.C. Asser Press, 2006 at pp. 77-108.

34 *Ibid* quoting Fuller 1969, p.37

35 Koops, *Supra* note 15

36 For more details on technological neutrality of law; cf: Lyria Bennett Moses, **Recurring Dilemmas: The Law's Race to keep up with Technological Change.** Faculty of Law, University of New South Wales, Sydney NSW 2052 Australia.

37 Koops Supra note 16 quoting the Earl of Nortek while discussing the UK Regulation of Investigatory Powers Act of 2000.

to advise the legislature on these matters so that the law becomes visionary and sustainable and at the end of the day, it protects citizens on one hand and it never act as a brake to the development of technology itself on the other.

The solution to the aforesaid problems is to enact a comprehensive electronic communications legislation to cover all the technologies. This legislation must be drafted in such a way that it will take cognizance of the pace of technology and the convergence of technologies. To allow technological neutrality, it should thus have open ended phrases[38] to cover many technologies than having restricted itself to a particular technology like TV or radio broadcasting or telecommunication, instead of enacting an electronic communication law, etc. The legislation designated as electronic communications Act will serve all the purpose and do away with the piece meal approach of enacting a new law for every new technology or change of technology or convergence of technology.

A good example is that offered by the EU. Having been exhausted by the constant change and convergence of ICT, the EU devised a solution. The European Union's New Regulatory Framework (NRF) is the EU Electronic Communications Regulatory Framework. This is a well compacted legislation of which its primary goal is to address the convergence of ICT. This NRF is constituted of six Directives.

By analogy, one may wish to consider the problem we had with the Land Legislation in Tanzania. These were scattered pieces of legislation. It was undoubtedly not even possible for lay persons to comprehend such legislation; sometimes even lawyers were sweating to comprehend such legislation. However, when the Land Acts, 1999 (No. 4/99) and the Village Land Act, 1999 (No. 5/99) came into force, all these problems were eliminated. It is high time that we should apply the same approach to regulate ICT. We can have a comprehensive electronic communications legislation to regulate such area.

4. Conclusion

Tanzania being at an infancy stage of devising mechanisms or legal infrastructure to regulate electronic communications area, we cannot blame the legislature for such lag. Besides, even some of the developed countries are facing the similar challenge. The plain truth is that, no country has done this correctly and in the right way in the first place. Problems are bound to haunt us if we will keep on

38 This is what Prof. Hart HLA call Open Texture in his book, **The Concept of Law**, 2nd edition, Oxford, Clarendon Press, 1994

entertaining our piece meal approach of enacting new legislation for any change or convergence of technologies. This applies to all technologies including though not limited to ICT.

There are other problems which have not been mentioned in this Article. These problems include such areas as the failure to tax e-commerce is an obvious one. Many Tanzanians and foreigners are taking advantage of such a loophole to conduct e commerce. This is afforded by the lack of electronic communications legislation which could have defined what e-commerce is and ascertain the possibly what is to be taxed under the same legislation. The other problem is how the privacy of Tanzanians is to be guaranteed when they go to the cyberspace; this ought to have been stated in the electronic communications legislation. All these matters deserve a separate piece of writing to be expounded in explicating perspectives.

TAKING STOCK OF THE LAW AND PRACTICE OF THE RIGHT TO FREEDOM OF POLITICAL ASSOCIATION IN TANZANIA

By Michael K.B. Wambali[39]

1.0. Background Introduction

In the year 1992, Tanzania adopted major and unprecedented legal and socio-political reforms, which in the country's current constitutional discourse, are usually referred to in the *Kiswahili* acronym as "*Mageuzi"*. I do not intend here to deal with the factors that lead to the coming of or the actual process of the *Mageuzi* reforms, the area having now been over-researched.[40] This paper explores on how these major changes in the constitutional set up and political scenario of Tanzania, affected the freedom of political association and assembly in the country. It is argued that the way in which these rights were articulated in the political discourse involved, had a lot to do with the low level of the Government's commitment to change in order to liberate itself from the legacy of the former one-party political system that had just been discontinued by the *Mageuzi* reforms.

2.0. The Scope of the Rights Provided in the Bill of Rights

The sister rights of association and free assembly which usually co-exist in bills of rights all over the world, are basically the most fundamental civil and political rights. They form part and parcel of the traditional human rights discourse, which is predominantly liberal-democratic. Moreover, the same have been an essential part of the civil and political rights as are enshrined in the relevant United Nations and Regional instruments as well as the many written constitutions of the world.

At the time of the launching of the *Mageuzi* reforms in 1992, the general right to freedom of association was set out in Article 20 (1) of the Constitution,[41] which reads in the following terms, thus:

39 LL. B (Hons), LL.M. (Dar), Dip. in Int. Law (I.S.S. The Hague), Ph. D. (Warwick), Senior Lecturer, Faculty of Law, University of Dar ss Salaam.

40 See for example a recent publication, Peter, Chris Maina and Kopsieker, Fritz (Eds), (2006), **Political Succession in East Africa: In Search for a Limited Leadership**. Nairobi: Kituo Cha Katiba and Friedrich Ebert Stiftung, Kenya Office.

41 Article 20 (1) of the Constitution has recently been amended by section 7 of the Fourteenth Constitutional Amendment Act, 2005, Act No. 1 of 2005, which has replaced the sub-Article by a newly re-written one beginning without the limitation clause, "subject to the laws of the land".

> "subject to the laws of the land, every person is entitled to freedom of peaceful assembly, association and public expression, that is to say, the right to assemble freely and peaceably, to associate with persons and, in particular to form and belong to organizations or associations formed for the purposes of protecting and furthering his or any other interests."

In terms of content, the above-quoted provision did not differ with what is comprised in Articles 21 and 22 of the International Covenant on Civil and Political Rights of 1966.[42] Both provide for the right to freedom of peaceful assembly and association, although the international instrument has done that in two separate Articles. However, there is a difference of emphasis in respect of freedom of association. The above cited provision of the Tanzanian Bill of Rights did insist on the right to public expression, while the provision in the above mentioned UN Covenant underscores the individual's right "to form and join trade unions".

Actually, the Bill of Rights provision just stopped at the right "to form and belong to organizations or associations formed for the purposes of protecting and furthering his or any other interests." Indeed it is no accident that the phrase 'trade unions' is absent from the Tanzanian provision, taking into account the ruling regime's historical scepticism against people's grassroots and autonomous organizations.[43] The influence of the African Charter in this regard is noticeable. The Charter is also silent about the right to belong to and form trade unions.[44]

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42 United Nations General Assembly, adopted on 16th December 1966, entered into force on 23rd March 1976, 999, United Nations Treaty Series, p. 171.

43 Mwaikusa, Jwani, T. (1990), "Government Powers and Human Rights in Africa: Some Observations from the Tanzanian Experience," in REMBE, Nasila S and Evance Kalula (Eds) (1990), "Constitutional Government and Human Rights in Africa", Special Edition of the **Lesotho Law Journal**, 6 (1), pp. 75-105; (1994), "Local Government Policies in Tanzania: The Political Guinea Pg," in Rothchild, Donald (Ed), *Strengthening African Local Initiative: Local Self-Governance, Decentralization and Accountability*, (Hamburg, 3 Hamburg African Studies), pp. 59-74; Maguire, G. Andrew, (1969), **TOWARD 'UHURU' IN TANZANIA: The Politics of Participation.** London: Cambridge University Press, pp. 338-360; Friedland, William, H. (1967), "Co-operation, Conflict and Conscription: TANU-TFL Relations, 1955-1964," in Butler, J. and Castigano, A.A. (Eds), (1967), **Boston University Papers on Africa: Transition in African Politics.** New York: Preager Publishers, pp. 67-103; Pratt, Cranford, (1976) **The Critical Phase in Tanzania 1945-1968: Nyerere and the Emergence of a Socialist Strategy.** Cambridge: Cambridge University Press, p. 89.

44 However recently there have been improvements in this regard by the enactment of the Employment and Labour Relations Act 2004, Act No. 6 of 2004. The Act provides as one of its objectives set out in section 3 thereof, "(g) generally to give effect to the core Conventions of the International Labour Organisation as well as other ratified conventions." Then its section 9 (1) proceeds to provide for every

Another similarity of the Tanzanian Bill of Rights mentioned above to the African Charter and the UN Covenant, relates to the way the rights were made to apply subject to the laws of the land. But the Bill of Rights did not specify which type of laws. This is well done by the Covenant particularly in respect of the right to peaceful assembly. It specifically limits the restrictions thereof to "conformity with the law and which are necessary in a democratic society in the interests of national security and public safety (*ordre public*), the protection of public health or morals or the protection of the rights and freedom of others."[45]

Certainly subject to the general limitation clause enshrined in Article 30[46] of the Constitution, the inclusion of the above-cited provision within the ambit of the old Article 20, would have provided viable guidelines for interpretation in specific cases, as to which laws would be capable of restricting the enjoyment of the right to freedoms of peaceful assembly and association. But that is part of history as the limitation clause was removed by section 7 of the Fourteenth Constitutional Amendment Act 2005.[47] Now as the main focus here is the right to freedom of political association, I shall deliberately abandon at this juncture the discussion of the other aspects of freedom of association, such as some aspects of media freedom or freedom to form and conduct trade union activities, and proceed with the former in the next section.

3.0. The Eighth Constitutional Amendment Act 1992 and Freedom of Political Association

Section 5 of the Eighth Constitutional Amendment Act 1992 (Act No. 4 of 1992) abolished the one-party political system by amending Article 3 (1) of the Constitution to read, "the United Republic is a democratic and socialist state adhering to a multi-party political system." It also repealed the provisions which had provided for party supremacy (Arts. 3 (2) and (3); Art. 10), and then authority was given to Parliament to legislate for the new political scenario.
Hence the Political Parties Act 1992 came into existence. (Act No. 5 of 1992) This law set out some legal procedures for the establishment, registration and conduct of the activities of political parties, in accordance with the directive previously

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employee's right, (a) to form and join a trade union; and (b) to participate in the lawful activities of the trade union."

45 Article 21.

46 This has remained unchanged even after the coming into force of the Fourteenth Constitutional Amendment Act, 2005. See supra footnote 2.

47 Act No. 1 of 2005, implementing the recommendations of the "Presidential Committee for the Collection of Views on the Constitution of 1999," popularly known as the "Kisanga Committee". See footnote 2 supra.

issued by the ruling party CCM.[48] Sub-Article (2) of Article 20 of the Constitution as was amended by section 10 of the Eighth Constitutional Amendment Act 1992, specifically set out the conditions for the registration of political parties, thus:

> 20 (2) Without prejudice to sub-Article (1) no political party shall qualify for registration if by its constitution or policy-
>
> (a) it aspires to advocate or further the interests of-
>
> i. any religious belief or group;
> ii. any tribal, ethnic or racial group; or
> iii. only a specific area within any part of the United Republic;
>
> (b) it advocates the breaking up of the Union constituting the United Republic;
>
> (c) it accepts or advocates the use of force or violence as a means of attaining its political objectives;
>
> (d) it advocates or aims to carry on its political activities exclusively in one part of the United Republic; or
>
> (e) It does not allow periodic and democratic election of its leadership.

The above mentioned provisions were reproduced in section 9 (2) of the Political Parties Act 1992.[49] One takes note that even at their face value these conditions are stringent. They form one reason why it was decided against subjecting the registration of the new political parties to the procedure that had earlier existed under the Societies Ordinance.[50] The stiff conditions for political parties cannot be applied for ordinary societies, which are the main concern of the latter law.[51]

This invites the question as to whether the mere repudiation of Articles 3 and 10 of the Constitution, did in itself bring any improvements to the enjoyment of freedom of political association. The answer to this question is attempted in the following sections of this paper.

48 See Hansard, **Majadiliano ya Bunge – Taarifa Rasmi: Mkutano wa Saba – 28 Aprili – 8 Mei 1992**, Part I, (Dar es Salaam: Bunge Press – Government Printer). Speech of Hon. Edward Lowassa, the then Minister of State in the Prime Minister and First Vice-President's office, to the National Assembly during the second reading of the Bill thereof on 7 May 1992.

49 Sub-Article (3) of Article 20 of the Constitution empowers Parliament to enact a law for ensuring that political parties conform to the restrictions and criteria set out in sub-Article (2) of the same Article.

50 Cap 337, Re. 2002.

51 Take note that during the colonial era and even after Independence but before the imposition of the one-party political system in 1965, political parties were governed by the same Societies Ordinance.

The intention of Parliament in imposing the said conditions, was clearly stated in the National Assembly by Hon. Edward Lowassa, the then Minister of State in the Prime Minister and First Vice-President's Office, when introducing the Bill for the Political Parties Act 1992, as having been:

> …to make political parties to be national institutions which are not tribal, religious and organs only aimed at advocating and furthering ethnic and particular group or racial interests. Otherwise these conditions are also aimed at the safeguarding of the Union and democracy within the parties themselves and also peace and tranquillity in the conduct of political parties.[52]

The same had earlier been underscored by Hon. John Malecela, the then Prime Minister and Vice-President of Tanzania, who had said that the real intention of the Government was to "…ensure that *Mageuzi* in the country were coordinated in such a way that they met the desired aims without any disturbances, and indeed not only theoretical changes which have no benefits to our country,"[53] Thus the main task of the discussion below will be to strike the balance between the above aims of the Government on the one hand, and the constitutional demands of the right to freedom of political association, on the other hand.

Let us first give a brief but closer look at the conditions themselves. One cannot by any means deny the sensitivity of the religious issue, and the threat that the same has always posed to the customary peace and tranquillity in Tanzania. The latter was at the base of all decisions made by the ruling party CCM and its Government during the *Mageuzi* period. With the religious proportion of the population percentage of 45 Christian, 35 Muslim and 20 traditional beliefs,[54] the spectre of religious turmoil has continually been haunting the Tanzanian political discourse

52 Hansard, 1992, *op. cit*. pp. 684-5.

53 Hansard, 1992, *ibid*. pp. 684-5. See also the earlier Recommendation XXVII in the Nyalali Commission Report, (1991), **Tume ya Rais ya Mfumo Wa Chama Kimoja au Vyama Vingi yya Siasa Tanzania: Taarifa ya Mapendekezo ya Tume Kuhusu Mfumo wa Siasa Nchini Tanzania, Kitabu cha Kwanza**. Dar Es Salaam: President's Office, United Republic of Tanzania, p. 7.

54 See *Tanzania Information* in the CIA Server, from NETSCAPE [Tanzania]-Location: htt: www.odci.gov/cia/publications/95fact/tz. html. The religious issue is so sensitive that the major statistical data sources in the country like the Bureau of Statistics, (1988), *TANZANIA SENSA 1988 – Population Census: Preliminary Report*, (Dar Es Salaam: Ministry of Finance, Economic Affairs and Planning) and Bureau of Statistics, (1994), *United Republic of Tanzania Statistical Abstract, 1992,* (Dar Es Salaam: President's Office, Planning Commission), did not comprise information about this religious division in the country, which is indeed a very serious omission.

ever since the early Independence days. Indeed of the grassroots autonomous mass-oriented organizations disrupted by the post-independence government as early as 1962, was the All Muslim National Union of Tanganyika (AMNUT). But that did not mean the total silencing of the Islamic interest groups as later developments showed.[55]

During the tenure of Moslem President Alli Hassan Mwinyi, there emerged a significant number of non-state Islamic mass organizations. Their activities were not only limited to preaching the Islamic faith or even criticize that of the Christians. They were also demanding of the Government to accord Moslems with some form of positive discrimination against Christians, in respect of social services, notably education opportunities.[56] The same did eventually lead to a sensitive constitutional conflict within the National Assembly during the 1993/94 Budget Session.[57] Not only that, but on Good Friday of 1993, in some unprecedented fashion, a large group of allegedly Moslem followers attacked a substantial number of pock shops and butcheries in the Magomeni locality of the city of Dar Es Salaam, causing serious social chaos and a lot of damage to property.[58]

The point to be underscored here is that, the use of coercion or law by the state to silence some religious organizations does not necessarily work towards the safeguarding of the much cherished peace, unity and tranquillity. Instead of postponing the social turmoil from future religious conflicts, a more effective solution is for the Government to consider positively the alternative of

55 The same demands as had been advocated by the defunct AMNUT were in effect being pursued by the late Prof. Alli Kighoma Malima, in the short spell he occupied the position of Minister of Education in the Second Phase Government of Muslim President Alli Hassan Mwinyi, and after his removal allegedly for that reason, when he subsequently joined the National Reconstruction Alliance (NRA), for the same purpose.

56 There is no direct evidence of former President Mwinyi's support of such fundamentalist agenda. His Cabinet by 31 December 1992, comprised 10 Moslem Ministers out of the total number of 25, excluding the President of Zanzibar. See Bureau of Statistics, (1994), op. cit. p. 16.

57 This involved the unilateral accession by the Revolutionary Government of Zanzibar to the Organisation of Islamic States (OIC). It led to protracted debates in the House, which revealed apart from the Mainland Tanzania anti-union sentiments, also the Christian/Moslem often hidden rivalry. The Government had earlier through the Minister of Justice and Constitutional Affairs conceded to the unconstitutionality of the said OIC application by Zanzibar. See *Daily News Tanzania*, (1993), 7th August.

58 Stern measures were undertaken by the Government including large-scale arrests and incarcerations, a few of which were subsequently prosecuted.

legitimating political organizations based on some form of religious ideologies and philosophies. This could cultivate the culture of restraint, for the ultimate guarantee of permanent peace and tranquillity. The present set up of Article 20 of the Constitution cannot in the long run achieve the above ends.

Definitely within the context of multi-party politics, freedom of political association should be understood and practiced in the pluralistic sense, that is, the freedom of all interest groups to the lowest and most minute levels. It is only in that way that the nation as a whole could benefit from the contributions made by various initiatives from the grassroots level, not only politically, but culturally and economically as well. Indeed it is from this omission, that the country was condemned to total economic failure.

Coming to the disqualification of potential political parties for having advocated ethnic, tribal and racial or gender programs, one wonders on what basis this law has grouped the above in the same category. While there may be some relationship between ethnicity and tribalism, the same do not necessarily follow one after the other. Besides that, one does not see how racism and gender should be associated with the other categories mentioned in Article 20 (2) of the Constitution. Apparently the disqualification of potential political parties on the grounds related to the above-mentioned categories was a result of CCM and its Government's ostensible commitment to "national unity" at any cost. The same has brought forth another wrong assumption that Tanzania is, and has always been, a unified nation without any substantial regional differentiation.

However it is important to specifically take note of the obvious regional division of the country, as far as unequal development patterns are concerned. This has roots going as far back as the German colonialists' demarcation of the territory between coastal industrial urban areas and the rich-soil highlands favourable for European settlement, plantations and cash crop growing areas, on the one hand, and the labour reservoir areas, on the other hand. The country's development has ever since taken the same pattern, generally prioritizing the former. I did a study through library research in 1995[59] comparing the first group of regions comprising Arusha, Iringa, Kagera, Kilimanjaro and Tanga, with the second group with Mtwara, Tabora, Rukwa, Kigoma and Lindi, in respect of some development indicators, such as under five infant mortality rate, supply of water and electricity, Local Government recurrent revenue and total gross output in manufacturing industries.

59 Wambali, Michael K.B. (1998) "**Democracy and Human Rights in Mainland Tanzania: The Bill of Rights in the Context of Constitutional Developments and the History of Institutions of Governance**", (Ph. D. Thesis, University of Warwick, England), pp. 236-237.

The analysis of the collected data showed that, there are some areas within Tanzania which seem to have been condemned to lesser development on account of, among others, historical and political reasons. Certainly it cannot assist the articulation by the ethnic communities of the concerned backward regions, as far as their rights to economic self-determination are concerned, for the Constitution to forbid them to politically organize themselves along those lines. Outright tribalism and racism may justifiably remain in Article 20 of the Constitution, as the basis upon which to refuse the registration of political parties practicing them. But one cannot understand why developmental problems of particular areas of the United Republic should not be dealt with through the formation of political parties for those purposes, by the people who are ethnically tied thereto.

The same is even more accurate of the marginalized hunter/gatherer and purely pastoral communities such as the Tindiga, Dorobo and Barbaig of Northern and Central Tanzania. These communities have their own peculiar way of life, quite distinct from the domineering majority Bantu speaking people of Tanzania. Thus they have remained outside the modernization process, both culturally and economically. Yet all governments since the colonial days have always imposed on them the demands of contemporary political regimes with disastrous effects, as was admitted by the Government itself.[60] Indeed, the Government has so far done little to understand these basically tribal communities. At best it has been exposing them to continuous anthropological studies, mainly by foreign researchers looking for simple community case studies, to explain current problems of the complex modern societies.[61]

In the case of the Barbaig, in the mid 1980s, the Government basically uprooted a substantial part of this tribal community from their customary pastoral lands, alienating the same to a public corporation carrying out some large-scale wheat

60 Hansard, (1992), *op. cit*. p. 81. During the Third Meeting of the Seventh Session of the National Assembly on 30 April 1992, while responding to the question of Hon. J. Mulyambate, MP for Meatu Constituency, on development problems of the Tindiga and Barbaig, Hon. Anna Abdallah, then Minister of State in the Prime Minister and First Vice-President's Office, admitted as follows: "…efforts of the Government to settle and bring social services to Tindiga communities as of now have proved unsuccessful, as it has been found that services which had been rendered did not conform with their customs and norms and thus were unable to solve their problems."

61 On this point refer to Kaare, B.T.M., (1994), "The Impact of the Modernization Policies on the Hunter-Gatherer Hadzabe: The Case of Education and Language Policies of Post-Independence Tanzania," in Burch, Ernest S. Jr. and Ellana, Linda J. (1994), **Key Issues in Hunter-Gatherer Research**. Oxford/Providence: Berg Publications.

farming with Canadian aid.[62] Undoubtedly the problems mentioned above did negatively affect these communities in their tribal capacity and not otherwise. The Government's attitude of the condemnation of tribes as backward and counter-development while it is an open secret that each of the over 90 per cent of the people of this country belong to one of them, is a modernist legacy of colonialism. The same cannot have any basis in the political thinking of constitutional makers over four decades after Independence.

As to the Government's avowed commitment to preserve the present Tanzanian Union as is seen in Article 20 (2) of the Constitution, for a long time now the structure of the Union has been the subject of controversy both in legal and political circles, details of which are not intended to be covered here.[63] Suffice it to say that recent developments in that regard are living illustrations of the undeniable truth that the Union, which the CCM ruling party and its Government have avowed to keep sacred and free from uncontrolled political questioning, is not without serious problems. Moreover there is the fact that the said Union was actually a brainchild of the former nationalist leaders of the two partner states thereto,[64] and was only ratified by the law-making organs of both states,[65] without any wider approval of the people through a referendum. That might have been fine within the context of the post-independence overwhelming mass support TANU enjoyed in Tanganyika, and the revolutionary situation in Zanzibar. However

62 See for example the facts in the case of *Mulbadaw Village Council and 67 Others v. National Agricultural and Food Corporation*, [1984] TLR 15 (High Court) and *NAFCO v. Mulbadaw Village Council and Others*, Court of Appeal Civil Appeal No. 5 of 1985 (unreported). Whereas the aggrieved Barbaig villagers won the case in the High Court, they lost in the Court of Appeal of Tanzania, getting no remedy on account of dubious legal technicalities. On a similar case situation see Tenga, Ringo W. (2000), "**Revisiting Judicial Activism: The Mkomazi Pastoralists' Case in the Court of Appeal**," mimeo, Faculty of Law, University of Dar Es Salaam.

63 For the detailed analysis of the legal problems of the Union of Tanzania, see Shivji, Issa G. (1990), **The Legal Foundations of the Union in Tanzania's Union and Zanzibar Constitutions**. Dar Es Salaam: Dar Es Salaam University Press.

64 The Union of Tanzania came into existence following the signing of an agreement of understanding officially referred to as the Articles of the Union, by the first President of the Republic of Tanganyika the late Julius Kambarage Nyerere on the one part, and on the other part, the first President of the Revolutionary Government of Zanzibar, the late Sheikh Abeid Amani Karume.

65 In the case of Tanganyika, by the Union of Tanganyika and Zanzibar Act 1964, Act No. 22 of 1964, Cap.557 of the Revised Laws of Tanzania, 1965; and in the case of Zanzibar, there is only indirect evidence of such ratification by the Revolutionary Council with the Council of Ministers on 15 April 1964. See Shivji, Issa, G. (1990), *op. cit*. pp. 4 -5.

within the present multi-party situation, it should be expected, the existence of a good section of the citizenry who have serious reservations about the structure of the Union, and are desirous of expressing their position through the forum of a political party.[66]

There cannot be any justification, and indeed it amounts to dishonesty on the part of the Government to deny, by way of constitutional prohibitions, the right of such parties to be registered. Indeed it seems that this is the only viable alternative open to the anti-Union campaigners. The High Court of Tanzania in the case of *Rev. Christopher Mtikila v. The Attorney General*[67] has declared the court to be out of bounds of petitions complaining about and seeking redress as to the desirability and form of the Union between Tanganyika and Zanzibar and things related to what should or should not be included in the list of union matters. According to the Presiding Judge, that would amount to turning the court of law "into a political battleground."[68] However in another case of *Mabere Nyaucho Marando and Another v. The Attorney General*,[69] the High Court took the position expressed above, with Mackanja J. stating that, "If the policy of the incumbent government and that of the ruling party is not for a separate government for Tanganyika that does not mean that the issue is not legitimate for other political parties."[70]

4.0. The Registration, Co-ordination and Control of Political Parties

The process for the registration, coordination and control of political parties under the Political Parties Act of 1992 is another area where curtailment of the freedom of political association is obviously seen, apart from the stiff conditions set out by Article 20 of the Constitution discussed above. It begins with the powers bestowed upon the Registrar of Political Parties as demonstrated in the following sub-section.

4.1. Political Parties and the Powers of the Registrar

The Political Parties Act 1992 did confer powers of registration of political parties on the Registrar of Political Parties appointed by the President. (s. 4 (1) and (3)). In the performance of his duties the Registrar "shall from time to time consult the Minister." (s. 4 (4)). Therefore no organization was to engage in politics in

66 Before the 1995 General Elections and long thereafter the functionally live Democratic Party (DP) led by Rev. Christopher Mtikila was refused registration because its constitution had as one of its policy objectives, the repudiation of the Union and the restoration of Tanganyika, although it was later provisionally registered before the 2005 General Elections.

67 [1995] TLR 31.

68 P. 4 of the Ruling on the Preliminary Objections.

69 High Court Civil Case No. 168 of 1993, Dar Es Salaam Registry, (unreported).

70 Page 22.

Tanzania without first being registered by the Registrar after having tendered the relevant application "in the prescribed manner…." (s. 7 (1) and (3)) save for the CCM party, whose application had been presumed by the Act. (s. 7 (2)).

The registration process itself is not simple. It must be made in two stages, (s. 8) with special conditions imposed for each of them. First is what is known as provisional registration, granted upon fulfilment of the conditions set out in section 9 of the Act. (s. 7 (2)). These are: first, receipt by the Registrar of an application to that effect, by the founder members of the applicant party, in a prescribed form, (s. 9 (1) (a)) accompanied with a copy of its constitution. (s. 9 (1) (b)) The second requirement is that, the membership of the applicant party must be "voluntary and open to all citizens of the United Republic without discrimination on account of gender, religious belief, race, tribe, ethnic origin, profession or occupation." (s. 9 (1) (c)) Proof of compliance with this latter requirement depends entirely on the discretion and satisfaction of the Registrar.

The second stage of registration involves even tougher conditions whose proof of compliance, again depends on the Registrar's verification. Ironically, the Act exempts him from liability for genuine mistakes in the process. (s. 6) Thus, in order to qualify for full registration, the concerned party, having first secured provisional registration, must obtain "…not less than two hundred members who are qualified to be registered as voters for the purposes of parliamentary elections from each of at least ten regions, of which two should be in Tanzania Zanzibar, one from Zanzibar and one from Pemba…." (s. 10 (1) (b).

Undoubtedly, this requirement was intended to limit the proliferation of political parties. It involves spending a lot of money to travel to eight regions of Mainland Tanzania, which cannot easily be undertaken by small budding organizations wishing to become political parties. In the long run this condition will invite the domination and control of politics in the country by a small class of wealthy people in a poor country.

The other requirements include the submission by the applicant party of the names of its national leaders, who must come from both sides of the United Republic, and the establishment and notification of the address of the national headquarters of the said applicant party. (s.10 (1) (c) and (d)).

The above conditions being so demanding, it was not surprising that during the early stages of their implementation, at least two known strong political organizations were negatively affected. The first was the KAMAHURU of Zanzibar then lead by the popular, charismatic and former Chief Minister of the

Revolutionary Government of Zanzibar Seif Shariff Hamad. The other one from Mainland Tanzania was the Democratic Party (DP) of the controversial Reverend Christopher Mtikila.

However, whereas the former organization decided to go round the rules by forging a marriage of convenience with the then mainland party *Chama Cha Wananchi* led by James Mapalala and formed what is still known as the Civic United Front (CUF), the DP went on to renounce the Tanzanian Union in its policies and has remained adamantly defiant, and consequently did not then receive full registration. Besides that, thirteen political parties were before the 1995 general elections, recorded as having attained full registration and they contested in the elections. The number of fully registered political parties has steadily been growing despite the constitutional constraints mentioned above, so that in 2005 eighteen fully registered political parties contested in that year's general elections.[71]

5.0. Judicial Opinion on the Conditions and Criteria for the Registration of Political Parties in Tanzania

Some of the above conditions and criteria have already received judicial consideration in the few cases that have followed up the practical operation of the new system. In *Rev. Christopher Mtikila v. The Attorney General*,[72] one centre of controversy was the amended Article 20 of the Constitution.[73] In that case the court having satisfied itself as to the immutability of the ethic of human rights and thus, the unlimited power of Parliament to amend the provisions of the Bill of Rights, decided in favour of the validity of the amendments to Article 20 discussed above. In the words of the Judge, the new Article 20 (2):

> …does not abrogate or abridge beyond the purview of Article 30 (2) of the right of association guaranteed under Article 20

71 See the certified extracts entitled, "Particulars of Political Parties that Have Obtained Full Registration under the Political Parties Act 1992" for the years 1995 and 2005, at the Office of the Registrar of Political Parties.

72 See *supra*, footnote 27.

73 Thee court in the case rightly notes that the right to freedom of association as provided for in sub-Article (1) of Article 20 of the Constitution remains unchanged after the coming into force of the Eighth Constitutional Act 1992 although it is insisted that now the right "includes the formation of political parties." The same is said of the former sub-Article (2), which is now (4), indicating that the presiding Judge did not seem to realise the expansion of the sub-Article to include a directive that no political party may be refused registration merely on the grounds of her ideology or philosophy.

> (1). It merely lays down the conditions a political party has to fulfill before registration and all these conditions are within the parameters of Article 30 (2). The conditions are clearly aimed at the promotion and enhancement of public safety, public order and national cohesion. There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint, for that would lead to anarchy and disorder. In a young country like ours, nothing could be more suicidal than to license parties based on tribe, race or religion. (p. 25)

However, in the subsequent appeal of *Rev. Christopher Mtikila and the Democratic Party v. The Hon. Attorney General and the Registrar of Political Parties*[74] the Court of Appeal of Tanzania, decided the matter in the Plaintiff's favour, holding that the Registrar of Political Parties had acted illegally and in contravention of the principles of natural justice, when he refused to grant the second Appellant full registration, without first affording him an opportunity to be heard. This leads us to the discussion on the right to freedom of peaceful assembly.

6.0. The Right to Freedom of Peaceful Assembly

The right to freedom of peaceful assembly is closely related to the right to freedom of political association. One can suggest that the former is a sub-set of the latter, using the mathematical jargon, and for that reason it was chosen by the drafters of the Bill of Rights to include the two freedoms in the same Article 20 (2) of the Constitution. Indeed, the right to political association cannot be fully enjoyed in the absence of unhampered freedom of assembly.

Freedom of assembly was curtailed in Tanzania throughout the one-party era, by the excessive misuse of law and the government administrative machinery at the grassroots level. At the peak of the system in the Tanzania of the late 1970s, it was the District Commissioner who always carried the day. Thus section 40 (2) of the Police Force Ordinance[75] granted to these powerful leaders of central government at that stage, absolute power to issue permits which, by virtue of sub-section (1) of the same section, were necessary and precondition for organizing any public meeting, assembly, rally or procession. The law had stated thus:

> Any person who is desirous of convening, collecting, forming or organizing any assembly or procession in any public place, shall first make application for a permit in that behalf to the District Commissioner… and if the District Commissioner is

74 Court of Appeal Civil appeal No. 28 of 1995, Dar es Salaam, (unreported).
75 Cap. 322, Revised Edition 2002.

> satisfied, having regard to all circumstances… he shall, subject to the provisions of sub-section (3), issue a permit….

During colonialism and immediately after Independence, this power had been vested originally in a police officer in-charge of a station. It was in 1962 that the above-quoted section was amended, to transfer the power to issue these permits to District Commissioners as shown above. Indeed this followed the institution of the omnipotent presidency at the national level by the Republic of Tanganyika Constitution of 1962, (C.A. Act No. 1 of 1962) as well as the creation of the likewise powerful representatives thereof at the regional and district levels.[76] Actually this illustrated the post-independence regime's resolve to control political activity at grassroots level at any cost. The effect of this desire came to mature and was seen much later with the enunciation of the doctrine of party supremacy. The latter move gave the ruling and then only political party, through its stalwart supporters in government at district level, exclusive command over all political activity.

This arrangement posed no controversy during the three decades of one-party rule. But surprisingly the same was carried over to the post-*mageuzi* era by section 11 (1) of the Political Parties Act 1992, which read as follows:

> 11 (1) Every party which has been provisionally registered shall be entitled-
>
> (a) to hold and address public meetings in any area in the United Republic after obtaining a permit from the District Commissioner of the area concerned for the purposes of publicizing their party and soliciting for membership.

It was this statutory provision which was the major issue of contention in *Mabere Nyaucho Marando and Another v. The Attorney General*.[77] The two Plaintiffs who were leaders of the then newly registered political parties, jointly challenged section 11 (1) (a) of the Political Parties Act 1992, for having offended the Constitution. It was argued that the sub-section had granted to District Commissioners who were members and officers of the ruling party CCM, power to grant permits for political rallies, which had often been deliberately used to the disadvantage of opposition parties. It was in effect established in evidence that while the said government officials continued to hold their position on the basis of being steadfast members

76 By the enactment in the same package, of the Area Commissioners Act 1962, Cap. 466 and the Regions and Regional Commissioners Act 1962, Cap. 461.

77 High Court Civil Case No. 168 of 1993, Dar Es Salaam Registry (unreported).

of the ruling party CCM, they invariably gave preferential treatment to CCM and exercised their discretion to the disadvantage of the rest of the parties.

Deliberating on that issue, the Presiding Judge Hon. Mr. Justice J. Mackanja emphasized that the power to issue permits was essentially discretionary to be exercised judicially. According to the Judge, that required *inter alia*, "… that all get the same and equal treatment…. if other parties are discriminated it necessarily results in the infringement of the right of assembly of those who will be discriminated." (p. 19).

Following what he referred to as a liberal approach, the Judge ultimately held that section 11 (1) of the Political Parties Act 1992, offended Article 20 (1) of the Constitution and could not be saved by Article 30 (2) thereof. (p. 23) Thus he insisted that no one could take away the freedoms of association and assembly from any other person. Moreover while adhering to the cannons of statutory interpretation which take into account the actual words used and the circumstances in which they are used[78] and while looking at the Constitution as a living instrument,[79] the Judge concluded that the question of maintaining public security during political rallies was important and thus there was need for permits to be issued.

One sees that the court did not see anything wrong in the requirement for permits as such. What was wrong was the empowerment of District Commissioners to issue the same allegedly in order to ensure public security, an object they could not be able to fulfil without involving the government security agencies. In order to cure that absurdity in the law, the Judge went on to order that the operation of the law should be as it had been comprised in section 40 of the Police Force Ordinance, prior to its amendment by Act No. 35 of 1962. The impact of this decision was to return to the police officer in-charge of a station, the power to issue permits for public assemblies, meetings and rallies.

However a different position was taken by the same High Court in another case, decided contemporaneously with the foregoing.[80]
In the latter case it was also posed as one of the issues whether sections 40, 41, 42 and 43 of the Police Force Ordinance and section 11 (1) and (2) of the Political Parties Act 1992, which made it necessary to obtain permits in order to hold or organize public meetings and processions, were unconstitutional or not. Before

78 Citing the case of *James v. Commonwealth of Australia*, (1936) AC 578, 613 and that of *British Coal Corporation v. The King* (1935) AC 500, 518.

79 Borrowing from Samatta, J.K. (now retired Chief Justice as he then was) in *Mwalimu Paul Mhozya v. The Attorney General*, [1996] TLR 229.

80 The *Mtikila* case cited above in footnote 27.

endeavouring to answer that issue, the late Hon. Mr Justice K. Lugakingira (as he then was) concluded that, section 40 of the Police Force Ordinance and section 11 (1) of the Political Parties Act 1992, belonged to a class of laws which made the enjoyment of the constitutional right to freedom of peaceful assembly illusory. He found them inconsistent with the provisions the Constitution for subjecting the exercise of that right to the permission of another person, (p. 33) as they had hijacked the right to peaceful assembly and procession guaranteed under the Constitution and placed it under the personal disposition of the District Commissioner.

It was thus held that, section 40 of the Police Force Ordinance and section 11 (1) of the Political Parties Act 1992 failed to meet the requirements set out by the Court of Appeal of Tanzania in the case of *Kukutia Ole Pumbun and Another v. The Hon. Attorney General and Another*,[81] regarding instances when a law derogating from some provision of the Bill of Rights could be saved by Article 30 (2) of the Constitution.

However it was on the question of the Police's control of public meetings and processions that the Judge's reasoning and decision are interesting. He did not see anything wrong with section 41 of the Police Force Ordinance, for according to him it does not take away the right to hold assemblies or processions merely because it empowers the police and the magistracy to step in, "for the preservation of peace and order." (p. 34) And finding support in the cases of *Mohammed Nawaz Sharif v. President of Pakistan*[82] and *C. R. Ramsan v. Lloyed Barker and the Attorney General*[83] from Pakistan and Guyana, respectively, the court held that, the granting of the powers of control of public meetings to the police under section 41 of the Police Force Ordinance, met the requirements of the 'clear and present danger' test established in the Pakistani case above.

Having thus established that the granting of permits and the supervisory aspects of this law were very separate and that on the authority of Article 64 (5) of the Constitution, they could easily be severed from each other, the court held further, thus:

81 [1993] 2 LRC 317.
82 PLD 1993 8C 473, at pp. 832-833.
83 (1983) 9 CLB 1211.

> …the requirement for a permit is unconstitutional and void. I direct the provisions of s. 40 of the Police Force Ordinance and s. 11 (1) (a) of the Political Parties Act and all provisions related thereto and connected therewith, shall henceforth be read as if all reference to a permit were removed. It follows that from this moment it shall be lawful for any person or body to convene, collect, form or organize and address an assembly or procession in any public place without first having to obtain a permit from the District Commissioner. Until the Legislature makes appropriate arrangements for this purpose, it shall be sufficient for a notice of such assembly or procession, to be lodged with the police, being delivered a copy to the District Commissioner for his information. (p.34)

There is no doubt therefore that in both the *Marando* and *Mtikila* cases, the High Court of Tanzania outlawed the granting of permits for public assemblies by District Commissioners. However in the former case the court did not completely do away with the permits procedure; in fact it even encroached upon the Legislature by 'amending' the relevant statutory provision and thus transferring the said powers to the Police. But in the latter case, any type of permits for public assembly and procession were declared unnecessary; instead one needed only to notify the police and inform the District Commissioner.

This seemingly slight difference of judicial opinion from the same court has over years mattered, as far as the government's unaltered desire to control political activity is concerned. In practice, permission from the Police is a pre-requisite for holding any political assembly and/or procession. The position has remained unchanged even after the law was amended subsequent to the above court decisions, by the Written Laws Miscellaneous (Amendment) Act 1994. (Act No. 32 of 1994) Thus a new sub-section (3) was added to section 11 of the Political Parties Act 1992 reading as follows:

> 11 (3) When a political party is desirous of holding a meeting or procession in any public place in any area it shall, not less than forty eight hours before the meeting, submit a written notification of its impeding meeting to the police officer in-charge of the area in which the meeting is to take place is situated.

Undoubtedly, the requirement for a notification as given above, is sort of an imposition of pre-conditions for the practice by political parties of their right to

freedom of assembly. This view is confirmed by the provision in sub-section 5 thereof indicating that the police officer concerned may direct that the meeting so notified shall not be held. And to make it worse, even after complying with the above requirement, the police officer in-charge of a station in the respective area can prevent the holding of the meeting or procession already notified by the issuance of a stop order. The stop order can be issued if such officer satisfies himself under sub-section (6) thereof, that the same place is to be used at the same time for a previously notified meeting of another political party, and/or that the meeting so notified is intended to be conducted for unlawful purposes.

One sees that what the Legislature did by this amendment was to go further than the substance of the *Marando* case. The Police have invariably interpreted the law as having provided for their exclusive discretion regarding decisions on whether public political meetings, processions and rallies should he held and at what times, days and places. Apart from that while the law talks about the notification of an officer in-charge of a police station of the area the meeting is to be held, in practice these discretional decisions have always been made publicly by Regional Police Commanders in other regions, and the Commissioner for the Dar Es Salaam Special Police Area, in the case the largest city in the country.[84]

This is an indication of the involvement of the highest levels of the Police Force, which invites the implication of closer follow up by the highest levels of Government, if not the ruling party itself. Indeed, the extensive misuse and abuse of discretion by the police officers involved is an open secret. Immediately before, during and after the three general elections that have taken place during the period covered by this work in the years 1995, 2000 and 2005, there have been witnessed a series of incidents involving the riot police (Police Field Force Unit), invariably applying excessive force to break up rallies and processions being held against dubious police stop orders. The problem has always involved controversies about the interpretation of the phrase "unlawful purposes" in sub-section (6) of section 11 of the Political Parties Act 1992.

We can therefore say conclusively that, for the period of ten years or so after the taking place of the first multi-party general elections of 1995, the full practice of

84 Refer to the recent public announcement of Mr. Alfred Tibaigana, the then Commissioner for the Dar Es Salaam Special Police Zone, in the exercise of his personal discretion, banning the holding of a procession earlier notified, involving some Moslem radicals to condemn the national leaders of BAKWATA (the national Union of Moslems enjoying government support) for the sale to an individual of a piece of land in the city, religiously held by the Union through *Wakf* in June, 2007. Take note that there are so many police administrative ranks between the police officer in-charge of a station and the Commissioner.

free and unrestricted freedom of peaceful assembly is still a dream in Tanzania. Before we conclude let us briefly discuss developments that have recently taken place as related to the right to political association.

7.0. Some Recent Developments towards the Practice of Wider Democracy

This section enumerates in a nutshell some few developments and constitutional endeavours towards reform of the law relating to the right to freedom of political association. Most constitutional amendments so effected during the period under study followed the recommendations contained in the *Report of the Committee for the Collection of Views on the Constitution* of 1999.[85]

The Committee for the Collection of Views on the Constitution was appointed by Hon. Benjamin William Mkapa, the then President of the United Republic of Tanzania in July, 1998, for the collection and coordination of the people's views on the required constitutional changes in the country. There were three Terms of Reference namely, first, to coordinate the views of the people, organized groups and various institutions regarding Government Circular No. 1 of 1998.[86]

Secondly, was to receive and coordinate the recommendations on any additional proposals from the people, groups and various public institutions, including their views as regards those Proposals. And thirdly, was to collect, scrutinize and assemble the views and recommendations received and submit them together with its advice to the Government, to enable the latter to make the final decisions thereon. About 600,000 people in rural and urban areas, men and women, the youth and the elderly, people of various responsibilities, businesses, political aspirations, religious and academic orientations, participated in this exercise in the various ways and modalities as had been formulated by the Committee. On 20 August, 1999 the Committee submitted their report to the President after having visited all the 25 Regions of the United Republic.

Among the nineteen proposals of the Government in the White Paper was the seventeenth Proposal (a) which read that, "Human rights as are entrenched in the Constitution have been weakened in application because the implementation

85 See Book One, "The Summary of Views of the People and the Committee's Advice," Ministry of Justice and Constitutional Affairs, Dar es Salaam, 1999.

86 Government Circular No. 1 of 1998 otherwise referred to as the "White Paper", had listed nineteen proposals of the Government as related to some problematic areas of the Constitution requiring consideration for amendment, for the people to give their views thereon.

of those rights is subjected to other ordinary laws." It is quite surprising that the absolute majority of the views expressed by the respondents on this proposal that is, 93.62 per cent, preferred that human rights in the Constitution should have limited implementation.

Thus, following the will of the majority of the respondents in favour of reasonable limitations upon the implementation of the human rights as entrenched in the Constitution, and having taken on board the Government's justification for the limitations, that there is no right without some corresponding duty, and having read similar provisions of the Constitutions of South Africa and Namibia, the Committee among others, went on to confirm the provisions of section 30 of the Constitution as they had stood when it was first enacted by the Fifth Constitutional Amendment Act 1984, (Act No. 15 of 1984) as if these limitations did not pose any problem to the implementation of the Bill of Rights provisions, very contrary to the current international view as supported by the local academic and judicial opinion on the issue.87

87 See for example the European Human Rights Court/Commission cases of *Young and Webster v. UK*. (1982) 4 E.H.R.R. 38; Handyside *v. UK*. (1976) 1 E.H.R.R. 737; *Sunday Times v. UK*. (1979) 2 E.H.R.R. 245; *Bath v. Germany*, (1984) E.H.R.R. 82 (Commission), (1985) E.H.R.R 383 (Court); *Malone v. U.K*. (1985) E.H.R.R. 14; and *Kruslin v. France* (1990) 12 E.H.R.R. 587. Also see cases from the Asian Commonwealth, *Ong Ah Chua v. Public Prosecutor*, [1981] A.C. 648 (Singapore) and *Maneka Ghandi v. Union of India*, AIR 1978 SC 597, (India) and Canadian case of *Queen v. Big M. Drug Mart Ltd*., (1986) L.R.C. (Const.) 332. As for local cases see, *Chumchua s/o Marwa v. Officer in charge Musoma Prison and the Attorney General*, High Court Miscellaneous Criminal Cause No. 2 of 1988, Mwanza Registry – (unreported); *A.G. v. Lesinoi Ndeinai & Others*, (1980) T.L.R. 214; *Director of Public Prosecutions v. Pete*, [1991] L.R.C. (Const.) 553; *Peter Ng'omango v. Gerson Mwangwa & the Attorney General*, High Court of Tanzania at Dodoma, Civil Case No. 22 of 1992 – (unreported); *Re: Application for Bail – Mohamed Liheta*, High Court Miscellaneous Criminal Cause No. 29 of 1991, Dar Es Salaam Registry – (unreported); *Lohay Akonay and Another v. The Hon. Attorney General*, High Court Miscellaneous Civil Cause No. 1 of 1993, Arusha Registry – (unreported); *Kukutia Ole Pumbun and Another v. The Hon. Attorney General and Another*, [1993] 2 L.R.C. 317; *Mbushuu @ Mnyaroje and Another v. Republic,* Court of Appeal of Tanzania, Criminal Appeal No. 142 of 1994 – reported as [1995] T.L.R. 97 (CA); and *Rev. Christopher Mtikila v. The Attorney General*, [1995] T.L.R. 31 (HC). See also academic views of Shivji, Issa G. (1991) "Preconditions for a Popular Debate on Democracy in Tanzania," **Dar Es Salaam University Law Journal**, 8, 6-19; Mwaikusa, Jwani T. (1991), "The Genesis of the Bill of Rights in Tanzania" **Journal of the African Society of International and Comparative Law,** 3: 680-698 at p. 693; Mbunda, Lutfried X. (1994), "The Bill of Rights in Tanzania: Strategies for the Protection and Promotion of Funda-

Moreover, apart from the general derogation clause in Article 30, the Committee did very little to dismiss the unjustified subjection of human rights to any other laws of the land. It was not enough just to say as they did in the fifth piece of advice that Parliament should refrain from enacting laws excessively encroaching upon the enforcement of the Bill of Rights provisions.

It is just fortunate as I stated above that, the Government while intending to implement the same Committee's advice,[88] has by way of some unprecedented action through section 7 of the Fourteenth Constitutional Act 2005 (Act No. 1 of 2005), removed from Article 20 and other Articles of the Constitution, any subjection of human rights therein to any other laws of the land. Indeed the intention of Parliament for the constitutional amendment in this regard as seen in the Minister's statement of the Objects and Reasons, is among others, the *widening and fortifying of the arena of democracy*".

It should be emphasized here that, by mentioning the phrase "wider democracy" this time around, the Government was not merely getting involved in its usual political rhetoric, but was doing so through tangible deeds, that is, by effecting this amendment in very clear terms. The same was not done by the Kisanga Committee despite the wealth of expertise within its membership. This is a new approach of a state authority in post-independence Africa, which should be appreciated by all progressive people in the Continent.

8.0. Conclusion

This paper has explored on how the major changes brought about by *Mageuzi* since 1992 in the constitutional set up and political scenario of Tanzania, have affected the right to freedoms of political association and assembly. Having done some comparative analysis of the contents of these rights as comprised in the Constitution of the United Republic of Tanzania, as against similar regional and international instruments, the discussion moved towards the laws which generally

mental Rights and Freedoms in Multi-Party Tanzania" in Mtaki, Cornel K. and Okema, Michael (Eds), (1994), **Constitutional Reform and Democratic Governance in Tanzania.** Dar Es Salaam: Friedrich Nauman Foundation and Faculty of Law, University of Dar Es Salaam, pp. 147-8; Mbunda, Luitfried X. (1998), "Limitation Clauses and the Bill of Rights in Tanzania," **Lesotho Law Journal**, 4: 4, 153-170; **Review, Journal of the International Commission of Jurists**: No. 36 of June 1986: 47; and Nyalali, Francis L. (1991), "The Bill of Rights in Tanzania", **Dar Es Salaam University Law Journal**, 8, 1-5.

88 See the Bill Supplement for the Fourteenth Constitutional Amendment Act 2005, No. 12, Gazette of the United Republic of Tanzania, No. 46, Vol. 85 dated 12 November, 2004, (Dar Es Salaam: Government Printer).

allow the Government in power to manipulate the practice and enjoyment of the right to the freedoms of political association and assembly.

It is argued that, the way in which these rights are articulated in political practice in Tanzania, have a lot to do with the low level of the Government's commitment to change in order to liberate itself from the legacy of the former one-party political system that was discontinued by the *Mageuzi* reforms. However an example has been cited in the paper of the occasion where the government gave in completely, when it surprised even the members of the opposition by the removal of claw-back clauses, which hitherto had subjected the fundamental rights so protected by the Constitution, to the operation of the ordinary laws of the land.

If that was possible the same should be true of the removal of all the constraints limiting the unhampered practice and enjoyment of the right to freedoms of political association and assembly. This is particularly so because these freedoms are the bedrock of all other rights, for associating politically is the key to all rights, including social as well as economic rights and most importantly growth of civil society and wider democracy.

REFUGEE PROTECTION: PRACTICAL CHALLENGES AFTER TEN YEARS OF IMPLEMENTATION OF THE REFUGEE LAW AND POLICY IN TANZANIA

By Armando Swenya & Daniel N. Lema[89]

1. Introduction

For a very long time now, Tanzania has been hosting refugees. In recent years, some efforts have been made by Tanzania, countries from which refugees originated and the United Nation High Commission of Refugees (UNHCR) to repatriate these refugees after it has been ascertained that the situation which made them flee out of their home countries has been settled. Since the whole issue of repatriation is voluntary on the part of refugees, the task has not been smooth or out of blame.

During the struggle for independence, Tanzania played a vital role in hosting freedom fighters some of whom remained in the country even after the attainment of the independence of their countries. But the huge influx of refugees was witnessed from the 1990's resulting from tribal/ethnic wars in Rwanda, Burundi and the Democratic Republic of Congo (DRC). The inflow of refugees and was mainly caused by the following reasons: -

- That, Tanzania is contiguous to refugee generating countries that include Rwanda Burundi and DRC. The closeness of these countries has made it easier for refugees to flee easily to Tanzania when the situation in their countries becomes hostile.

- The other reason could be the fact that, some Tanzanians and refugees share a lot in common. The cultural ties between the refugees and some of Tanzania's communites made it easier for refugees to flee into Tanzania.

- Again, Tanzania's hospitality and fair treatment of aliens made it vulnerable to refugees. Tanzanians are in general, generous people, they, respect one another including aliens who visit their country. Refugees were therefore assured that they will be welcomed and assisted by the host communities.

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- Political stability of the country is said to be one of the reasons, which made refugees to flee into Tanzania. It was noted that the early refugees from Burundi who fled to DRC experienced difficult times after the eruption of civil wars in Congo. Some of them died, while others escaped from the massacre into Tanzania.

The Open Door Policy of Tanzania is said to be one of the reasons, which made refugees from different countries to flee into Tanzania. Tanzania had already hosted refugees during the liberation movement and portrayed a good image to other countries including refugees generating countries. Tanzania in the 1970's naturalised refugees who were reluctant to go back home and therefore in the 1990's, refugees found Tanzania to be a safe place for them.[90]

The 1990's influx of refugees played a vital role in the development of refugee laws in Tanzania. The laws and policies relating to refugee status were reviewed and new laws and policies were formulated. These are the Refugee Act of 1998[91] and the Refugee Policy of 2003, which became operational in 2004.[92] This Article aims at analysing this law and the policy with the intention of identifying gaps and challenges thereto and recommend for its suitability for future application.

2. The Refugee Law and Policy In Tanzania

As it has been stated above, the 1990's influx of refugees in Tanzania made a key contribution to the development of the refugee law and policy in the country. Statistics reveal that, between 1993 and 2006 Tanzania, received 1.3 million refugees hosted in western regions of Kigoma and Kagera, whose population is estimated to be 2.5 million.[93]

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90 See Kamanga, K, "The (Tanzania) Refugee Act of 1998: Some Legal and Policy Implications" in the **Journal of Refugee Studies**, Vol. 18, Pg 100-115 for more reasons why refugees escaped to Tanzania.

91 In 15th April 1999 the Refugee Act of Tanzania was declared enforceable. The same law is referred as the Refugee Act of 1998, (Act No. 9 of 1998) as it was presented, enacted by the Parliament and Assented to by the President on the same year of 1998.

92 The National Refugee Policy was formulated on 2003 and became operational on 2004. This Policy is meant to be the tool to implement the National Refugee Act although there has been an argument that this policy was formulated after the Act contrary to the Normal Procedure where Policy precedes the Law or Act of the Parliament.

93 Research Report on Social-Economic impacts of Refugees in Tanzania – A Case Study of Kasulu Districts Kigoma Region; SAHRiNGON Tanzania Chapter, 2007; pg 1.

Before the enactment of the Refugee Act, 1998 and formulation of the Refugee Policy in 2003, Tanzania had enacted some of the legislation as a guide. Tanzania had hosted a good number of refugees before those of 1990's. Before independence, Tanganyika was guided by the Defence (War Evacuees) Regulations of 1942[94] and later on by the War Refugees (Control and Expulsion) Ordinance of 1946.[95] In 1966, Tanzania passed a law on refugees, known as the Refugee (Control) Act of 1966.[96]

At international level, Tanzania is a party to the Convention relating to the Status of Refugees of 1951, its Protocol of 1967 and the Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969. However, it has made reservations for protocol's referral of disputes between the State Parties to the International Court of Justice.[97] Also it is worthy to note that since 1998 Tanzania seemed to have been implementing the International conventions through the Refugee Act of 1998.

The Refugee Act of 1998 has five parts, consisting of part I preliminary provisions; part II the Administration of refugee activities generally; part III contains sections applied to refugees; part IV has provisions which may be applied to refugees and part V contains miscellaneous provisions. The Refugee Act of 1998 is said to be one of the very progressive document when it comes to the interpretation of a refugee and specific aspects governing refugees. It has broadly defined who a refugee is and entails the overall picture in the Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 and the repealed Tanzania Refugee (Control) Act of 1966.

After the enactment of the Refugee Act of 1998, Tanzania came up with the Refugee Policy of 2003. This policy was to provide the framework on the Implementation of the Refugee Act of 1998. The Refugee Policy is divided into five chapters. Chapter I gives a general Overview; chapter II provides for Refugee admission procedure; chapter III focuses on refugees' welfare; chapter IV deals

94 These regulations were passed by the colonialists with their mind that Refugees is a temporal phenomenon and ought to pass. Therefore the law enacted aimed at controlling the refugees as "temporal" situation and required them to stay in camps pending return into their homes.

95 This was the law enacted after the 1942 Regulations which served as more competent law compared to the 1942 regulations.

96 Refugee Act of 1966 aimed at regulating and "controlling" the already existing refugees in our country who were some freedom fighters and those who could go back due to different reasons. The Act required refugees to stay in camps and other designated areas.

97 Word Refugee Survey 2008, Worst Places for Refugees; U.S. Committee for Refugees and Immigrants, pg 158.

with administration and Management and chapter V is centred on implementation strategies.

Apart from having in place laws and policies to govern refugees in Tanzania, there have been challenges identified, which need to be taken on board under the legal sector reform programme of Tanzania. These will enable the Government to come up with a more significant and satisfactory legal framework to regulate this field.

3. Identified Challenges

3.1 Preparedness

Preparedness is the critical stage towards hosting refugees anywhere. It is very unfortunate that the arrival of refugees has always been an emergency situation which caught countries unprepared, hence rendering the whole activity of handling refugees difficult. The influx of refugees in the 1990's was not expected by the Government, hence, Tanzania as a hosting country met some challenges, including identification and registration of refugees. Nevertheless, the whole issue of settling the refugees was not an easy task, which later on leads to the intervention by the UNHCR[98] by offering assistance to the Government.

It is therefore, important that new legal reforms should reflect on the whole issue of preparedness in receiving refugees. This should be done by establishing a unit or a committee vested with the power to deal with issues of refugees rather than using *ad hoc* committees as the ones used in 1994. It would be better for this committee to be given mandate to deal with refugee issues. It may be noted in this respect that, Tanzania has established the National Eligibility Committee under the Ministry of Home Affairs to deal with refugee issues.

3.2 Environmental Degradation

Another problem of hosting refugees that needs to be examined is the issue of environmental degradation. Tanzania shares borders with neighbouring countries generating refugees such as Rwanda, Burundi and DRC which are mainly surrounded by forests. However, these forests were depleted following the influx of refugees in 1994, as a result of the establishment of refugee's camps in close proximity to the forests. Refugees caused destruction to the environment in search

98 B.T. Mapunda **Refugee Law In Tanzania: An Examination of Law and Practice.** The Paper presented in the 10th ESRHA session in Dar es Salaam August 2008.

of firewood, building poles and cultivation of different crops, thus rendering the ecosystem fragile.

The adverse impact of environmental degradation caused by refugees in Tanzania has been felt in other countries such as DRC where it has been reported that, the movement of refugees from Rwanda to Congo DRC consumed at least 3,758 hectares of forest while Mozambican refugees in Malawi cleared at least 3.5 percent of the country's forest while settling in the country.[99] Moreover, it has been reported that some animal species have disappeared at the places where refugees settled due to the destruction of their original habitats by the refugees and also due to the fact that they were hunted down by refugees for their meat or ivory.

The sanitation condition in densely populated areas such as in refugees' camps is a problem as it is difficult to maintain these areas when they are over crowded, especially in the third world countries such as Tanzania.

Problems caused by refugees need to be addressed as they are critical to the development of the host nation. It would be better in future for the Government to consider establishing specifically designated areas where refugees will be hosted. The Local Government (District Authorities) Act No.7 of 1982 and the Environmental Management Act No.20 of 2004 should be used in establishing refugees' designated areas when need arises. Local Government authorities, particularly those close to the boarder regions should be required to identify specific areas for hosting refugees prior to their emergency.

3.3 Limitation of freedom of movement

The Refugee Act No.9 of 1998 requires Asylum seekers and Refugees to stay in designated areas or settlements. They are also restricted to move out of the camps without prior permission of the Settlements Officer who may issue a permit and such permit lapses after 14 days, unless the Director of Settlement has allowed extension of such time upon the refugee giving good reasons to do so.[100]

Practically, refugees are restricted from moving 4 kilometres out of their camps without such permission. This restriction contravenes the freedom of movement.[101]

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99 N. Poku and D.T. Graham, Redefining Security: Population Movements and National Security, Westport Connecticut, London. Pg 156-157

100 The Refugee Act 1998 section 17 requires the refugee or group of refugee to stay in their designated areas and any movement out of the camps has to be authorised by the Director or the Settlement Officer

101 Kamanga, K, "International Refugee Law in East Africa: An Evolving Regime",

The congestion in camps has resulted into so many social and legal problems such as rape, poverty, inadequate land for cultivation, environmental degradation due to over cultivation of land, conflicts between pastoralists and farmers on the use of land.

In order to eliminate problem associated with restricting movement of refugees in restricted areas, it is proposed that, the law should be amended to allow free but regulated movement of refugees by issuing special identity cards for refugees who should then be allowed to integrate within communities while at the same time refugees retain their refugee status.

3.4 Arrest and Detaining of Asylum Seeker or a Refugee

The Refugee Act of 1998, gives a settlement officer the power to arrest without a warrant of any person when he has reasonable ground for suspecting him to have committed an offence or a disciplinary offence under the Act, and such person may be detained in custody in a settlement or camp lock-up in accordance with the Act.[102] For instance, in 2007 Tanzania arrested and detained nearly 1,260 refugees without arrest warrants;[103] whereas under normal circumstances and under the Criminal Procedure Act, a person can not be arrested without a warrant. It is very unfortunate therefore that the Refugee Act denies refugee and asylum seekers this basic legal/right. Furthermore, the Act empowers a Settlement Officer to use force to arrest refugee or asylum seeker, provided that he alerts a suspect that force is going to be used.[104]

This law may further be criticised for being discriminatory against refugees, especially taking into account the fact that conferment of discretionary powers leads to use of excessive force accompanied by torture and battery to the arrested persons.[105]

Georgetown Journal of International Affairs, Vol. III, Pg. 25-35. The author acknowledges the fact that the Refugee Act of 1998 is a limitation to fundamental rights and freedoms which includes freedom of movement, the right to own property and freedom of association. He as well acknowledges that the limitation of these rights and freedoms do limit and raises doubt on the 'practical utility' of the same rights.

102 *Ibid* section 25.

103 Word Refugee Survey 2008, Worst Places for Refugees: U.S. Committee for Refugees and Immigrants, page 158.

104 *Ibid* section 26.

105 LHRC and ZLSC, **Tanzania Human Rights Report of 2007**, Part One and Chapter two has the expression on how the right of Freedom from torture in carried out negatively by the police officers in Tanzania under page 23.

3.5 Integration and Naturalisation as a Solution

This is one of the principles introduced by the Convention Relating to the Status of Refugee of 1951.[106] Integration and Naturalisation is regarded as one of the solutions to refugees' problems under which the hosting country assimilates refugees as its citizens. Integration may take different forms such as assimilating refugees within the local community, but at the same time retaining their nationality or citizenship. In the 1970's, the first President of the United Republic of Tanzania, *Mwalimu* Julius Kambarage Nyerere, assimilated a substantial number of Rwandese Refugees in Tanzania in line with his open door policy. This approach has neither been sustained by the current Refugee Act of 1998 nor has it been incorporated in the Refugee Policy of 2003. The Act contains three basic solutions namely repatriation to the country of origin. Resettlement and creation of safe zones.

The whole question of naturalization or integration of refugees in the hosting country has almost been ignored by the current Refugee Act of 1998. While the law does not allow naturalisation of refugees in Tanzania, the practice has been different.

It has been suggested by different scholars that it is just and fair for the government of Tanzania to positively consider naturalization of refugees within its territory.

> It sounds fair that the naturalization of refugees should be governed by the new legislation rather than the current practice whereby citizenship and the naturalization process are governed by the Act relating to citizenship.[107]

Professor Chris Maina Peter upon examining the whole aspect of naturalization as a refugee solution before the enactment of new Refugee Act, recommended that it is just and fair that the whole procedure of naturalisation be provided for, in the new legislation (the Refugee Act of 1998). In that sense, he meant that, naturalisation processes should be a matter of law. It is unfortunate that his suggestion was not taken up in the new legislation.

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106 Article 34 of the Convention Relating to the Status of Refugee of 1951.

107 Peter, C.M, "Rights and Duties of Refugees under Municipal Law in Tanzania: Examining a Proposed New Legislation", **Journal of African Law**, Vol. 41, Pg. 81-99.

Regarding naturalization of refugees in local community, governments should progressively accept this concept and integrate it in their municipal laws. Governments are however cautioned to consider possible socio-economic, political and cultural impacts of naturalisation before implementing the naturalisation processes. Without the clear policy and provisions of law relating to this principle, naturalisation would be of negative impact both to the government and the naturalised person.

3.6 From Refugee Act to Internally Displaced Persons Law

In recent years, there have been developments at the international law level regarding the handling of the internally displaced persons (IDPs). It is estimated that, about 24.4 million people from 52 countries are internally displaced due to different reasons. Africa alone has 11.8 million; Europe 2.8 million; Middle East 2.7 million and Asia has 3 million IDPs. Factors leading to these alarming numbers of IDPs include wars; natural disasters; over population; development projects and activities and unequal sharing of resources. The difference between refugees and IDPs is that, a refugee is a person who is compelled by circumstances to cross his or her country's boarders to live in another country in which he/she is not a citizen; but the internally displaced person remains within the boundaries of his/her own country, but away from his/her original place of residence.

Recently, the United Nations (UN) has developed guidelines to address the problem of IDPs. Although these guidelines are not binding or enforceable, they constitute the beginning of the development of legal protection of IDPs. Also, the UN has already established the office of the Commissioner for IDPs who operates independently from the UNHCR Representative. This is yet another development in this area. It is also to note that, the African Union (AU) has already drafted the Convention on the Internally Displaced Persons, which is currently open for ratification. It is hoped that after ratification, Africa will be the first region to develop a binding document on [the] matters of IDPs.

The situation is however different in Tanzania since the country has not yet recognised the problem of IDPs. Due to non-recognition of the problem by the state, there has not been any legal development in this area. In this regard, there is no law or policy to regulate matters of IDPs.

4. Conclusion

The authors of this Article find clearly that, although Tanzania has a good refugee law and policy, but stands to face some challenges in the administration and implementation of the same. Issues of Preparedness, environmental degradation, limitation of freedom of movement of refugees, arrest and detention of refugees without warrant, naturalisation and integration processes and other issues not discussed, such as coordination of refugee activities both in hosting country and country of origin, need to be properly addressed in the Tanzanian laws and policies under the ongoing reforms in Tanzania.

HUMAN DNA TECHNOLOGY: THE NEED FOR LEGISLATION IN TANZANIA

By Fredy A. Kandonga[108]

1. Introduction

1.1 Background

On the 24th October, 2005, the Commission received a letter of reference wherein the Ministry of Health and Social Welfare requested the Law Reform Commission of Tanzania to undertake a joint research before the preparation of a Cabinet Paper leading up to the establishment of a legal framework for the application of Human DNA Technology in Tanzania. The Commission undertook the project under its mandate leading up to the final Report and a Working Draft Bill on the importance of enacting DNA Identification and Genetic Privacy Act for Tanzania, which has been submitted to the Minister for Constitutional Affairs and Justice.

The aim of this paper therefore, is to present the Commission's findings, thus creating awareness of the public in regard to the establishment of a Legal framework for Human DNA Technology in Tanzania. Generally, the Report on DNA Technology contains the following.

1.2 Definition of DNA

DNA is an acronym of *deoxyribonucleic* acid which is a chemical compound found in the nucleus of every cell of living organisms.[109] It carries the genetic information that supplies all its physical and functional characteristics. It's found in every tissue in bones, blood, hair roots, and skin, saliva, semen and urine. It should be noted that each person's DNA is unique.[110]

1.3 Usage of DNA Technology

The discovery of DNA technology is considered as one of the most revolutionary and beneficial contributions to the modern scientific development in the world. In most countries, Police officers and Lawyers have used DNA testing results

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108 LL.B (Hons) UDSM, Legal Officer Law Reform Commission of Tanzania.

109 Report on the establishment of DNA database, The Law Reform Commission of Ireland at http://www.lawreform.ie/DNA%20Database%20Report%20No1.pdf, accessed on 26/08/2008.

110 The National DNA Data Bank of Canada at http://www.nddb-bndg/main-e,htm accessed on 27/07/2005.

vide 'Forensic Science'[111] to find, apprehend, incriminate, convict and exonerate criminal suspects ranging from those of burglary, rape and murder. This technology is further used in Scientific Research, in civil disputes settlements especially those concerning maternity or paternity whereby DNA results can be used as evidence in courts of law to prove or disprove them, in Environmental Management by saving endangered and protected species, in Historical and Anthropological Studies, by collecting mutation overtime, which are then passed down from parents to offspring, containing information about processes that have occurred in the past, whereby by comparing different DNA sequences, genetic information can attempt to infer the history of an organism.

This has been so, because of the reliability of DNA testing is 99.99%[112] as opposed to the reliability of ABO (blood group) testing, which is only 20-40% precise or specific. The scientific reliability of a genetic test is measured by the "sensitivity" and "specificity" of the test. However, few laboratory tests are currently more than 98% sensitive and specific.[113]

2. The State of the Law on the use of Human DNA Technology in Tanzania

2.1 Situation on the Ground

Currently, Tanzania and other developing countries have no legislation, which expressly provides for application of Human DNA technology in several sectors of the societies. The reason behind is obvious that, the technology is still new to most developing countries, Tanzania being one of them. However, notwithstanding the infancy of DNA technology in the country, the use of medical science and scientific evidence in Tanzanian legal system has been embodied by various pieces of legislation under which some of the uses of DNA technology have been applied. Generally, the legislation in the country does not directly mention Human DNA technology. The coverage on the application of scientific evidence and DNA technology is limited to the extent as discussed by various laws herein below.

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111 Forensic Science is a branch of science connected with legal investigation. It is useful in solving both criminal and civil cases such as homicide, rape and parentage cases.

112 Partenity Testing Corporation at http://www.ptclabs.com/ accessed on 26/09/2007.

113 Australian Law Reform Commission and the National Health and Medical Research Council Australian Health Ethics Committee, **Essentially Yours: The Protection of Human Genetic Information in Australia, Report 96**, March 2003.

2.2 DNA in Criminal Justice

The criminal justice in Tanzania is administered by, but not limited to the following pieces of legislation; the Penal Code[114], the Criminal Procedure Act[115], the Evidence Act[116] and the Inquests Act[117]. These pieces of legislation have some provisions, which have been used to deploy scientific expertise in investigation and prosecution of crimes committed against the provisions of the Penal Code or any other law creating criminal offences in Tanzania. According to these pieces of legislation, samples for DNA such as blood, saliva, semen, hair with root and fingerprints can be used for criminal investigation and prosecution.

2.2.1 DNA in Criminal Investigation

Investigation process in Tanzania is administered by the provisions of the *Criminal Procedure Act*.[118] Generally, the Act provides for the procedures to be followed during investigation of crimes and the conduct of criminal trials and for other related purposes.

2.2.1.1 Physical Examination

Section 59(1) of the Act, provides that, a Police Officer in charge of a police station or any police officer investigating an offence may take or cause to be taken measurements, prints of the hands, fingers, feet or toes, recording of the voice or photographs, or samples of the hand writing of any person who is charged with an offence, where such measurements are reasonably believed to be necessary for identification of the person with the aim of affording evidence as to the commission of an offence for which the person is charged with.

However, the provisions of section 59(2) of the *Act* appear not to cover biological forensic science in investigation process, for it is limited to physical measurements, prints of hands, fingers, feet or toes, recordings of voice, photographs and samples of handwriting of a person.

Under section 47 of Evidence Act,[119] expert opinion is admissible evidence as relevant facts. The meaning of expert can be construed to mean a person with knowledge or ability and who performs skilfully. An example is the case of *Joseph*

114 Cap. 16 of the Revised Edition 2002 of the Laws of Tanzania.
115 Cap. 20 of the Revised Edition 2002 of the Laws of Tanzania.
116 Cap. 6 of the Revised Edition 2002 of the Laws of Tanzania.
117 Cap. 24 of the Revised Edition 2002 of the Laws of Tanzania.
118 Cap. 20 of the Revised Edition 2002 of the Laws of Tanzania.
119 Cap. 6 of the Revised Edition 2002 of the Laws of Tanzania.

Mapema v. R[120] where the issue was whether handwriting should be proved only by a handwriting expert. The High Court held that, for the purpose of enabling a court to decide the author of any piece of handwriting in dispute, the opinion of a person who is conversant with the handwriting of the disputing author is as good as, if not sometimes better than, that of a handwriting expert.

From the case of *Joseph Mapema,* one can learn that expert evidence in handwriting could be weaker than the testimony of a person who is familiar and more conversant with the handwriting in question, notwithstanding the fact that, the person in question is not a handwriting expert. In such a case, the evidence of the person who is familiar with the handwriting is stronger than that of scientific handwriting expert.

In the event of such a dilemma, the solution would be to have a law in place for the application of DNA in criminal investigation. This is due to the fact that, DNA testing is allegedly 99.99% accurate, thus courts would be more inclined to uphold such evidence rather than reject it.

2.2.1.2 Medical Examination

The Criminal Procedure Act also provides for medical examination, which is another form of scientific expertise used in investigation process. It is provided under section 63 of the Act that, a Magistrate, upon the application of a police officer, may direct a medical officer to examine a person in respect of an offence so charged. The Magistrate may also direct a medical officer to take and analyse any specimen from that person if he has reasonable grounds for believing that the examination or analysis would provide evidence relating to the offence.[121] After the medical officer has made the examination and analysis, he/she is required to submit a written report on it to the court.[122]

Moreover, the court is also empowered in any proceedings to order any person who is a party to or witness in the proceedings to submit himself or herself for medical examination and a report thereof be made by the Medical Officer.[123]

Again, in solving rape cases, the Criminal Procedure Act allows the use of medical science in identifying a suspect of rape. According to the Act, specimens such as semen or any other materials useful for identification of a suspect of rape are

120 [1986] T.L.R 148.
121 *Ibid.,* section 63(1).
122 *Ibid*., section 63(2).
123 *Ibid.,* section 63(3 and 4).

admissible. Despite the fact that, the Criminal Procedure Act does not expressly provide for DNA analysis as one of the investigative mechanism, still, the use of the term specimen in section 63(1), can be construed to include the specimen for DNA analysis.

Furthermore, if an investigation is about the cause of death, the Inquest Act[124] applies. The Act requires a Coroner to direct post-mortem examination to be done by a Government medical practitioner.[125] The medical practitioner, upon receipt of an order for post-mortem examination, should immediately examine the body. In the process of examining such a body, he/she is required to find out, who the deceased was; how, when and where the deceased met his/her death; whether the circumstances of the death disclose any offence.[126] Although the Act is silent on the application of DNA technology, still, DNA technology can be used to identify who the person/deceased was, and where the deceased met his/her death.

A suspect of a crime under the criminal law of Tanzania is compelled to have his/her measurement and examination for investigation purposes to be taken as provided by the Criminal Procedure Act. The punishment for failure to comply with the law is a fine not exceeding ten thousand shillings and in case of default, imprisonment of a term not exceeding twenty four months or both fine and imprisonment.[127]

2.2.1.3 Admissibility of Scientific Evidence in Criminal Cases

The *Criminal Procedure Act* further provides for the admissibility of scientific evidence tendered in criminal trials. It is provided under section 203 of the Act, that, a document purporting to be a report under the hand of any Government analyst upon any matter or thing duly submitted to him for examination or analysis, may be used as evidence.

It should be noted that the evidence of an expert does not bind the court. This is evidenced in the case of *Hilder, Abel v. R*[128], where the issue was whether evidence by medical expert was binding to the court. The Court of Appeal held that, Courts are not bound to accept medical expert's evidence if there are good reasons for not doing so. Had it been evidence based on DNA testing which is 99.99% accurate, courts would be more inclined to uphold such evidence rather than reject it.

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124 Cap 24 of the Revised Edition 2002 of the Laws of Tanzania.
125 *Ibid*, section 10.
126 *Ibid.,* section 19(1).
127 *Ibid.,* section 59(4).
128 [1993] TLR 246

Again, section 204 of the *Criminal Procedure Act*, provides for admissibility of a report of fingerprint expert. It provides, that any document under the hand of an officer appointed for analysis of fingerprints is receivable in evidence in any inquiry or trial. The *Act* further provides that, in any trial before a subordinate court, any document purporting to be a report signed by a medical expert upon any purely medical or surgical matter is receivable in evidence.[129]

Moreover, the scientific evidence is admissible under the provisions of the *Evidence Act*[130] as opinion of an expert. It is provided that, when a court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger or other impressions, the opinion, upon that point of persons (generally called experts) possessing special knowledge, skill, experience or training in such foreign law, science or art or question as to identity of handwriting or finger or other impressions are relevant facts.[131]

The above provision connotes that evidence obtained through DNA testing can be admitted by the Court as relevant facts derived from an opinion of an expert upon a point of science. The position would have been more authentic and emphatic if there was in place a law governing DNA testing evidence in criminal cases.

2.3 DNA in Civil Justice

In Tanzania, medical science is used in solving disputes of paternity in order to decide controversies on child custody and maintenance, which appear in the *Affiliation Act*[132]. This Act provides for the maintenance of children born out of wedlock. Section 5(1) of the Act provides that, after the birth of a child, a Magistrate shall hear the evidence of the mother of the child and any other evidence, which she may produce, and shall also hear, any evidence tendered by or on behalf of the person alleged to be the father. It further provides that if the evidence of the mother is corroborated by other evidence to the satisfaction of the Magistrate, he may adJudge the person summoned to be the putative father of the child. [133]

The above provisions of the Affiliation Act, connotes the admissibility of whatever evidence, which can prove paternity in event of dispute. The current state of the Affiliation Act is that the court may order for medical examination to be carried where it deems necessary for the purpose of solving the dispute. The evidence so

129 section 240(1) of the Tanzania Criminal Procedure Act.
130 Cap., 6 of the Revised Edition 2002 of the Laws of Tanzania.
131 *Ibid.*, section 47.
132 Cap 278 of the Revised Edition 2002 of the Laws of Tanzania.
133 *Ibid.,* section 5(2).

tendered in that regard including DNA test results is admissible by the Court in accordance with the provision of the Evidence Act. It is considered that if there would have been a specific law providing for the application of DNA testing, its evidence on the above issues would be more conclusive than, the current state of affairs, thus the imminent urge for such legislation.

2.4 Laws Related to Medical Research and Environment

DNA technology is also used in research programmes to locate inherited disorders depending on the information contained in the DNA profile. By studying the DNA profiles of relatives who have a history of some particular disorder, this technology can be used to identify patterns associated with the disease for research purposes.[134]

In pharmaceutical companies, DNA is used for developing new medicines. Agriculture specialists use DNA for agriculture genetic engineering such as identifying genetically modified organisms. However, despite this development in the use of DNA technology in Tanzania, there is no legislation which specifically regulates, monitor and control the use of DNA in research activities.[135]

The National Institute for Medical Research Act,[136] establishes the National Institute for Medical Research (NIMR) and provides for its functions and powers in relation to the promotion of medical research. Section 4 of the Act, only charges the Institute with the functions of carrying out medical research designed to contain diseases, monitor, control and co-ordinate medical research carried out within Tanzania. However, the Act does not clearly define the application of DNA technology in medical research.

There are other laws, which regulate the health sector such as the Health Laboratory Technologist Registration Act,[137] the Medical Practitioners and Dentists Act[138], the Ocean Road Cancer Institute Act,[139] the Infectious Diseases Act,[140] the Pharmaceutical Act, and the Nurses and Midwives Registration Act.[141] However, these pieces of legislation do not provide for regulation for the use of

134 "Genetic Testing and Privacy", by the Privacy Commissioner of Canada at http://www.privcom.gc.ca/information/02_05_11_e.pdf accesses on 26/09/2008 .
135 *Ibid*
136 Cap. 59 of the Revised Edition 2002 of the Laws of Tanzania.
137 Cap. 48 of the Revised Edition 2002 of the Laws of Tanzania.
138 Cap. 152 of the Revised Edition 2002 of the Laws of Tanzania.
139 Cap. 86 of the Revised Edition 2002 of the Laws of Tanzania.
140 Cap. 96 of the Revised Edition 2002 of the Laws of Tanzania.
141 Cap. 325 of the Revised Edition 2002 of the Laws of Tanzania.

DNA technology, hence subjecting it to the risk of being misused.
The Environmental Management Act[142] consists of provisions, which to some extent regulate the impact of Genetically Modified Organisms (GMOs) to the environment.[143] The Act requires a proponent of any project which involves GMOs to conduct an Environmental Impact Assessment before embarking on the implementation of such project. According to the Act, any project in which GMOs are involved needs to be reviewed by the National Environmental Management Council (NEMC) with a view to determine whether the project has negative impact to the environment. Such project is also subjected to the approval of the Minister responsible for the environment. Nevertheless, the provisions do not adequately take protective care of either danger or risk, which could arise from loose application of DNA technology.

3. Impact of Lack of Legal Framework On DNA Technology

The current state of the law indirectly allows the application of DNA technology for various purposes. However, there is no legal framework to cater for the following probable impact: There are ethical and legal challenges posed by the DNA testing. In some countries, concern has been raised about the misuse of genetic information particularly with computerization, the impact of digital technology and linkage of health records.[144] These concerns are likely to reduce the willingness of individuals to undergo genetic testing even where it is beneficial. Fears about lack of confidentiality and potential misuse of information may bring negative impacts in Tanzanian society given the lack of a legal framework on DNA and privacy protection.

The availability of new genetic science has implication to medical personnel's legal duty of care to their patients. However, as already pointed out, there is no law to protect individuals from avoidable damages. Problems can also arise with individuals' information divulged to the family members. As with medical procedures, the law protects the autonomy of competent individuals to decide whether to undergo genetic testing and to accept medical treatment or advice about lifestyle changes arising from such testing.[145]

142 Act No.4 of 2004.
143 *ibid* Section 81-90.
144 Goldberg, I. Genetic Information, Privacy and Discrimination, Health Care Manager 2001; 20:19-28
145 The New "Genetics" and Clinical Practice by Ronald J A Trent, Robert Williamson and Grant R Sutherland, at http://www.mja.com.au./public/issues/178 11 020603 accessed on 2/1/2006.

There is a great likelihood of tussle between the rights of individuals and family rights for whom this information may have relevance to their health. As it is propounded elsewhere in this Article, other jurisdictions such as Australia, privacy regulations comprise a combination of common law and legislation though there is a lack of special statute on genetic information.[146]

The absence of a legal framework on protection of privacy dangerously gives room for third parties to access personal genetic information. The disclosed information on the result of genetic test for example may be used by insurers and employers to deny application for insurance policies and employment.

The risk of using DNA technology without proper legal framework on sample tracking and control system, on handling of genetic samples such as blood or other sources of DNA is great and this may lead to illegal trade on human DNA, breach of confidentiality and uncontrolled research activities on human DNA.

There is no mechanism of compelling contesting parents to go for DNA testing in case of disputed parenthood. Therefore it is important to have a legal framework in place to ensure effective use of Human DNA technology in solving parental disputes.

Another negative impact arises from the absence of Tanzanian's DNA profiles database and the law regulating its administration, has caused difficulties in identifying casualties and missing people. For example, in the MV Bukoba accident in 1996[147], the Dodoma train disaster[148] and the Shauritanga fire calamity,[149] some corpses could not be identified. If DNA technology and relevant laws were in place victims of these sad episodes would have been easily traced and identified.

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146 Australian *Privacy Act* 1988 at en.wikipedia.org/wiki/Privacy_Act_1988 accesses on 26/09/2008

147 MV-Bukoba was a legendary passengers' ship which was operating in Lake Victoria between Bukoba town and Mwanza. On 21st day of May 1996 while sailing from Bukoba to Mwanza it sank few kilometres from Mwanza port, more than 500 people died.

148 The Dodoma train disaster was an accident which occurred in the early morning of the 24 June 2002 in the East African country of Tanzania when a large passenger train with over 1,200 people on board rolled backwards down a hill into a stationary goods train, killing 281 people in the worst rail accident in African history.

149 This was 1994 fire incidents which claimed 41 lives of Students at Shauritanga Secondary School in Kilimanjaro Region, Tanzania.

4. What Should the Law on DNA Technology Regulate?

The need for a new law on DNA technology in Tanzania is of great importance. There are areas that need to be addressed by the legislation for effective and efficient use of this technology.

Among the areas the law must provide for is, sampling. The law must regulate the act or process of taking a small part or quantity of something as a sample for testing or analysis by DNA technology. The law must also provide for packing. It must regulate modes of collecting samples for DNA testing, filling them in a container and sealing the container ready for dispatch to its intended destination, where the said samples will undergo DNA testing with the hope of getting results to answer issues which had prompted such exercise.
The law should also regulate transportation of DNA samples. It must provide for the means or system of physical conveyance of DNA samples from where they are taken to where they are intended to be analyzed. The law should also provide on who should receive samples at the destination and further, who should be responsible for the custody thereof.

Another area of great importance to be prescribed by law is on analysis of samples. The law should prescribe the mode and qualification of persons conducting examination or analysis of DNA samples.

The law should also prescribe on who should pronounce the results of the Human DNA analysis and to whom such results should be delivered. The law should also regulate storage of samples, establishment of Human DNA Database and the right to privacy as prescribed in the International covenants and in the Constitution of the United Republic of Tanzania. The law should also prescribe the issue of consent of person from whom samples are being taken.

5. Conclusion

The pace of using DNA technology for various purposes is increasing. Despite such increase in the use of DNA technology, there is no legislation providing for general administration of the application of the DNA technology in Tanzania. Such *lacuna* is likely to cause a lot of negative impacts resulting from mishandling or misuse of the technology. Therefore, this is a very sensitive area of concern, which needs for legislative intervention.

UNMERITED ECONOMIC COMPETITION BETWEEN LOCAL SMEs AND FOREIGN INVESTORS: REFLECTION OF LEGAL PROTECTIONS IN TANZANIA

By Clarence Kipobota[150]

1. Introduction

In this era of liberal marketing, which has been brought about by the command of globalization, the legal regulation and protection of the market interplay between multinational, national and Small and Medium Enterprises (SMEs) is vital. Liberal marketing has increased competition because of the absence of monopoly of goods and services. Therefore, as it is said, the business and/or economic environment of today are very turbulent and competitive.[151] There is an increasingly competitive marketing dimension caused by, *inter alia*, constant changes experienced in technology.[152]

The said economic competition is of two folds. One is internal competition between the local entrepreneurs themselves and the other one is between multinational investors and local investors. The competition is very stiff and sometimes unruly because globalization demands for removal of all sorts of barriers to international trade and foreign direct investments all over the world, Tanzania inclusive. Increasingly, unskilled entrepreneurs, who are also in a low income bracket such as SMEs are becoming footloose;[153] and this is the beginning of the unmerited struggles in the market, which policies and laws should be premeditated to arrest the situation.

This Article assesses the efficacy of legal protection, to see how it reflects the on-going investment drift in Tanzania in which local entrepreneurs are apparently overshadowed by the powerful economic giants from Asia, Europe and America.

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151 Nungu, Michael D., *"Problems and Issues in Designing and Implementing a System of Performance Appraisal"* in **The IFM Journal of Finance and Management**, Volume 4, Number 1, July 1995, at page 56.

152 *Ibid*, Nungu page 56.

153 Lipumba, Ibrahim Haruna, "*Globalization, National Economy and Socio-Economic Rights in Tanzania*" in **Annual Human Rights Conference Report: Globalization, Who Benefits**, 2003 of LHRC, December 2003, Page 33.

2. Evolution of SMEs Protection in Tanzania

2.1 Definition, Significance and Recognition of SMEs

SMEs are a recent phenomenon in Tanzania. They are emerging as part of the economic reforms taking place in the country and have developed to mitigate economic crisis such as lack of a broad range of consumer goods, of investments; of failing businesses; lay offs and unemployment, especially amongst the youths which had emerged from the early 1980s. It should be noted that, in the 1960's, Tanzania's economy had performed very well but did not improve tremendously because of its dependence on subsistence agriculture, small industrial base and limited number of skilled, educated and trained personnel. The Government then nationalized all major means of productions through the *Arusha Declaration* (sort of African Socialism) of February 1967.

However, after the oil crisis of 1970s and the war between Tanzania and Uganda of 1979, there was a serious shortage of foreign exchange coupled with other economic problems. Parastatals which had been formed in the wake of the Arusha Declaration also started to collapse. This situation rendered people jobless and it is from this time when the private sector was allowed to operate simultaneously with the public sector. This was the beginning of economic reforms in the country.

Despite the early policy reforms, the economy did not improve substantially. Some of the reasons for this fact were poor pricing policies and curtailment of private sector competition. As a result of the slow pace of the growth of the economy, it was thought that, the best solution was to liberalize the economy, to allow the interplay of the private sectors albeit with limited freedom because, the price of commodities in the local markets were discouragingly low, as they were controlled by the Government through regulation as provided for in the Regulation of Prices Act, 1973.

As part of liberalization process of its economy, Tanzania adopted a policy of promoting SMEs in 1990s and later on articulated their operations through the *Small and Medium Enterprises Development Policy (SMEs Policy) of 2002*. Most of the countries, which adopted policies for promotion of SMEs consider them as labour intensive, easy to set up, have low capital intensity and do not require high managerial skills.[154]

The SME Policy of 2002 defines the Small and Medium Enterprise as a nomenclature which is used to mean micro, small and medium enterprises

154 Tahsoh, Joseph T and Clement N. Ngwasiri, "Legal and Administrative Constraints to Small and Medium Sized Enterprises in Cameroon" in **The IFM Journal of Finance and Management**, Volume 8, Number 1, July 1999, at page 42.

(production, processing supply, marketing businesses and the like). The SMEs cover non-farm economic activities mainly manufacturing, mining, commerce and the services industry. The SMEs development is implemented in Tanzania in line with Economic Reform Programmes, which have been based on the philosophy that Tanzania is committed to a market economy whereby the private sector will take the lead in creating incomes, employment and growth.[155]

In Tanzania, the SME sector is estimated to generate about a third of the Gross Domestic Product (GDP), employs about 20% of the Tanzanian labour force and has greatest potential for further employment generation.[156] This Policy stipulates that, the vision of the SME Development Policy is to have a vibrant and dynamic SME sector that ensures effective utilization of available resources to attain accelerated and sustainable growth.

As for protection of the SMEs, the Policy's thrust is directed towards ensuring the development of strategies that will facilitate provision of financial and non-financial services to SMEs. The Policy also considers the importance of promoting the skills of the labour force[157]. The SME Policy is complemented by the National Microfinance Policy, which *inter alia*, envisages achieving widespread access to micro-finance credits throughout the country by involving financial institutions. The SMEs are also safeguarded by other policies such as the Tanzania Economic Empowerment Policy of 2004 conceived under the realms of Government Development Vision 2025 and other development strategies. The policies however, provide for very passive protection to SMEs.

2.2 Legal Protection: Some Strategies

2.2.1 Legal Protection before Liberalization of Market

As it has been indicated above, Tanzania has a very long history of using laws to control and safeguard its economic activities, modes and means of production, markets, prices and the economic actors including this sector.[158] For instance,

155 Kipobota, Clarence (2007) **Enhancement of Capital Mobilization Skills for Rural Economic Development Projects: Case Study of WACOD-Women in Kisarawe District, Coastal Region, Tanzania**. Msc. CED Thesis, Southern Hampshire University and Open University of Tanzania, pages 59 and 60.

156 Kaare, Suma. C. M "Bridging the Livelihood Insecurity Gap: The Role of Informal Sector in Tanzania" in **The IFM Journal of Finance and Management**, Volume 7, Number 2, January 1999, at page 85.

157 *Op Cit* Kipobota, Pages 13 – 17.

158 Rice, Robert C "The Tanzanian Price Control System: Theory, Practice and Some Possible Improvements" in Kwan S. Kim *et al* (Eds) (1979) **Papers on the Political**

during colonial times, land as means of production was under the control of the Governor through the Land Ordinance, 1923[159] and the Chiefs Ordinance, 1923, which vested powers to the Governor and local chiefs to control and allocate land to individual for their social and economic activities. After the independence of Tanganyika of 1961, the Government of Tanzania abolished colonial free-hold tenure in order to safeguard interests of the majority. Therefore, the freehold titles were converted into leaseholds under the law.[160] By then, farming, which includes processing of the produce and trading in agricultural produce, were the only major economic activities carried out by small economic actors such as SMEs.

In the 1970's, the Government passed two important laws to control and safeguard the interests of, *inter alia*, small entrepreneurs and consumers in the markets. Thus, the Regulation of Prices Act, 1973 was enacted. The legislation sets rules[161] of determining prices in the markets. In 1974 the National Price Commission (NPC) was established[162] to ensure protection of customers in the market.[163] The current statutory body to safeguard interests of customers and traders in the market is the Fair Competition Commission (FCC), which is established under the Fair Competition Act, 2003.[164]

Economy of Tanzania. Nairobi: Heinemann Educational Books Ltd., page 95.

159 Cap. 113 of the then Laws of Tanganyika. It was also called the *Land Tenure Ordinance Number 3* of *1923.* This law was in 1999 repealed and replaced by the new *Land Act, Cap. 113*, which is the current land legislation in Tanzania. The village land is governed by the *Village Land Act, Cap. 114*, which was enacted in the same year. The two land legislation put clear the legality and tenure of the land ownership in Tanzania especially the status of the Customary Rights of Occupancy, which these laws pronounce that it has same status as Granted Right of Occupancy.

160 The law called *Freehold Titles (Conversion) and Government Lease Act, Cap. 523* of 1963 and later on was changed into rights of occupancy under the Government Leaseholds (Conversion of the Rights of Occupancy) Act, 1969 Act No. 44 of 1969.

161 *The Regulation of Prices Act, 1973* provided, *inter alia*, that in determining the price structure of any goods or services, the government shall have regard to: (a) Commodities and services essential to the community; (b) the need to avoid unduly rapid or frequent variations in prices; (c) the need to preserve and promote the competitive position of local products in the domestic market as well as in a foreign markets; (d) the need to prevent the income of peasants and workers in the United Republic from being affected adversely by unnecessary and unjustified price increases; (e) the need to maintain fair relationships among the incomes of different sectors of the community, and so on.

162 Rice, Robert C *op cit* page 95.

163 One of its duties was to determine reasonable price structures on a national basis and provide their orderly variation when necessary.

164 Act No. 8 of 2003. It is established under Section 62 of that law.

The NPC was required to perform the following functions, namely; (a) to determine reasonable price structures on a national basis and provide for their orderly variation when necessary; (b) ensure that, prices of goods and services in Tanzania are compatible with and conform to the principles of socialism and the political, economic and social aspirations of the people of the United Republic; (c) to perform such other functions as are conferred on it by this Act or as the President may from time to time confer upon it[165].

It is obvious that, consumers in the market were over-protected by the law at the expense of producers (Government and private sectors). This is another reason for the collapse of the parastatals, because of the biased legal protection. Therefore, despite the good intention to protect actors in the local market, the protection provided was inadequate for the public as well as the private sector such as SMEs to grow.

2.2.2 Legal Protection after the Liberalization of the Market

Generally, the economic condition continued to decelerate despite stated policy reforms such as the *Arusha Declaration* of 1967. In view of the said poor performance, the Government acceded to the Structural Adjustment Programme (SAP), which *inter alia*, forced the Government to liberalize the trade sector in 1980s. Since then, Tanzanians who had foreign exchanges were allowed to import goods. SAP came in with lots of other requirements including an increase of import facilities, slackening of exchange control, adjustment of the prices in the market to reflect the world market, privatization, liberalization of markets and so on.[166]

As the pressure from development partners mounted, the Government had to amend its policies and laws to give room for foreign companies to trade in Tanzania. The Economic Recovery Programme, which was introduced in 1986, lifted a great number of restrictions on markets. A number of measures were taken to stimulate the private sector[167]. This is the time when SMEs started to emerge in the form they are at the moment. In fact, they started to mushroom alongside the influx of foreign companies.

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165 See the United *Republic of Tanzania Acts Supplement, Number 1, 9th March, 1973*, page 284.

166 Nangu, Shilla, "Tanzania Economy: Structural Adjustment to What?" in **The IFM Journal of Finance and Management**, Volume 6, Number 2, January 1998, at pages 1, 2 and 3.

167 Bol, et al (*Eds*) (1997) **Economic Management in Tanzania.** TEMA Publishers Company Limited: Dar es Salaam. Pages 1 and 2.

Lots of economic laws were enacted in the 1990s to regulate the liberalized market. Some of the laws enacted during this era were; the Banking and Financial Institutions Act, 1991; Insurance Act, 1996;[168] the Tanzania Investment Act, 1997;[169] the Land Acts, 1999; the Foreign Exchange Regulation Act, 1992 and so on, which all together aimed at facilitating the enabling environment for the investors. Indeed, investors were fascinated and they came in large numbers. The state owned companies were privatized through Public Corporations Act, 1992[170] as amended from time to time.

The danger of SMEs downfall was obvious. In 1994 the Fair Competition Act[171] was passed by the National Assembly and Assented to by the President to try to address the situation. But later on, it was repealed and replaced by another law in 2003. The new law is the Fair Competitions Act, 2003.[172] This law is administered by the Fair Competition Commission (FCC), which is established under section 62 of the law.

3. The Tanzania Investment Act, 1997: Swindle and Denial of Opportunities to SMEs in Tanzania?

The Tanzania Investment Act, 1997, makes provisions for investment in Tanzania and it provides for more favourable conditions for investors. It is managed by the Tanzania Investment Centre (TIC) established under the provision of this law.[173] Both local and foreign investors are targets of this law. A foreign investor is termed as a natural person who is not a citizen of Tanzania or a company incorporated under foreign laws.[174] A local investor is in fact the opposite of the meaning of the term "foreign investor". The law gives the duo the same status and attention regardless of their economic and technological status. This is the first weakness of this law.

If an application for example, is for a prospective concession, say of constructing and operating a factory to process fruits, the foreign investor is usually given the first priority. It is impliedly taken into account that the foreign investor has the knowledge, technology and capital to manage the investment, which the local investor does not have. This might be true, but the duty of TIC ought to have been

168 Cap. 394 of the Revised Edition 2002 of the Laws of Tanzania.
169 Cap. 38 of the Revised Edition 2002 of the Laws of Tanzania.
170 Cap. 257 of the Revised Edition 2002 of the Laws of Tanzania.
171 Act No. 4 of 1994.
172 Act No. 8 of 2003.
173 TIC is established under Section 4 of the *Tanzania Investment Act, Cap. 38* of the Revised Edition 2002 of the Laws of Tanzania.
174 *Ibid* Section 3.

not only to assess and grant permission only for those credible investors who qualify, rather, to *encourage*, *promote* and *facilitate* investments in Tanzania.[175] If TIC had used a different approach, it is likely that local investors would have considerably increased like mushrooms.

The Act provides a number of incentives including, exemption of certain taxes under the Income Tax Act, 2004; the Customs (Management and Tariff) Act, Cap. 403; the Value Added Tax Act, Cap. 148; and in other written laws. For instance, fiscal incentives provided to exploration and mining activities include among others; exemption from import duty and Value Added Tax (VAT) on equipment and other essential materials up to the anniversary of the start of production, and thereafter, a maximum rate of 5% applies; a depreciation allowances of 100%; repatriation of capital and profit directly related to mining and non-mandatory Government participation in the extraction processes of the minerals.[176] On the side of the small scale miners, they do not enjoy the same concessions because they do not register their investments through TIC.

Another incentive enjoyed by foreign invertors is the immigration quota granted to them under subsection (1) of section 24 of the Tanzania Investment Act, which provides that;

> Every business enterprise granted a certificate of incentives under this Act, shall be entitled to an initial automatic immigrant quota of up to five persons during the start up period.

This is one of the opportunities, which foreign investors use or are likely to use to undercut employment for citizens. However, the provision does not specify the qualifications of personnel in the immigrant quota. As a result, Asians have now flooded the local labour markets utilizing the loophole created under the provisions of the Tanzania Investment Act. An investor brings in other four persons during the start up period and the immigrants stay in the country to compete with SMEs by doing petty businesses in major cities of Tanzania.

Immigrants, who are not refugees or asylum seekers are supposed to be regulated by the Immigration Act.[177] Immigrants are defined in this law as people who are not Tanzanian citizens. Section 16 of this law prohibits the carrying out of any business by foreigners without appropriate permit issued in accordance with the provisions of this Act. Employments and studies in Tanzania, which

175 *Ibid* Section 5.

176 LHRC and ZLSC (2007) **Tanzania Human Rights Report 2007: Incorporating Specific Chapter on Zanzibar**. Dar es Salaam: LHRC and ZLSC, page 98.

177 Cap. 54 of the Revised Edition 2002 of the Laws of Tanzania.

are not permitted, are also prohibited by this law.[178] Section 17 puts factors to be considered before issuing any permit to an immigrant employee. In short, a desirable immigrant must be one who possesses special skills and qualification which are not easily available amongst citizens of Tanzania.[179] If it is the business of investment, it should ideally pass this test.

Experience has already shown that, the Tanzanian labour market is full of petty traders from China and other Asian countries. The presence of these petty traders from China, who import cheaply and therefore are able to sell cheaply, is a threat to local petty traders engaged in SMEs. The immigration quota under the investment law should be removed and the screening under the immigration law, should be tightened in order to protect local investors in Tanzania. There is also a need of controlling imports in the country. Tanzania should import what is not (sufficiently) available in the country. Allowing foreigners to sell consumer items such as coconuts, vegetables, oranges and the like in supermarkets or shops are tantamount to undercutting small producers and vendors.

The efforts of TIC, if any, of facilitating local investors to invest are supposed to be complemented by other governmental and non-governmental agencies. For instance, [there is] the Tanzania Industrial Research and Development Organization (TIRDO)[180] and the Small Industries Development Organization (SIDO) need to be pro-active in supporting the development of SMEs.[181] Both of the two institutions are charged with the promotion of applied research especially for (small) local experts but they have not yet discharged their responsibilities satisfactorily and the linkage between TIC and the two institutions is not very clear, because their respective laws do not make cross-referencing to each other.

4. The Fair Competition Act, 2003: The Effectiveness and Gaps

This law[182] was enacted to promote and protect effective competition in trade and commerce in the markets. It is also aimed at protecting consumers from unfair and misleading market conduct, among other related matters. Section 3 of the Act further states that, if the market conduct will be controlled, the efficiency in production, distribution and supply of goods and services will be

178 See Sections 16 (1) – (3) of the *Immigration Act*.
179 *Ibid* Section 17 (3).
180 Established under the *Tanzania Industrial Research and Development Organization Act*, Cap. 159 of the Revised Edition 2002 of the Laws of Tanzania.
181 Established under the *Small Industries Development Organization Act*, Cap. 112 of the Revised Edition 2002 of the Laws of Tanzania.
182 *The Fair Competition Act, 2003*, (Act No. 8 of 2003).

increased; innovation will be promoted and consumers will be protected from an unruly market. This provision gives the whole gist of this law. It deals with the market.[183]

The law makes it an offence for any market or trade practices, which have direct or indirect negative effects to the notion of fair competitions in the market. The aim is to protect the interests of all people engaging at different levels of business enterprises, including the SMEs. The following are business conducts prohibited by this law;

- The law restricts all agreements, which by their natures, will appreciably prevent, restrict or distort (fair) competition. One party or few people in the market are not allowed to enjoy dominant positions in the market.[184]
- Secondly, this law prohibits price fixing between competitors, prohibits collective boycott by the same and collusive bidding or tendering[185]. Unlike the way in which the Regulation of Prices Act, 1973 addressed control of prices, the Fair Competition Act, 2003 leaves freedom of action at the discretion of competitors to determine price ceiling of commodities in the market.
- Thirdly, the merger of business if it creates or strengthens a position of dominance in a market is also prohibited[186]. Other offences which this law creates are giving a misleading or deceptive conduct[187] and bait advertisements.[188]

Again, unlike the 1973, which gave the then NPC powers to set and control prices of goods and services in the market, the 2003 law does not give those powers to the FCC. In stead, the Fair Competition Act, 2003 gives competitors wide discretionary powers to decide the ceiling of prices of commodities in the market. In fact, there are two regulatory authorities, the SUMATRA[189] and EWURA[190] established under the Surface and Marine Transport Regulatory Authority Act,

183 Section 5(4) of the law defines the "Market". It states that "Market refers to the range of reasonable possibilities for substitution in supply or demand between particular kinds of goods or services between suppliers or acquirers, or potential suppliers or acquires, of those goods or services".

184 See Section 8 (1) and (3) of this law.

185 Sections 9 (1) (a) to (c) and 9 (2).

186 Section 11. But there are exemptions to Section 11 as provided for under Section 13 of the same law.

187 Sections 15 and 16 of the law.

188 Section 22.

189 Means "Surface and Marine Transports Regulatory Authority".

190 Means "Energy and Water Utilities Regulatory Authority".

2001[191] and the Energy and Water Utilities Regulatory Authority Act, 2001[192] respectively. But they are also denied of the powers to determine prices of commodities in the market.

The Fair Competition Act, 2003 does not even give directives as to what factors should competitors use when they want to fix prices of commodities or services. In most cases, large companies are the ones which set prices, of course, suitable for them and not necessarily for other market players.

5. Synergy of Law and Fiscal Measures

As stated above, regulation of competition in markets is part of the country's economic management. There must be a business climate in which all people can fairly benefit. Moreover, the essence should be to induce more entrepreneurs to invest.[193] The law and policy should focus on these two economic norms.

Some of the measures to stimulate fair business climate include creation of credit or loan facilities for prospective investors who do not have capital to initiate businesses. The National Microfinance Policy of 2000 recognizes the fact that, the majority of Tanzanians have low income and their access to financial services is low. Moreover, there is no protection against risks that the small economic actors would face.[194] Those factors have denied SMEs a wide range of investment opportunities.

The policy recognizes that, credit services can facilitate some of the enterprises in making important investment decisions. Secondly, the fiscal policies could as well regulate markets through taxes. Thirdly, economic reforms, such as those which will address regulation of bank interests and promote extension of credits to the rural areas can considerably facilitate people to opt for alternative sources of capital.

The enforceability of all these policy measures could be achieved by enacting or amending laws in order to address these issues. The proposed amendments should look at all stages of competition in the local market. That is, the protection should begin from the early stages of market development to get rid off unfair business practices. The current Fair Competition Act, 2003 apart from other weaknesses as explained above, addresses the issue of protection at the second stage. That is,

191 Act No. 9 of 2001.

192 Act No. 11 of 2001.

193 Bol, et al (*Eds*) (1997) **Economic Management in Tanzania.** TEMA Publishers Company Limited: Dar es Salaam. Page 11.

194 National Micro-finance Policy, paragraph 1.2.1.

it addresses the competition or possibilities of competition at the stage when the actors are already in the market.

It does not consider factors such as technology, business knowledge, and capital availability for SMEs and the like. Apparently, FCC or TIC can not do all these alone. Their duties could be to facilitate the creation of an enabling environment for SMEs to operate. Here comes the idea of interlinking these entities with others established under their respective laws.

Moreover, the current laws should do away with the presumption that, fair competition means equal treatment of all players in the market. For the purposes of protection of local investors, the focus of the laws should consider the fact that local investors will not, in anyway, stand on equal footing with foreign investors. There is a need to separate the two to avoid equal treatment of the unequal players.

6. Recommendations

The laws do address the issue of fair competition in the markets and other related economic activities; but very unsatisfactorily. Owing to these, there is a need of strengthening the legal protection of the SMEs and other local producers and traders. Globalization and liberal economy do not mean that market practices can be twisted in whatever ways in which the few actors want. The Government has to play its regulatory duty.

The immigration quota under the investment law should be removed and the screening under the immigration law, should be tightened in order to protect the local investors in Tanzania.

There is also a need to control imports in the country. Tanzania should import only what is not (sufficiently) available in the country. Therefore, the laws should address this issue very clearly.

Since TIC, TiRDO and other relevant institutions are charged with the role of promotion of applied research especially for (small) local enterprises but have not yet discharged their duties exhaustively and the linkage between TIC and the two institutions is not very clear, there is a need to make cross-referencing between the different institutions in order to mobilize efforts aimed at promoting indigenous technology and industry.

The Fair Competition Act, 2003 should be amended to give guidance as to what

factors should competitors use when they want to fix prices of the commodities or services they offer because in most cases, large companies are the ones which set prices, suitable for their interests and not necessarily for other market players.

There is a need of synergizing of law and fiscal measures. The essence should be to induce more entrepreneurs to invest and stimulate fair business climate, including creation of credits or loans for prospective investors who do not have capital to initiate businesses.

7. Conclusion

SMEs and other local investors or entrepreneurs in Tanzania are weakened by a number of factors including limited knowledge of modern technology, poor financial management, lack of sufficient capital, administrative and clerical staff lack technical skills, nuisance taxes are rife and investors are not afforded tax exemptions as is the case for other foreign investors, the lack of free and fair market and so on, are other impediments which the local investor face. All these are reasons for the unfair treatment in the market in which both fiscal and legal measures need to be addressed.

USING DIRECTIVE PRINCIPLES OF STATE POLICY TO INTERPRET SOCIO-ECONOMIC RIGHTS INTO THE TANZANIAN BILL OF RIGHTS

By Clement Mashamba[195]

1. Introduction

Although the African Union (formerly, the Organization of African Unity) has repeatedly been stressing the importance of constitutionalisation and justiciability of socio-economic rights in domestic jurisdictions as a central part to achieving development on the continent, 'there are very few African countries that have included socio-economic rights in their constitutions.'[196] Even for those who have attempted to do so, they have 'done it in such a way that makes those rights non-justiciable and therefore unenforceable.'[197] As Prof John Mubangizi points out,

> "Moreover, unlike South Africa where the constitution explicitly requires the state 'to respect, protect, promote and fulfil'[198] socio-economic rights and to take 'reasonable legislative and other measures … to achieve the[ir] progressive realisation,'[199] socio-economic rights in other African countries enjoy only negative protection.[200]"

With the exception of Ghana and South Africa, where socio-economic rights are contained in the body of the Bills of Rights, other African countries have tended to exclude these rights in this enforceable part of classical constitutions.[201] Tanzania is one of such African countries, where the bulky of socio-economic rights are

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196 MUBANGIZI, J.C., "**Prospects and Challenges in the Protection and Enforcement of Socio-Economic Rights: Lessons from the South African Experience**," a paper presented at the VII World Congress of the International Association of Constitutional Law, Athens, 11th – 15th June 2007.

197 *Ibid*.

198 *See* section 7(2) of the South African Constitution, 1996.

199 Ibid, sections 26(2) and 27(2).

200 MUBANGIZI, J.C., "**Prospects and Challenges in the Protection and Enforcement of Socio-Economic Rights: Lessons from the South African Experience**," *op. cit*.

201 Ibid.

contained in the unenforceable part of the Constitution.

However, this approach of constitutionalising and enforcing socio-economic rights only defeats the purpose and spirit of protection and promotion of human rights at domestic level. The starting point for any meaningful evaluation of the protection and realisation of human rights should be gauged in the well established principle that, human rights are birthrights.[202] They inhere in a human being by virtue of being a human being. As Article 20(1) of the Ugandan Constitution provides, 'fundamental rights and freedoms of the individual are inherent and not granted by the state.'[203] Thus, the inclusion of basic rights and fundamental freedoms in a Constitution is a mere appreciation of the same.[204] As the late Justice Lugakingira observed in the case of *Rev. Christopher Mtikila v. A.G.*,[205]

> In assessing this power it is appropriate to recall, in the first place, that *fundamental rights are not gifts from the State. They inhere in a person by reason of his birth and are therefore prior to the State and the law*. In our times one method of judging the character of a government is to look at the extent to which it recognises and protects human rights. The *raison d'etre* for any government is its ability to secure the welfare of the governed. Its claim to the allegiance of the governed has to be in terms of what that allegiance is to serve. Allegiance has to be correlative with rights. Modern constitutions like our own have enacted fundamental rights in their provisions. *This does not mean that the rights are thereby created; rather it is evidence of their recognition and the intention that they should be enforceable in a court of law.* It can therefore be argued that *the very decision to translate fundamental rights into a written code is by itself a restraint upon the powers of Parliament to act arbitrarily*.[206] [Emphasis supplied].

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202 *See* particularly *Rev. Christopher Mtikila v. A.G.* [1995] TLR 31. *See* also *Muhammed Nawaz Sharif v. President of Pakistan*, PLD 1993 DC 473.

203 For a detailed account on this matter *see* TWINOMUGISHA, B.K., "Exploring Judicial Strategies to Protect the Right of Access to Emergency Obstetric Case in Uganda," **African Human Rights Law Journal,** Vol. No. 2, 2007, pp. 283-306, at p. 294.

204 MASHAMBA, C.J., "**Enforcing Social Justice in Tanzania: The Case of Economic and Social Rights**," an LL.M. Thesis submitted to the Open University of Tanzania, 2007.

205 [1995] TLR 31.

206 *Ibid*. *See* also Chief Justice Nasim Hassan Shah in *Muhammed Nawaz Sharif v. President at Pakistan*, PLD 1993 DC 473 at p. 557.

Basing on the foregoing principle, this Article evaluates the place of the fundamental objectives and directive principles of state policy in enforcing socio-economic rights under the Constitution of Tanzania. The Article is set against a background that the Bill of Rights under the Constitution protects, as justiciable, only two socio-economic rights – i.e. the right to work[207] which goes together with the right to a fair remuneration;[208] and the right to property.[209] The rest of the socio-economic rights are set out in Article 11[210] that is contained in an unenforceable part of the Constitution – i.e. Part II of Chapter One, which contains fundamental objectives and directive principles of state policy.[211]

In such a situation, the Constitution of Tanzania does not offer full realisation of socio-economic rights. Thus, this Article urges that, there is a dire need to creatively interpret fundamental objectives and directive principles of state policy into the Bill of Rights so as to give practical effect to all socio-economic rights in the Tanzanian human rights jurisprudence.

2. Conceptualising Socio-Economic Rights

Socio-economic rights include the right to an adequate standard of living; the right to housing and to education; the right to work and to equal pay for equal work; and the rights of minorities to enjoy their own culture, to practice their own religion and communicate in their own language. Others are rights to adequate food; the right to adequate health; and the right to housing. [212] The main, specific international human rights instrument that comprehensively catalogues these rights is the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR).

However, these rights are also contained in other international human rights instruments, such as the UN Convention on the Rights of the Child of 1989 (CRC), the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the African Charter on Human and Peoples' Rights of 1981 and the African Charter on the Rights and Welfare of the State of 1990.

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207 Article 22 of the Constitution of the United Republic of Tanzania, 1977.

208 *Ibid*, Article 23.

209 *Ibid*, Article 24.

210 *Inter alia*, including the right to education, the right to social security; and the right to health.

211 According to Article 7(2), courts of law have no jurisdiction to adjudicate on any provisions of Part II of the Constitution.

212 PETER, C.M., "The Human Rights System: An Overview," in MCHOME, S.E. (ed.), **Taking Stock of Human Rights Situation in Africa**, Dar es Salaam: Faculty of Law (University of Dar es Salaam), 2002, p. 2.

Since the 1970s socio-economic rights have also been referred to as *Second Generation Human Rights,* following the categorisation of human rights into three groups that was expounded for the first time in the 1970s by Karel Vasak, the Czech human rights expert.[213] The other two categories of human rights in this categorisation are *First Generation Rights* that is civil and political rights; and *Third Generation Rights* that is collective rights. Altogether, the three generations of human rights shall be discussed in a latter section in this Article.

3. The Hypocrisy about the Nature of Socio-Economic Rights

(a) Ignoring Socio-Economic Rights

Between 1950s and early 1980s socio-economic rights were simply ignored; where some of the scholars, like the American Maurice Cranston, went as far as to argue that, the term "human rights" did not, and cannot, possibly include socio-economic rights.[214] This is the view that has been previously responsible for providing differently for socio-economic rights from civil and political rights.[215] This view was not only held by Western scholars, but it also influenced drafters of some important human rights instruments such as those who wrote the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950. In fact,

> In that instrument, ESC [economic, social and cultural] rights were rudely ignored from the pages of the instrument. It was only later after the Treaty had already come into force that it was grudgingly decided as an afterthought to add some of the ESC

213 *See* particularly VASAK, K., "The International Dimension of Human Rights," Vol. 1, Westport/Connecticut: Greenwood Press, 1977; OLENASHA, W.T., **The Enforcement of Socio-Economic Rights: Opportunities and Challenges in the International, Regional and Municipal Spheres**, **Tanzania Lawyer,** Vol. 1 No. 2, 2007, pp. 25-35; and NOWAK, M., **Introduction to the International Human Rights Regime**, Leiden/Boston: Martinus Nijhoff Publishers, 2003, pp. 23-25.

214 CRANSTON, M., **What are Human Rights***?* 1974. This school of thought is discussed at length in HANSUNGULE, M., "Strategies for Implementing Economic, Social and Cultural Rights and the Right to Development: Millennium Development Goals and NEPAD," a paper presented at a SADC-wide civil society workshop on human rights obligations of the state, held on 20th to 23rd March 2006 at Acadia Hotel, Pretoria, South Africa, and organized by SAHRIT.

215 HANSUNGULE, M., "Strategies for Implementing Economic, Social and Cultural Rights and the Right to Development: Millennium Development Goals and NEPAD," *ibid*.

> rights. For instance, the right to education was added as an after the fact by way of a protocol. Similarly, the European Social Charter was added to the European human rights architecture more than a decade after the Convention and then in a totally different form and structure.[216]

The overlook on positive implementation of socio-economic rights, as part of the comprehensive human rights discourse, coincided with the Cold-War, meaning that the controversy on their implementation attracted supporters from both sides of the divide. On their part, scholars and statesmen in the West insisted on disregarding socio-economic rights as *implementable* categories of human rights as civil and political rights are.[217] As Manfred Nowak rightly points out:

> The states in the West liked to emphasise, and some are convinced to this day, that the civil and political rights of the first generation, i.e., the liberal rights of non-interference and the democratic participation rights inherent in the classical human rights concept, are the only real human rights in the sense of individual rights enforceable by law against the state.[218]

This narrow view of the concept of enforceable human rights is clearly reflected in several Western constitutions, 'as well as in the liberal-constitutional theory of fundamental rights and jurisprudence of many courts in Europe, the United States and other countries.'[219] In principle, this view restricts human rights to the vertical relationship between the state and the individual and to claims of the individual against the state. This narrow view, in essence, does not accept positive obligations of the state to protect and fulfil human rights in a horizontal relationship between individuals, that is, "the third party effect."[220]

(b) The Basis for Ignoring Socio-Economic Rights

From a historical point of view, this model derives its basis on the classical human rights concept that was developed during the Age of Enlightenment, where the main claims for human rights protection and fulfilment was levelled at the (autocratic) state by individual citizens. However, this 'overlooks the fact that,

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216 *Ibid*.

217 *See* particularly NOWAK, M., **Introduction to the International Human Rights Regime**, *op. cit*; and MASHAMBA, C.J., **Enforcing Social Justice in Tanzania: The Case of Economic and Social Justice**, *op. cit.*

218 NOWAK, M., *ibid*, pp. 23-24.

219 *Ibid*, p. 24.

220 *Ibid*.

the rationalist doctrine of natural law in particular considered the natural rights of human beings as effective against all types of interference, by the state and non-state actors alike.'[221] It is said that,

> … this restriction of human rights to mere claims of non-interference only came about in the latter days of liberalism and legal positivism in the late 19th century and today is no longer sustainable. After all, all human rights are justiciable, obliging the state to respect (by non-interference), fulfil (by positive action) and to protect them against third parties.[222]

(c) Communism and the Claim for the Supremacy of Socio-Economic Rights

On the other side of the divide, communist scholars and politicians insisted that, human rights in fact meant socio-economic rights.[223] To them, 'civil and political rights would only aid and abet the capitalist interests of separating state and society,'[224] which is a rather narrow conception of the human rights dimensions. Their view was found on claims that, 'the only real human rights were those based on harmonisation of individual and collective interests in socialist states, in other words the **economic, social and cultural rights** as originally understood.'[225]

It was the communist scholars' and politicians' view that the state had an obligation to ensure that the rights to work, social security, food, housing, health, education, etc. were protected by granting benefits. Viewed in this context, 'individual and legally enforceable claims against the state would therefore not only be superfluous, but actually run counter to the system.'[226] In practice,

> … exercising such rights was not at the discretion of the individual, but in fact considered every citizen's duty (principle of the unity of rights and obligations). Thus, the right to work implied in socialist economy also the duty to work, and even political freedoms, such as freedom of assembly, were exercised

221 *Ibid*.
222 *Ibid*.
223 HANSUNGULE, M., **Strategies for Implementing Economic, Social and Cultural Rights and the Right to Development: Millennium Development Goals and NEPAD**, *op. cit*.
224 NOWAK, M., **Introduction to the International Human Rights Regime,** *op. cit*, p. 24.
225 *Ibid*.
226 *Ibid*.

in conformity with collective interests of socialist society.[227]

(d) Africa's Hypocrisy about Socio-Economic Rights

In Africa, and in most third world countries, the *loyalties* of human rights scholars and policymakers depended on which side of the divide a particular state allied to. Indeed, for most African policymakers and scholars,[228] socio-economic rights were regarded as of more significance in the building of states just emerging from colonial oppression and subjugation. It was then the contention of African policymakers and scholars that between the two groups of human rights, there was no doubt that, socio-economic rights enjoyed a higher hierarchy and massive popularity than civil and political rights, which was conceived as Europe's preoccupation.[229]

So, for African states, the third generation of the *collective rights of peoples* (of the South) were perceived as adding a third dimension to human rights, 'which draws on the concept of universalism.'[230] It was then, and still is, perceived that as the human rights situation in the South (particularly, Africa) was, and still is, fragile 'due to a large extent to centuries of colonialism and imperialism, postulating individual rights at the national level only would hardly resolve the matter.'[231] Viewed in this perspective,

> International human rights protection, instead of being limited to international monitoring of states' observance of human rights, would have to ensure that the peoples of the South [particularly in Africa] are granted collective solidarity rights vis-à-vis the peoples of the North.

Indeed, to some scholars advocating for the third generation of collective rights of the peoples, the basis for this claim is enshrined in the provisions of Article 28 of the Universal Declaration of Human Rights of 1948 (UDHR), which stipulates that, 'everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.' That is why

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227 *Ibid*.

228 *See* SHIVJI, I. G., **The Concept of Human Rights in Africa**, London: CODESRIA, 1989.

229 HANSUNGULE, M., **Strategies for Implementing Economic, Social and Cultural Rights and the Right to Development: Millennium Development Goals and NEPAD**, *op. cit*.

230 NOWAK, M., **Introduction to the International Human Rights Regime,** *op. cit*, p. 24.

231 *Ibid*.

the main hub around which the third generation rights revolve is the right to self-determination, interpreted by Nowak as 'colonial peoples' right to political independence from European colonial powers and to free disposition of natural resources (*viz*. natural resources and environmental rights), as well as the right to self-determined development which is closely linked to the former.'[232]

(e) The UDHR and the Notion of Indivisibility of Human Rights

Nonetheless, the Universal Declaration Human Rights (UDHR) and subsequent international human rights instruments had not suggested such a division of human rights. This division of human rights was just a direct outcome of a grave ideological division that preoccupied the world at the time the UDHR, the International Covenant on Civil and Political Rights of 1966 (ICCPR) and ICESCR were being drafted. However, it is important to note that due to this ideological division, the UDHR had to be drafted and adopted as a mere declaration that would not bind the ideologically divided members of the UN at the time. If the UDHR would have tried to provide differently against each of these two groups of ideology (and hence two different categories of rights), such step 'would have put its claims of legitimacy open to serious doubts. Both its moral worth and legal value would have varnished were the Declaration had leaned on either or the other side.'[233]

What is interesting to modern human rights jurisprudence, at least at the political level, is that while it was possible for the UDHR to provide expressly for socio-economic rights, 'it was impossible for European states to agree to incorporate them in the European Human Rights Convention that was almost drafted at the same time as the UDHR.'[234] This is an interesting issue at this moment because at that time western states and their scholars did not regard socio-economic rights as part of human rights. Of course,

> One possible explanation why the UDHR acknowledged both civil and political rights as well as the ESC [economic, social and cultural] rights with such loquacious easy could be due to the nature of the promises in the UDHR. Granted that the UDHR did not seek to provide legally-binding obligations as

232 *Ibid*, pp. 24-25.

233 HANSUNGULE, M., **Strategies for Implementing Economic, Social and Cultural Rights and the Right to Development: Millennium Development Goals and NEPAD**, op. cit.

234 MASHAMBA, C.J., **Enforcing Social Justice in Tanzania: The Case of Economic and Social Justice**, *op. cit*.

> it was not a hard treaty, most (western) states did not worry with what it in effect provided for since the main means of implementation of those rights is unlikely to bring them legal complications.[235]

All in all, the 1993 Vienna Declaration dealt a serious historical blow on the categorisation of human rights into generations and its divisive undercurrents. In the main, the Vienna Declaration decreed that, all human rights are indivisible, interrelated and interdependent. It also affirmed that all human rights have the same content and substance, notwithstanding their different origins; and, further, that the right to development, in particular; and socio-economic rights, in general, form an integral part of the human rights paradigm.[236]

4. Pre-Requisites for the Domestic Justiciability of Socio-Economic Rights

(a) Constitutionalisation and Justiciability of Socio-Economic Rights

To date, many state constitutions in the world 'contain a broad chapter of fundamental human rights displaying arrays of rights spanning the right to life, pecuniary rights, property rights and rights regarding beliefs.'[237] From a historical perspective, it can be gathered that up until World War II human rights norms as we know them to date were not well developed within international law, but they were primarily enshrined within the framework of national constitutions as bills of rights.

This was made possible with the rise of *constitutionalism* that was born out of the spirit of the Age of Enlightenment seeking to ensure that the state's main tasks and structures were written down in a constitution, 'which as a highest legal standard within the state, was considered binding and lasting.'[238] To date,

> ... every country has its own distinct bill of rights as well as its own internal mechanisms to ensure these fundamental rights.

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235 HANSUNGULE, M., **Strategies for Implementing Economic, Social and Cultural Rights and the Right to Development: Millennium Development Goals and NEPAD**, *op. cit*.

236 *See* Vienna Declaration and Programme of Action, 1993, adopted at the World Conference on Human Rights, Vienna, Austria, 1993, 1:5.

237 JIMOH, R., "Female Genital Mutilation: Violation of Women's Human Rights in Nigeria," available at www.globaljusticecenter.org/papers2005/jimoh_eng.htm (accessed on 18 August 2008).

238 NOWAK, M., Introduction to the International Human Rights Regime**,** *op. cit*, p. 15.

> Nevertheless, there has been a clear *trend towards aligning national constitutions with international minimum standards* in recent years, which has partly been achieved by incorporating international human rights treaties. Many constitutions are also increasingly relying on particularly successful national institutions for the protection of fundamental rights such as Constitutional Courts, Parliamentary Committees, ombudsman institutions, and national human rights commissions.[239] [Emphasis in the original text].

Traditionally, the constitution of a country is generally regarded as the supreme law of the country. This means that, the modern approach of entrenching a Bill of Rights in a country's Constitution is particularly significant for the protection and enforcement of human rights. However, in most contemporary state constitutions, such as the Constitution of the United Republic of Tanzania of 1977, the Bill of Rights has largely entrenched civil and political rights in more lucid terms than is the case for socio-economic rights.

As such, civil and political rights have received extensive protection through their inclusion as justiciable rights in the constitutions of such countries. Individuals have generally been able to invoke these constitutional provisions to obtain redress from courts when their civil and political rights are infringed or threatened by the state or any individual.[240] In this regard, the constitutions of this category may bestow on certain courts the power to declare invalid legislation that is inconsistent with the rights granted in the Bill of Rights.[241] This is in line with the

239 *Ibid*.

240 In Tanzania, there are vivid examples where many cases on civil and political rights have been widely litigated in courts of law, such as: *Christopher Mtikila v. A.G.*, High Court of Tanzania at Dar Es Salaam, Miscellaneous Civil Cause No. 10 of 2005 (unreported); *D.P.P. v. Daudi Pete* [1993] TLR 22; *Julius Ishengoma Francis Ndyanabo v. the Attorney-General*, Court of Appeal of Tanzania at Dar Es Salaam, Civil Appeal No. 64 of 2001 (unreported); *Kukutia Ole Pumbuni v. A.G*. [1993] TLR 159; *Legal and Human Rights Centre and 2 Others v. A.G.,* High Court of Tanzania at Dar Es Salaam, Miscellaneous Civil Cause No. 77 of 2005 (unreported); *Rev. Christopher Mtikila v. Attorney-General* [1995] TLR 31; and *The Judge i/c High Court (Arusha) and A.G. v. N.I. Munuo Ng'uni,* Court of Appeal of Tanzania at Arusha, Civil Appeal No. 45 of 1998 (unreported). *See* also *The Registered Trustees of Chama cha Demokrasia na Maendeleo (CHADEMA) & 3 Others v. The Chairman, National Electoral Commission of Tanzania & Another,* High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 72 of 2007 (Ruling dated 26th October 2007, unreported).

241 LIEBENBERG, S., "Judicial and Civil Society Initiatives in the Development of Economic and Social Rights in the Commonwealth," (2001) available at <www.communitylawcentre.uwc.ac.za> (accessed 19 August 2008). *See* also Article 30(3) of the Constitution of the United Republic of Tanzania of 1977.

provisions of General Comment No. 9 of the UN Committee on Economic, Social and Cultural Rights that emphasises on the importance of judicial remedies for the protection of the rights recognised in the ICESCR.[242]

Therefore, the entrenchment of a set of justiciable human rights in a country's constitution basically represents the highest ranking norms within the domestic legal order. In such a system of constitutional supremacy, the Courts are vested with extensive power to enforce human rights that also tends to include wider judicial review of Government policies and programmes. Thus, the incorporation of socio-economic rights as justiciable rights in a country's constitution provides a great deal of scope for developing effective remedies for these rights at the domestic level.[243]

This kind of constitutional order can be found in the 1996 South African Constitution. On the other hand, there are countries, such as Tanzania, where the country's constitutions do not clearly provide for some of the economic and social rights as justiciable rights. However, it should be noted from the outset that: 'even if economic and social rights are not directly entrenched in the constitution, they may nonetheless receive significant indirect protection through the interpretation and application of other constitutional rights.' [244]

It is, thus, a cardinal principle of international human rights law that, socio-economic rights have equal footing for litigation in Courts of law with "other" categories of human rights. Even where the national constitution is silent on the recognition, respect, promotion and protection of socio-economic rights, Courts of law have a noble duty to interpret them, purposively, into the national constitution, by particularly basing on the basic and fundamental principles underlying the respective national constitution. For instance, in the case of *The Permanent Secretary, Department of Welfare (Eastern Cape Province Government) and Another v. M.N. Ngxuza and 2 Others,*[245] the Supreme Court of Appeal of South Africa [Cameron, J.A.], held that, where the Constitution is silent on the enforceability of a certain category of basic rights or procedure thereof, the Court's role is to interpret that right or procedure thereof into the Bill of Rights enshrined in the national constitution.

Therefore, from the foregoing account, it is apparent that, the justiciability of socio-economic rights can be either direct through the constitution or indirect as directive principles of state policy.

242 General Comment No. 9 (1998) on the domestic application of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/1999/22, para. 4.

243 LIEBENBERG, S., **Judicial and Civil Society Initiatives in the Development of Economic and Social Rights in the Commonwealth**, *op. cit*., p. 8.

244 *Ibid*.

245 Case No. 493/2000.

(b) The Import of Entrenching all Human Rights in the Constitution

It is axiomatic that, constitutional entrenchment of socio-economic rights at municipal level offers the best protection of these rights in a given country.[246] Such constitutional entrenchment normally guarantees judicial remedies to socio-economic rights, than the other "appropriate means" referred to in Article 2(1) of the ICESCR, which 'could be rendered ineffective if they are not reinforced or complimented by judicial remedies.'[247]

So, by failing to entrench some of the fundamental rights – like children's rights and socio-economic rights – in the enforceable part of the Constitution, the Government of Tanzania has limited the chances of litigants to *directly* access judicial remedy in case of violation of any of these rights. Presumably,

> … the Government of the day avoided to include those economic and social rights that require direct positive obligation of the State such as the right to health, the right to food, and the right to housing – in the justiciable part of the Constitution, in order to play a negative role as far as promotion and protection of these rights are concerned.[248]

It should be borne in mind, nevertheless that, although in Tanzania most of the socio-economic rights are not judicially enforceable, the Courts may not entirely ignore them, but should adopt the principle of harmonious construction and should attempt to give effect to both categories of rights as much as possible.[249]

5. Interpreting Directive Principles of State Policy into the Tanzanian Bill of Rights

(a) Constitutionalisation of Socio-Economic Rights in Tanzania

The *constitutionalisation* of human rights as enforceable part of the Constitution in Tanzania took place in 1984, vide the 5th Constitutional Amendment made to the

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246 MASHAMBA, C.J., **Enforcing Social Justice in Tanzania: The Case of Economic and Social Rights**, *op. cit*.

247 General Comment No. 9, Nineteen Session, 1998: "The Domestic Application of the Covenant," UN Doc E/1999/22 117-121 para 3.

248 MASHAMBA, C.J., **Enforcing Social Justice in Tanzania: The Case of Economic and Social Rights**, *op. cit*.

249 RUHANGISA, J.E., **Human Rights in Tanzania: The Role of the Judiciary**, a Ph.D. Thesis submitted to the University of London, 1998, p. 136. *See* also SINGH, D.K., **Constitution of India**, 6th Edn., Lucknow: Eastern Book Company, 1995, pp.179-180.

Constitution of the United Republic of Tanzania.[250] Through this Constitutional amendment, a Bill of Rights was introduced in the 1977 Constitution of the United Republic of Tanzania. However, this Bill of Rights did not *incorporate* all of the fundamental rights, particularly socio-economic rights, in the "enforceable part" of the Constitution that is, Part III of Chapter One of the Constitution. In fact,

> Only the right to work[251] and get commensurate remuneration;[252] and the right to own property[253] were included in the Bill of Rights (i.e., the justiciable or 'enforceable part' of the Constitution). The rest of the economic and social rights as provided for in the ICESCR were relegated to the unjusticiable or 'unenforceable' part of the Constitution[254] – i.e., in Part II of Chapter One of the Constitution that contains Fundamental Objectives and Directive Principles of State Policy. The main economic and social rights that are contained in Part II of Chapter One of the Constitution include the right to education; the right to social welfare/security at times of old age, sickness and in other cases of incapacity; the right to health and the right to livelihood.[255] The rights to adequate food and housing were, surprisingly, left out of the Constitution.[256]

Therefore, it is evident that, the Constitution of Tanzania classifies socio-economic rights into two categories that are, justiciable or "enforceable" ones and unjusticiable or "unenforceable" one.

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250 For a detailed discussion on the history of the Bill of Rights in Tanzania *see* particularly, RUHANGUSA, J.E., ibid; PETER, C.M., **Blocking Fundamental Rights and Freedoms in Tanzania: The History of** the Bill of Rights," Vol. 7. No. 1 *Justice Review*, 2008; KABUDI, P.J., "The Judiciary and Human Rights in Tanzania: Domestic Application of International Human Rights Norms," *Verfassung Und Recht,* Vol. 24, 1991; PETER, C.M., **Human Rights in Tanzania: Selected Cases and Materials**, Rudiger Koppe Verlag, Köln, 1997; and MBUNDA, L.X., "Limitation Clauses and Bill of Rights in Tanzania," **Lesotho Law Journal,** Vol. 4, No. 2, 1988.

251 Article 22 of the Constitution of Tanzania of 1977.

252 *Ibid*, Article 23.

253 *Ibid*, Article 24.

254 *Ibid*, Article 7(2).

255 *Ibid*, Article 11.

256 MASHAMBA, C.J., **Enforcing Social Justice in Tanzania: The Case of Economic and Social Rights**, *op. cit*.

(b) The Scope of Fundamental Objectives and Directive Principles of State Policy

In many Commonwealth countries whose Bill of Rights do not *expressly* provide for socio-economic rights, the most common method of recognising these rights is through the Fundamental Objectives and Directive Principles of State Policy. Under such Constitutions, socio-economic rights are usually set out in a separate chapter of the Constitution from the one protecting "fundamental" rights.[257] The chapter on "fundamental" rights mostly provides for civil and political rights, although in some cases it may provide for some few socio-economic rights.

For instance, in the Constitution of the United Republic of Tanzania of 1977, most of the substantive economic and social rights – with the exception of the right to property[258] and the right to work and earn equal pay for equal work[259] – are contained in Article 11 Part II of Chapter One of the Constitution which sets out the Directive Principles of State Policy. Other Commonwealth countries with provisions relating to socio-economic rights contained in the directive state policy are Ghana, India, Nigeria and Sri Lanka.

Amongst the common features of these Constitutions is an express provision that declare them unenforceable by the judiciary,[260] in that they are intended to guide the Government in making and applying laws;[261] and, in some Constitutions, the Courts are entitled to have regard to the said principles in interpreting any laws based on them.[262] The Ghanaian Constitution is very relevant in this regard. It provides lucidly that, the directive principles of state policy contained in chapter six of the Constitution may provide guidance to the Judiciary and other bodies 'applying and interpreting' the constitution. Article 34 (1) of the Ghanaian Constitution provides categorically that,

> 34. (1) The Directive Principles of State Policy contained in this Chapter *shall guide* all citizens, Parliament, the President, *the Judiciary,* the Council of State, the Cabinet, political parties and other bodies and persons *in applying or interpreting this*

257 LIEBENBERG, S., **Judicial and Civil Society Initiatives in the Development of Economic and Social Rights in the Commonwealth**, *ibid*, p. 20.

258 Article 24 of the Constitution of Tanzania.

259 Ibid, Articles 22 and 23.

260 *See* for instance, Article 7(2), ibid.

261 LIEBENBERG, Sandra, **Judicial and Civil Society Initiatives in the Development of Economic and Social Rights in the Commonwealth**, *op. cit*.

262 *See* for instance, Article 101 of the Constitution of the Republic of Namibia, 1990.

> *Constitution or any other law* and in taking and implementing any policy decisions, for the establishment of a just and free society. [Emphasis supplied].

It also imposes a duty on the President of the Republic of Ghana to report annually to Parliament on all the steps undertaken to ensure the realisation of the policy objectives, 'and, in particular, the realisation of basic human rights, a healthy economy, the right to work, the right to good healthcare and the right to education.'[263] This enables the Ghanaian Parliament to check Government's implementation of socio-economic rights in terms of policy choice and programmatic implementation.

Unlike many other African countries, particularly Uganda, Namibia and Tanzania, 'the enforceability of socio-economic rights in Ghana is not limited to those that are contained in the Bill of Rights. It may in fact extend to those laid down in the Directive Principles of State Policy.'[264] Indeed, this legal position is according to *New Patriotic Party v. Attorney General*,[265] where it was held, *inter alia*,

> … although the Directive Principles of State Policy are not in themselves legally enforceable by the courts, *there are exceptions to this principle in that where the Directive Principles are read together with other enforceable parts of the Constitution they then in that sense become enforceable*. [Emphasis supplied].[266]

In India, the "fundamental" rights embodied in the Constitution are guaranteed to all citizens. These civil liberties take precedence over any other law of the land. They include,

> ... individual rights common to most liberal democracies, such as equality before the law, freedom of speech and expression, freedom of association and peaceful assembly, freedom of religion, and the right to constitutional remedies for the protection of civil rights such as habeas corpus. [267]

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263 *See* Article 34 (2) of the Constitution of the Republic of Ghana, 1993.

264 MUBANGIZI, J.C., "The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation," **African Journal of Legal Studies,** Vol. 2 No. 1, 2006, pp. 1-19, at p. 17.

265 (1996-97) SCGLR 729.

266 For a detailed discussion on the enforceability of socio-economic rights through interpreting Directive Principles of State Policy in Ghana *see* MUBANGIZI, J.C., **The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation**, *op. cit*, p. 15-18.

267 India Directive Principles of State Policy at (www.photius.com/countries/india/

Under the Indian human rights jurisprudence, "fundamental rights" and the fundamental objectives and directive principles of state policy seem to have been patched up together through creative interpretation of the latter into the former by the Indian Judiciary.[268] As such, the latter are contained in the unenforceable part of the Indian Constitution and they are fundamental for the governance of the country, whereby the Indian Government is duty bound to apply these principles while making laws as they aim at promoting the social welfare (justice) of the people.[269]

(c) Interpreting Directive Principles of State Policy into the Tanzanian Bill of Rights

(i) The Essence of the Fundamental Objectives in Interpreting Socio-Economic Rights into the Tanzanian Bill of Rights

Part II of Chapter One of the Tanzanian Constitution provides for the fundamental objectives and directive principles of state policy. While "Fundamental Objectives" refer to the ultimate objectives of the Tanzanian nation which should be pursued by the Government in power, "Directive Principles" of state policy refer to the paths which should be followed by the Government to achieve the identified objectives.[270] As the Nigerian Constitutional Drafting Committee (CDI) said in the 1980s,

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government/india_government_directive_principles~8861.html (accessed on 19 August 2008)).

268 For a comprehensive perspective on the judicial activism in favour of socio-economic rights (i.e. social; justice) in India *see* particularly Indian court decisions in *Keshavananda Bharati v. State of Kerala* [1973] 4 SCC 255; *Maneka Gandhi v. Union of India*, AIR (1978) 1 SCC 248; *Tellis & Others v. Bombay Municipal Corporation & Others,* (1987) LRC (Const.) 351 (popularly known as the 'pavement-dwellers' case); *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan & Others,* (1997) AIR SC 152; *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1996) AIR SC 2426; *Jain v. State of Karnataka,* (1992) 3 SCC 666; *Krishnan v. State Andhra Pradesh & Others*, (1993) 4 LRC 234; *Francis Coralie Mullin v. The Administrator, Union of Delhi*, (1981) 2 SCR 516 at 529; *Bandhua Mukti Morcha v. Union of India and Others*, (1984) 2 SCR 67; and *M.C. Metha v. Union of India*, AIR 1997 SC 965.

269 *Inter alia*, the Indian Directive Principles of State Policy direct the government to (i) secure all its citizens an adequate means of livelihood; (ii) make all material resources beneficial to the common good; (iii) prevent concentration of wealth; (iv) ensure both men and women get equal pay for equal work; (v) prevent child labour; and (vi) make provision for free legal aid to the poor.

270 JUMA, I.H., "Constitution-Making in Tanzania: The Case for a National Conference," in OLOKA-ONYANGO, J., *et al* (Eds.), **Law and the Struggle for Democracy in East Africa**, Claripress Ltd., 1996, p. 413.

> By Fundamental Objectives we refer to the identification of the ultimate objectives of the Nation whilst Directive Principles of State Policy indicate paths which lead to those objectives. Fundamental Objectives are ideals towards which the Nation is expected to strive whilst Directive Principles lay down policies which are expected to be pursued in the efforts of the Nation to reach the national ideals.[271]

In the CDI's view, the rationale for embodying these Fundamental Objectives and Directive Principles of State Policy in the Constitution is that: 'Government in developing countries have tended to be pre-occupied with power and material prerequisite' with scant regard for 'political ideas as to how society [can] be organised and ruled to the best advantage of all.'[272] Indeed, this rationale is also of special relevance to Tanzania, where there is an increasing gap between the rich and the poor, leading to overt socio-economic inequalities.

According to Prof. Ibrahim Juma, in Tanzania 'these provisions disclose the lines on which a social welfare state may be built.'[273] Thus, the fundamental objectives and directive principles of state policy are contained in Articles 7, 8, 9, and 11 of the Tanzanian Constitution. Under Article 8 of the Constitution, the United Republic of Tanzania pursues and 'adheres to the principles of democracy and *social justice.*'

The foregoing are, thus, the foundations upon which social justice in Tanzania is grounded – that is to say, the Government of Tanzania derives its sovereignty from the people whose welfare is the primary objective of the Government. The Government is also accountable to the people who are entitled to participate in the affairs of their Government as per the Constitution. This view underlies the contention that, although some of the socio-economic rights are not contained in the justiciable part of the Constitution – that is, the Bill of Rights – they can be realised through the foregoing social justice objectives which the Government strives to achieve.

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271 Report of the Constitution Drafting Committee , Vol. 1, p. v. quoted in OKERE, O., "Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution," **The International and Comparative Law Quarterly,** Vol. 32 No. 1, 1983, available at http://www.jstor.org/pss/759474 (accessed 19 August 2008).

272 JUMA, I.H., "Constitution-Making in Tanzania: The Case for a National Conference," *op. cit*.

273 *Ibid*, quoting MUNISHI, K.M., *Journal of the Parliaments of the Commonwealth*.

This is so argued principally because, as Samatta, C.J. (as he then was), held in *Julius Ishengoma Francis Ndyanabo v. A.G.*,[274]

> [T]he Constitution of the United Republic of Tanzania *is a living instrument, having a soul and consciousness of its own as reflected in the Preamble and Fundamental and Directive Principles of State Policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and rule of law*. [Emphasis added].[275]

The major object of the Constitution of Tanzania is set out in Article 9, which 'is to facilitate the building of the United Republic as a nation of equal and free individuals enjoying freedom, justice, fraternity and concord.' The Constitution also requires all state authorities and institutions to carry out their statutory duties in accordance with the law, and moving Tanzania into full compliance with the provisions of the UDHR.[276]

(ii) The Spirit of the Directive Principles of State Policy in Informing the Interpretation of Socio-Economic Rights into the Tanzanian Bill of Rights

The Directive Principles of State Policy in the Tanzanian Constitution are expressly provided for in Article 11. In terms of this Article,

> 11.-(1) The state authority shall make appropriate provisions for the realisation of a person's right to work, to self education and social welfare at times of old age, sickness or disability and in other cases of incapacity. Without prejudice to those rights, the state authority shall make provisions to ensure that every person earns his livelihood.
> (2) Ever person has the right to self education, and every citizen shall be free to pursue education in a field of his choice up to the highest level according to his merits and ability.
> (3) The Government shall endeavour to ensure that there are equal and adequate opportunities to all persons to enable them

274 Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 64 of 2001 (unreported).
275 *Ibid*, p. 17 of the typed judgment.
276 Article 9(f) of the Constitution of Tanzania.

to acquire education and vocational training at all levels of schools and other institutions of learning.

The essence of these Directive Principles of State Policy is that they 'form a code of conduct both for the legislators and administrators and set before the country a socio-economic objective that is to be realised as early as possible. These principles and objectives help the people to assess, in the light of a clearly laid standard, the achievement of each Government in office at the time of every general election.'[277]

According to Article 7(1), the Government, all its organs and all persons or authorities Exercising executive Legislative or judicial functions are vested with the duty 'to take cognizance of, observe and apply the provisions of this Part of this Chapter,' including the Directive Principles of State Policy. The language of these provisions is more or less similar to the wording of section 34(1) of the Ghanaian Constitution, though the latter is more elaborate.[278]

While Article 7(1) of the Tanzanian Constitution imposes a duty and responsibility on the state and its organs to take cognizance of the directive principles of state policy, section 34(1) of the Ghanaian Constitution provides *guidance* to 'all citizens, Parliament, the President, *the Judiciary,* the Council of State, the Cabinet, political parties and other bodies and persons *in applying or interpreting this Constitution or any other law* and in taking and implementing any policy decisions, for the establishment of a just and free society.'

This means that, the language used in the Ghanaian Constitution is more emphatic and explicit than the Tanzanian one, in relation to the duty of the Judiciary, *inter alia*, to bring into play the directive principles of state policy while applying and interpreting the Ghanaian Constitution or any other law. So, while in Ghana, the Judiciary may easily interpret the provisions relating to directive principles of state policy into the Bill of Rights,[279] in Tanzania it may be difficult to do so unless the Court takes the liberal views taken by either the Canadian or the Indian

277 JUMA, I.H., "Constitution-Making in Tanzania: The Case for a National Conference," *op. cit*., p. 413, referring to PYLEE, M.V., **India's Constitution**, London: Asia Publishing House, 1962, p. 15.

278 The Ghanaian version of this directive principle is thus: "34. (1) The Directive Principles of State Policy contained in this Chapter *shall guide* all citizens, Parliament, the President, *the Judiciary,* the Council of State, the Cabinet, political parties and other bodies and persons *in applying or interpreting this Constitution or any other law* and in taking and implementing any policy decisions, for the establishment of a just and free society. [Emphasis supplied]."

279 *See* for instance, *New Patriotic Party v. Attorney General*, *op. cit*.

Supreme Courts.[280] This is further compounded by the provisions of paragraph (2) of Article 7 of the Tanzanian Constitution, which provides that,

> (2) The provisions of this Part of this Chapter are not enforceable by any court. No court shall be competent to determine the question whether or not any action or omission by any person or court, or any law or judgment complies with the provisions of this Part of this Chapter.

However, the foregoing provisions seem to be in direct conflict with the new provisions of Article 107A (1) and (2), of the Constitution which provide that:

> *107A.-(1) Mamlaka yenye kauli ya mwisho ya utoaji haki katika Jamhuri ya Muungano itakuwa ni Mahakama.*
>
> *(2) Katika kutoa uamuzi wa mashauri ya madai na jinai kwa kuzingatia sheria, Mahakama zitafuata kanuni zifuatazo, yaani:*
>
> *(a) kutenda haki kwa wote bila kujali hali ya mtu kijamii au kiuchumi;*
>
> *(b) kutochelewesha haki bila sababu ya kimsingi;*
>
> *(c) kutoa fidia ipasavyo kwa watu wanaoathirika kutokana na makosa ya watu wengine, na kwa mujibu wa sheria mahususi iliyotungwa na Bunge;*
>
> *(d) kukuza na kuendeleza usuluhishi baina ya wanaohusika katika migogoro; na*
>
> *(e) kutenda haki bila kufungwa kupita kiasi na masharti ya kiufundi yanayoweza kukwamisha haki kutendeka.*[281]

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280 The liberal interpretation of socio-economic rights into a constitution that does not have express provisions protecting these rights in a Bill of Rights is discussed at length in MASHAMBA, C.J., **Enforcing Social Justice in Tanzania: The Case of Economic and Social Rights,** LL.M. Thesis submitted to the Open University of Tanzania, 2007.

281 Literary translated, the new provisions may be read as: "107A.-(1) The Judiciary shall have final authority of administering justice in the United Republic of Tanzania. (2) In the determination of civil and criminal matters according to the law, the courts shall have regard to the following principles, that is to say: (a) Administering justice for all regardless of their social or economic status; (b) Determine cases without unnecessary delays; (c) Issuing orders for adequate compensation for victims of tortious wrongs, in accordance to a specific Act of Parliament in force at the time being; (d) Encourage reconciliation between the parties to a dispute; and (e) Administering justice without being constrained unduly by technical requirements, which are capable of preventing justice from being done."

(c) Some Court Decisions that can inspire the Interpretation of Socio-Economic Rights into the Tanzanian Bill of Rights through Directive Principles of State Policy

In *N.I. Munuo Ng'uni v. The Judge i/c High Court (Arusha) and the Attorney General*,[282] the Court of Appeal of Tanzania interpreted Article 107A of the Constitution purposively to the effect that, it is the Courts of law which have final say in the administration of justice in Tanzania; and further that, no provisions of law should ouster their jurisdiction. In *Julius Ishengoma Francis Ndyanabo v. the Attorney-General*,[283] the Court of Appeal held that, the Constitutional provisions 'touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights (and) our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail.'[284] The Court further stated that:

> Access to Court is, undoubtedly, a cardinal safeguard against violations of one's rights, whether those rights are fundamental *or not*. Without that right, there can be no rule of law and, therefore, no democracy. A Court of law is the "last resort of the oppressed and bewildered." Anyone seeking a legal remedy should be able to knock on the doors of justice and be heard.[285] [Emphasis supplied].

In view of the Court of Appeal's observation, in the case of *Ndyanabo,* 'Restrictions on fundamental rights must be strictly construed (by the Court).'[286] This view was also adopted by the High Court in *Rev. Christopher Mtikila v. A.G.*,[287] where Justice Massati held that:

> A Constitution must not be construed in isolation, but in its context which includes the history and background to the adoption of the Constitution itself. It must also be construed in a way which secures for individuals the full measures of its provisions.[288]

282 High Court of Tanzania at Arusha, Civil Cause No. 3 of 1998 [unreported].
283 Court of Appeal of Tanzania at Dar Es Salaam, Civil Appeal No. 64 of 2001 (unreported).
284 *Ibid*, pp. 17-18.
285 *Ibid*, p. 25.
286 *Ibid*, p. 18.
287 High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 10 of 2005 (unreported).
288 *Ibid*, p. 14.

thus, the Court in Tanzania can use this approach to interpret into the Constitution socio-economic rights. This view could further be reinforced by the Ghanaian case of *New Patriotic Party v. Attorney General,*[289] where Sophia Akuffo, JSC, observed that,

> As far as courts are concerned, the Directive Principles are intended to serve as an aid to the construction or interpretation of the Constitution and all other laws. This is not, however, to demote the Principles to a secondary position relative to the other provisions of the Constitution.

In *Kukutia ole Pumbun and Another v. A.G. and Another,*[290] Kisanga, J.A. (as he then was) held that, in considering any act which restricts fundamental rights of the individual, such as the right to free access to the Court of law in this case, the Court has to take into account and strike a balance between the interests of the individual and those of the society of which the individual is part. So, it can be generally argued that, the Courts of law in Tanzania could use the spirit of the Directive Principles of State Policy to interpret into the Bill of Rights all socio-economic rights that are not included therein along the above lines.

After all, in its Fundamental Objectives and Directive Principles of State Policy the Constitution in Article 9 states that, Tanzania is a state founded on democracy and social justice.[291] So, as the Indian Supreme Court has held more than once, the Fundamental Objectives and Directive Principles of State Policy in the Constitution are essential in interpreting the content of socio-economic rights. The Indian approach of expanding the scope of the right to life, in this regard, to include the right to livelihood, the basic necessities of life (such as adequate food, clothing and reading facilities) and the rights to health, shelter, and education,[292] could be appropriately adopted in the Tanzanian context.

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289 [1996-97] SCGLR 729 or [1997] 2 CHRLD 5.

290 [1993] TLR 159 (CA).

291 *See* also Mwalusanya, J. (as he then was) in *Peter Ng'omango v. Gerson M.K. Mwangwa and A.G.* [1993] TLR 77 (HC).

292 *See* for instance, the decisions of the Indian Supreme Court in *Tellis & Another v. Bombay Municipal Corporation and Others* (1987) LRC (Const) 351; *Francis Coralie Mullin v. The Administrator, Union of Territory of Delhi* (1981) 2 SCR 516; *Krishna v. State of Andhra Pradesh & Another* (1993) 4 LRC 234; and *Paschim Banga Khet Mazdoor Samity v. State of West Bengal* (1996) AIR SC 2426.

6. Conclusion

In particular, this Article's main thrust has been premised in the contention that, "Fundamental Objectives and Directive Principles of State Policy" set out in Part II of Chapter One of the Constitution of Tanzania can be used to guide and inform judicial interpretation of socio-economic rights into the Bill of Rights. The Article also has contented that, these principles can guide the Court when giving practical effect to socio-economic rights, as they are a very important path guiding all the three Arms of the Tanzanian State in their official functions, which is to achieve the state's fundamental objective – i.e., adherence to the principles of democracy and social justice.[293]

In effect, the foregoing contention could, to a larger extent, imply two actions. First, the Executive Arm of the state and Parliament could respectively formulate policies and enact specific legislation on the basis of the provisions of Articles 7(1), 8, 9 and 11 of the Constitution to positively respect, protect and fulfil socio-economic rights. And, second, on the basis of the provisions of Article 7(1) of the Constitution, Courts of law in Tanzania could be guided by the spirit and purpose of Part II of Chapter One of the Constitution to interpret socio-economic rights into the Bill of Rights.

293 Article 8 of the Constitution of Tanzania, 1977.

ADIEU FROM THE BENCH: EXCERPTS FROM THE FAREWELL SPEECH OF HON. JUDGE (rtd) ANTHONY. C. MREMA, ON THE OCCASION OF HIS RETIREMENT FROM THE BENCH, DELIVERED ON THE 25TH OF OCTOBER, 2007 IN MBEYA

1. Introduction

As many of our readers may be aware, it is common for Judges of the High Court to make farewell key note addresses on the occasion of their retirement. As they make their final bows out of their Courts and to their colleagues whom they leave behind at the Bench, they will henceforth not be bound by the Courts' rules and etiquettes, and are thus free to speak out their minds critically about events in the court, and what can be done to improve dispensation of justice in the country for the benefit of those they leave behind at the bench, and the general public at large.

Today, the law Reformer Journal is delighted to present to its readers, a synopsis of one such farewell speech delivered by one of the prominent Judges of the High Court, His Lordship (Retired) Justice A. C. Mrema, who retired from the Bench just a year ago. In that speech, his lordship highlighted on six key issues of great significance in the dispensation of justice, spanning from the role of the Judiciary as the fountain of justice to corruption as an enemy of justice. The most important key points of his address are reproduced below:

2. The Role of Judiciary as a Fountain or Custodian of Justice

On this subject, his lordship notes that, "A weak and un-impartial Judiciary, in particular in a democratic state like Tanzania, will fail to protect the country's democracy which is based on the freely expressed will of the people - to determine their own political, economic, social and cultural system, including their full participation in all aspects of their lives. In other words, the promotion and protection of human rights and fundamental freedoms both at the national and international level cannot flourish or be sustained unless there is a strong and unshakable Judiciary".

That, "The shield of Judges is the oath of office they took or take before His Excellency the President of the United Republic of Tanzania, in that in all their acts, whether of commission or of omission, they would be guaranteed by the Country's policies so as to attain the best in the application of the Rule of Law and

to ensure that justice is given without fear or favour, affection or ill-will".

That, "Judiciary must continue to play its role of ensuring that, democracy in our country grows and our people enjoy the personal freedoms guaranteed to them by the Constitution," Justice Mrema quotes the learned retired Chief Justice, Hon. Barnabas A.Samatta.

That, "the rule of Law must be protected above everything in this Country. The sky being the limit. Any flagrant interference with the rule of law and independence of Judiciary shall definitely impair the pillars of democracy - and if that happens the same shall definitely receive the appropriate condemnation by the people from whom the Supreme Law of the land, i.e. the Constitution and the other laws subordinate to it, did receive approval and authority".

That, "Independence of the Judiciary means every Judge or Magistrate, as the case may be, is free to decide matters brought before him in accordance with his assessment of the facts and his understanding of the law without any improper influence, inducements, or pressures, direct or indirect from any quantum or for any reason and in fact this is in accordance with the oath of office they take to dispense justice impartially, justiceably and without any prejudices".

That, "As we have always been warned, independence of the Judiciary is not a permit to discharge the judicial functions without following and adhering to both substantive and procedural laws, which guide Judges and Magistrates".

That "Judges have been and continue to be criticized for having not taken indomitable courage to revolutionize the law through their Judgments. 'Judiciary should not cow down and hide behind reasons, such as lack of proper legislation to empower them'" Justice Mrema quotes Prof. Kivutwa Kibwana.

3. The Role of Judicial Officers and the Legal Members of The Bar

With regard to the role of Judicial officers and members of the Bar, His lordship had this to say: "Legal members of the Bar should be resourceful persons to kindle the potential dynamism and vibrancy of Judges by presenting before the High Court or the Court of Appeal reference cases and jurisprudential arguments; and in that process, the law will continue to be developed. In other words, Judges have to be moved, otherwise criticism may be levelled against them as it happened in the case of *Attorney General is Vs V.W.K. Butambala* (1992) T.L.R - where the Learned Trial Judge was branded as "an omnibus Judge".

4. Judges and Magistrates Should Work Diligently and Cautiously

That, "Currently, it is a crucial period of drastic changes taking place globally and this would mean, therefore, in my view, that, Judges and Magistrates must act vibrantly and dynamically to dispense justice expeditiously, impartially and justice ably".

That, "The word "TIME" should be used as a guiding star in relation to speed up trials. We all know that a law has been enacted whereby a court judgment should be delivered within 90 DAYS from the date the proceedings in a particular case were completed and judgment reserved. Justice delayed is justice denied".

"But again, delays in disposing of cases are not contributed to by TIME FACTOR alone, there are many, including existence of absolute or archaic laws in our statues. Such archaic laws should be dropped as they are no longer relevant to the situations or circumstances under which they were enacted".

That, "Lawyers at the Bar should not sit idle and wait for the Judiciary to advise the Government to amend or get rid of Laws which appear obsolete. Advocates, as Officers of the Court, owe a duty to the Nation in the administration of justice, in particular in the process of law making, or development of the law. As for instance, they could remind the Tanzania Law reform Commission as to which laws should be struck off the statutes or which necessary and important regulations have not been made by the Chief Justice; and the same are necessary for the better carrying out of Judiciary's judicial functions".

5. Corruption

On the cancerous effect of corruption in undermining justice, his lordship had this to say: "It suffices to state that, the top level of the Judiciary has never lied low in the fight of this cancerous evil afflicting the society at large". "Corruption perverts justice, and if allowed to spread would destroy our nation. Therefore, in accordance with my duties under the constitution, I shall insist that corruption in any form is exposed to the gaze of the people. Where appropriate, prosecution will follow. Members of this House, and of the Government, will be well advised not only to resist corruption, but also to conduct themselves in such a manner that it is obvious that they are not corrupted," he quotes the late Father of the Nation, Mwalimu Julius Nyerere.

That, "The duties and responsibilities bestowed on judicial officers (Judges and

Magistrates) are of high calibre and persons who cannot adhere to judicial ethics will definitely not be suitable for judicial work. The Judiciary should now look at another facet of the problem and put everything in place to ensure that the undesirables do not get any seat in this enviable MIRROR AND GUARDIAN OF JUSTICE".

"But on the other hand, the top leadership of the Judiciary should stand firm to protect clean Judges and Magistrates, for experience has shown that some of these judicial officers have fallen pray of wicked persons, who, because they happened to loose their cases at their hands, according to law, picked up falsity to mud-sling them all bent to damage their reputation; and when this happens, unfortunately, the Authority concerned does not seriously and painstakingly delve into such allegations to unearth the truth. White should remain to be White lie and Black truth should remain Black truth".

That, "With respect, I implore the Judiciary's top leadership to be supersensitive and very cautious with anonymous letters containing pseudo complaints against judicial officers. Perceived corruption should not be looked at an arm length but quite closely. This is because a judicial officer may appear to have acquired more than he was before, but for reason that he is a judicial officer he is perceived by onlookers as being corruptive or one soaked in bribes. That is a gross misconception leading to an injustice to the one who is wrongly so perceived. Investigation should be done, even if it is carried out secretly, so long as reports of that particular judicial officer will be traced at the office of the ETHIC LEADERSHIP COMMISSION. Good governance does not earn credit or receive common support if the Authority concerned relies on unkind and baseless rumours or mud-slinging publications in whatever form".

6. Non-Judicial Employees and Facilities

Touching on the critical role of non-judicial officers in the dispensation of justice, his lord ship said: "Judges and Magistrates cannot operate in isolation of these humble employees. Their support to the judicial officers is immense and invaluable and I find it unnecessary to list down their duties here. Their support to the judicial officers is immense and invaluable. However, they are not fairly remunerated nor are they humanly motivated in the same manner as it happens in the other government circles, or public or private institutions. Their remunerations should be increased and be trained further.

With regard to the application of information and communication technologies in assisting speedy delivery of justice, his lordship had the following to say: "It

is good for the Judiciary to computerize its record by supplying computers to every Zone of the High Court, and when funds are available to the Regional Courts. But this provision will remain useless if training of Judges and employees who are supposed to use those computers are not trained in that technology. All Libraries in the High Court Zones should be installed with computers stored with relevant case authorities and other necessary information for judicial work; the same should be manned by trained competent Librarians.

That, "We are all ware that we are in the 21st Century, the era of science and technology. This means therefore that the millennium itself is dictating to us what we should do and that we really do not have any option regarding change. The Judiciary is bound to abandon its hitherto archaic ways in which she is conducting its affairs. She has to put in place changes to accommodate computer technology, internet, websites, *et ce tere.* Until today, for example, the Judiciary is still embarking on sending by post copies of judgments to the High Court centres – a system which is very much outdated".

7. Magistrates

Concerning the need to train judicial officers, his lordship was of the following view: "Magistrates who wish to pursue further studies but they find themselves bottled-necked by the Government policy that they must complete three years in service first before doing that. We know that the main reason behind this policy is to restrict disruption of services to the people by the newly employed magistrates. That is a good policy but on the other hand it is against HUMAN RIGHT LAW, i.e. THE RIGHT TO EDUCATION. It is always that the Government may be financially able to fund for further studies to those who are in need and have the necessary qualification even when the 3 YEARS RESTRICTIVE period has not expired.

His lordship concludes: "If that is the position, why should employers of Magistrates who have not finished 3 years in service be denied that Constitutional right to go for further studies if they chanced to get scholarships from their private sources? That chance may come once only! Some Resident Magistrates had to give 24 Hours Notice to abandon their jobs, or some of them just absconded simply because their employer (judiciary) was not ready to release them. I think this is another area where the top Management of the Judiciary should re-examine the policy and do justice in situations such as I have mentioned above".

LEGAL JOKES AND STORY

Compiled by Fredy Kandonga[294]

LEGAL JOKES

It was a hot summer day, and the old courthouse was just as hot. The air was thick and humid, and the jury was having a hard time staying focused. One of the jurors succumbed to the heat, falling asleep just as the victim was being questioned by the prosecutor.

"The defendant is accused of making obscene phone calls to your home. Would you please tell the jury precisely what the defendant said when he called you," asked the prosecutor.

"I can't do that," the victim replied. "It was so crude and disgusting. I can't use language like that."

"Would it help to just write it down?"

The victim wrote out every detail of what the obscene caller had said, and passed the note to the Judge. The Judge read the note. It was then passed to the prosecutor, the defence attorney, and finally to the jury.

The sleeping juror was seated at the back corner of the jury box, and was the last to receive the note. He was awoken with a nudge from an attractive young juror, seated next to him, and she passed him the note. He read it, gazed in awe at the woman, and read it again. He turned to her, smiling broadly, and winked. He then put the note into his pocket.

The Judge demanded, "Please pass that note to the bailiff."

"But your honour," the juror protested, "It's a private matter."

At the start of an important trial, a small town attorney called his first witness to the stand. She seemed like a sweet, elderly woman. He approached her and asked, "Mrs. Jones, do you know me?"

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294 LL.B (Hons) UDSM, Legal Officer Law Reform Commission of Tanzania

She responded, “Why, yes, I do know you Mr. Williams. I’ve known you since you were a young boy. You’ve become a huge disappointment to me. You lie, you cheat on your wife, you manipulate people and talk about them behind their backs. You think you’re a hot shot lawyer, when you haven’t the brains to realize you never will amount to anything more than a two-bit paper pusher. Yes, I know you.”

The lawyer was stunned. Not knowing what else to do he pointed across the room and asked, “Mrs. Jones, do you know the defence attorney?”

She replied, “Why, of course I do. I’ve known Mr. Bradley since he was a youngster, too. I used to baby-sit him for his parents. And he, also, is a real disappointment. He’s lazy, bigoted, never has a nice word to say about anybody, and he drinks like a fish. He’s been divorced five times, and everybody knows that his law practice is one of the shoddiest in the entire state. Yes, I know him.”

The Judge rapped his gavel, to quiet the tittering among the spectators in the courtroom. Once the room was silent, he called both attorneys to his bench. In a quiet, menacing voice, he warned, “If either of you asks her if she knows me, you’ll be jailed for contempt!”

A trial had been scheduled in a small town, but the court clerk had forgotten to call in a jury panel. Rather than adjourning what he thought was an exceptionally simple case, the Judge ordered his bailiff to go through the courthouse and round up enough people to form a jury. The bailiff returned with a group of lawyers.

The prosecutor felt that it would be an interesting experiment to try a case before a jury of lawyers, and the defence counsel had no objection, so a jury was empanelled. And the trial went very quickly -- after only an hour of testimony, and very short closing arguments, both sides rested. The jury was then instructed by the Judge, and was sent back to the jury room to deliberate.

After nearly six hours, the trial court was concerned that the jury had not returned with a verdict. The case had in fact turned out to be every bit as simple as he had expected, and it seemed to him that they should have been back in minutes. He sent the bailiff to the jury room, to see if they needed anything.

The bailiff returned, and the Judge asked, “Are they close to reaching a

verdict?" The bailiff shook his head, and replied, "You're honour, they're still doing nomination speeches for the position of foreman."

An attorney, cross-examining the local coroner, queried, "Before you signed the death certificate had you taken the man's pulse?"

"No," the coroner replied.

"Well, then, did you listen for a heart beat?"

The coroner answered, "No."

"Did you check for respiration? Breathing?", asked the attorney.

Again the coroner replied, "No."

"Ah," the attorney said, "So when you signed the death certificate you had not taken any steps to make sure the man was dead, had you?"

The coroner rolled his eyes, and shot back "Counsellor, at the time I signed the death certificate the man's brain was sitting in a jar on my desk. But I can see your point. For all I know he could be out there practicing law somewhere."

A prominent city lawyer went duck hunting in rural Tennessee. He shot and dropped a bird, but it fell into a farmer's field on the other side of a fence. As the lawyer climbed over the fence to collect the bird, an elderly farmer drove up on his tractor and asked him what he was doing.

The lawyer replied, "I shot a duck and it fell in this field. Now I'm going in to retrieve it."

The old farmer looked at the lawyer in the eyes and stated firmly, "This is my property, and you are not coming over here."

The lawyer huffed angrily, "I am one of the best trial attorneys in the country. If you don't let me get my duck, I'll sue you."

The old farmer smiled. “Apparently, you don’t know how we do things in Tennessee. We settle small disagreements like this with the Tennessee Three Kick Rule.”

The lawyer asked, “What’s the Tennessee Three Kick Rule?”
The Farmer answered, “Well, first I kick you three times and then you kick me three times, and so on, back and forth, until someone gives up.”

The attorney thought about the proposed contest and decided that he could easily take the old codger. He agreed to abide by the local custom.

The old farmer slowly climbed down from the tractor and walked up to the lawyer. His first kick to the shin had the lawyer hopping around on one foot when suddenly the farmer planted the toe of his heavy work boot into the lawyer’s groin and dropped him to his knees. The attorney was flat on his belly when the farmer’s third kick to a kidney nearly caused him to pass out.

The lawyer summoned every bit of his will and managed to get to his feet and said, “Okay, you old coot, now it’s my turn.”

The old farmer smiled and said, “Now, I give up. You can have the duck.

LAW STORY

THE BEST LAWYER STORY OF THE YEAR

A Charlotte, NC lawyer purchased a box of very rare and expensive cigars and then insured them against fire among other things. Within a month, having smoked his entire stockpile of these great cigars and without yet not having made even his first premium payment on the policy, the lawyer filed a claim against the insurance company.

In his claim, the lawyer stated the cigars were lost “in a series of small fires.” The insurance company refused to pay, citing the obvious reason that the man had consumed the cigars in the normal fashion. The lawyer sued.. and WON!

In delivering the ruling the Judge agreed with the insurance company that the claim was frivolous. The Judge stated nevertheless, that the lawyer “held a policy from the company in which it had warranted that

the cigars were insurable and also guaranteed that it would insure them against fire, without defining what is considered to be unacceptable fire" and was obligated to pay the claim.

Rather than endure lengthy and costly appeal process, the insurance company accepted the ruling and paid $15,000 to the lawyer for his loss of the rare cigars lost in the "fires."

After the lawyer cashed the check, the insurance company had him arrested on 24 counts of ARSON!!! Using his own insurance claim and with the testimony from the previous case being used against him, the lawyer was convicted of intentionally burning his insured property and was sentenced to 24 months in jail and a $24,000 fine.

Call for Subscription of Articles for Publication in the Journal

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

Persons from whom Subscriptions are invited, Themes and Selected Topics for Coverage

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

The Mandate of the Commission Publishing the Journal

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

Aims and Objectives of the Journal

For more effective performance of its functions, the Commission is required to establish and maintain a system of collaboration, consultation and cooperation

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

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

Subject Matter of Articles to be Submitted and Deadline for Submission

Articles for the Journal may be written on any branch of law; specific legislation; legal concept or system; administration of civil or criminal justice; environmental laws; human rights laws; constitutional law; electoral laws and or laws relating to leadership code of ethics. In order to meet publication deadlines, we would appreciate to receive Article for publication by **30/06/2009** and the Article should preferably be submitted in electronic form.

Length of Subscriptions

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

Style Guide

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

Early Indication of Intention to Subscribe

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

Contact Address

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

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