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The Perspectives of Mwalimu Julius Kambarage Nyerere on the Rule of Law
and National Development in Tanzania Between 1961 and 1985: A Critical
Analysis

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Eliminating Forms of Discrimination Against Persons with Disabilities in
Tanzania with Special Reference to Protection of the Right to Life and Free
Medical Care to Persons with Albinism

Prof. (Dr.) Mohammed Saheb Hussain and Mr. Bernard Otieno

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Foreword

It is my privilege and honor to welcome members of the academic community to this issue of the SAUT Law Journal which features articles on topical and important subjects in the field of law. This journal was launched a decade ago; the first issue was released in June 2011. the journal, however, remained dormant for some years. I congratulate staff of the School of Law and the whole publication team for coordinating the revival of the journal. It is my hope that the editorial team will ensure the journal's publication cycle and reputation are maintained and strengthened.

The SAUT Law Journal cherishes the mission of the University: Researching, Publishing and Educating. Besides, the Journal affords an ideal and strategic opportunity for the academic community to disseminate new knowledge resulting from their research. As for the practitioners, the journal offers a research repository from which they can gather new knowledge. This issue in particular covers diverse areas of topics including philosophy of law, land law, competition and consumer protection law, human rights law as well as law science and technology.

It is my urge, thus, that all of us in Tanzania and elsewhere should make good use of this journal; Karibu.

Dr. Neema Bhoke Mwita
Ag. Dean School of Law
St, Augustine University of Tanzania (SAUT)-Mwanza.

Editor's Note

Greetings,

On behalf of the Board of Editors, I am delighted to welcome all our readers to this edition of the SAUT Law Journal. The Journal is a bi-annual publication which appears in June and December every year. The June issue is on general legal matters while the December issue is designated for specific legal topics. The call for papers for the December issue usually specifies the areas of focus and the theme of publication. In addition to June and December issues, where necessary, the Journal may appear at any time as a special edition. Further, the journal is published in both online and print formats to allow access to as many reader as possible.

This edition of the Saut Law Journal features both theoretical and practical legal articles, it is therefore, an ideal source of knowledge for all the members of legal fraternity (academia and practitioners) and all with interests to enhance their knowledge on legal matters.

Enjoy reading!

Dr. George Mwaisondola
The Executive Editor

The Perspectives of Mwalimu Julius Kambarage Nyerere on the Rule of Law and National Development in Tanzania Between 1961 and 1985: A Critical Analysis

Dr. Thobias R.Mnyasenga*

Abstract

Scholars present Mwalimu Julius Kambarage Nyerere (Mwalimu) with two incompatible images towards the rule of law and national development in Tanzania. Whereas at one end, he is presented as a role model in upholding the rule of law, at the other end, he is presented conversely. This spoils the good image of Mwalimu in handling the rule of law issues and national development in Tanzania. Thus, this paper examines various policies and legislations adopted by the Government between 1961 and 1985 in order to appreciate Mwalimu's contribution in handling the rule of law and national development in Tanzania. The article argues that, despite Mwalimu's commitment to upholding the rule of law, his reign was truly associated with some incidents of waiver of the rule of

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law. Such incidents included the rejection of the Bill of Rights at independence, extension and application of oppressive colonial legislation, enactment of new draconian legislation that curtailed freedoms and civil rights of individuals, abolition of independent cooperative societies, implementation of forceful collective village programme in the 1970s, and the forceful nationalization of private properties in the implementation of the Arusha declaration. Nonetheless, such incidents were not actions of a dictator. It was the interests of the wider community that guided Mwalimu in his decisions and actions.

Keywords: Nyerere, rule of law, development, Tanzania.

1.0 Introduction

There seems to be a resilient discourse about Mwalimu's perspectives of the rule of law and national development. I, nonetheless, admit from the onset that this is a contentious debate which makes writing on the perspectives of Mwalimu of the rule of law and national development intricate indeed. The intricacy arises from the fact that, scholars present Mwalimu with two incompatible images towards the rule of law in his endeavors to bring national development in Tanzania.

At one end, Mwalimu is presented as a role model in upholding the rule of law through his commitment and struggle for freedom, equality of all the people, justice for all and anticorruption efforts. At the other end, he is criticized for breaching the rule of law in his initiatives to fight corruption and bring national development. This controversy causes

misunderstanding among the people especially the young generation who have had no opportunity of witnessing the reign of Mwalimu before he voluntarily stepped down in 1985. It also lowers down the good image of Mwalimu in handling rule of law and national development issues in Tanzania and the importance of commemorating him as father of the nation.

This paper is, therefore, intended to unfold the said controversy and clear the misunderstanding among the people on the perspectives of Mwalimu on the rule of law and national development. The idea is to honour Mwalimu's contribution as farther of the nation in upholding the rule of law and national development in Tanzania. The paper focuses on the examination of the contribution of Mwalimu in handling the rule of law issues and national development in Tanzania between 1961 and 1985. The article examines various policies and legislations adopted by the Government to ensure freedom, equality and justice for all; review of the judicial system; administration of criminal justice between 1961 and 1985; threats of the rule of law and national development; and government and community responses to the threats of the rule of law and national development; and concluding remarks.

The author used desk review to collect qualitative data through content analysis of primary and secondary sources. Primary sources involved legal texts and secondary sources involved documents other than legal texts including government reports and other literary materials in hard and soft copies. The article is organized into six major items: introduction; the concepts of rule of law and national development; contribution of Mwalimu in handling rule of law issues and national development between 1961 and 1985; threats to the rule of law between 1961 and 1985

in Tanzania; government and community responses to the threats of the rule of Law; and concluding remarks.

2.0 The Rule of Law

The rule of law is not a new concept though still lacks precise meaning.¹ It is a broad and dynamic doctrine whose meaning, scope and application vary from one culture to another and from one country to another.² In essence, it is meant to ensuring limited government and protection of individual rights against violation by government misuse of its coercive powers.³ It was A.V. Dicey who provide a classic definition of the rule of law in his book, *'Introduction to the Study of the Law of the Constitution'* published in 1885. Basing on the English constitution, A.V. Dicey identified three things as central to the rule of law- absolute supremacy of regular law as opposed to the influence of arbitrary powers or wide discretionary authority on the part of the Government; equality before the law or equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; and predominance of the legal spirit.⁴

Dicey's definition of the rule of law was bitterly criticized but stands to date as the basis of defining the rule of law. It is not,

¹ Wade, W & Forsyth, C.(2014), *Administrative Law*, 11th Ed., London, Oxford University Press, pp.20-21; Phillips, O.H., Jackson, P., & Leopold, P.(2001), *Constitutional and Administrative Law*, 8th Ed, London: Sweet Maxwell, pp.29-30.

² Bradley, A.W & Ewing, K.D.(2007), *Constitutional and Administrative Law*, 4th Ed, England, Pearson Education Limited, p.95.

³ *Ibid.* p.105; Giussani, E.(2008), *Constitutional and Administrative Law*, Singapore, Sweet &Maxwell, p. 60.

⁴ Bradley, *op.cit.* p.96-97.

however, the purpose of this article to discuss such criticisms. It suffices to say, much of Decey's exposition is somewhat outmoded. Today, the rule of law has assumed a broader meaning and scope of application to cover social and economic aspects which lie far beyond the ambits of the legal profession and the practice of law.⁵ Attempts have further been made to link the rule of law and national development.⁶ Consequently, this article uses the concept of rule of law to mean a political and moral doctrine which is meant to ensuring limited but effective government and protection of individual rights against administrative abuse of powers and public lawlessness. The next item examines, albeit briefly, the concept of national development.

3.0 National Development

There appears to be no uniformly devised definition of national development. Conceptual understanding of development varies from place to place depending on the level of development of a given society.⁷ In the African context, national development may be viewed as a continuous process of modernization of the people and their socio-economic lives.⁸ That is, in African context, national development means the ability of a country to address poverty, diseases and ignorance of its people

⁵ *Ibid.* pp.104-105.

⁶ Mnyasenga, T.R. (2021), *The Role of Universities in Enhancing the Rule of Law and National Development in Tanzania*, South Asian Law Review, vol.2(2), p. 9.

⁷ *Ibid.* p.20.

⁸ H.J. Mosha (2008), *The Role of African Universities in National Development: A Critical Analysis*, Comparative Education, vol. 22(2), p. 93.

irrespective of the economy being agrarian or industrial.⁹ Mwalimu vehemently declared poverty, diseases and ignorance in addition to corruption as enemies of the people.¹⁰ Thus, the ultimate development goal in developing countries is to address poverty, diseases and ignorance of the people. But national development cannot be achieved without heeding the rule of law.¹¹

Where there is no rule of law, corruption and illegal expropriation of public funds dominate the country.¹² And where there is corruption, there is no national development because, let alone the denial of justice, corrupt practices decelerates all government efforts to attain national development.¹³ It is for this reason that Mwalimu undertook strong measures to deal with corruption and economic sabotage. Among such measures was the enactment of the Economic Sabotage (Special Provisions) Act, 1983,¹⁴ which set very severe punishments for economic crimes and deviated from the renowned principles of criminal justice as discussed under section 6 *infra*.

4.0 The Role of Rule of Law in National Development

Gone are the days of the *laissez-faire state* of the 19th Century which considered the rule of law as an instrument of promoting free enterprise and restricting state interventions on individual

⁹ J.K.Nyerere (1965), *Freedom and Unity*, Oxford University Press, p. 82.

¹⁰ *Ibid.*

¹¹ Mnyasenga, *op.cit.* p.10.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Act No.9 of 1983.

affairs.¹⁵ Today, under the *socio-welfare* state, the rule of law is not a tool to restrict state interventions on individual matters but a safeguard against abuse of government powers. The socio-welfare state cannot effectively discharge its responsibilities without discretion powers and functions.¹⁶ The rule of law is, therefore, a catalyst of socio-economic development which enables government to take and implement viable and lucrative development policies and actions with a wider community benefit than individual interest.¹⁷

The rule of law enables the state to take proactive policies and decisions to bring rapid socio-economic national development.¹⁸ Therefore, the role of the rule of law in national development cannot be overemphasised. It ensures public order, crimes control, combating corruption, equal treatment of citizens, procedural fairness and access to justice for all the citizens.¹⁹ These benefit of the rule of law rest at the heart of national development.²⁰ On the basis of this foregone exposition, we can now turn our attention to the contribution of Mwalimu in handling the rule of law and national development between 1960s and 1980s in Tanzania.

5.0 Mwalimu Vis-À-Vis Rule of Law and National Development Issues

¹⁵ F. A. Hayek (1945), *The Road to Serfdom with the Intellectuals and Socialism*, the Institute of Economic Affairs, p. 57.

¹⁶ Loveland, I., Constitutional Law (2009), *Administrative Law, and Human Rights: A Critical Introduction*, 5th Ed, Oxford University, pp. 62-63.

¹⁷ Mnyasenga, *op.cit.* p.23.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

In the introductory item I admitted the difficult to write about the perspective of Mwalimu on the rule of law and national development because of the two incompatible images envisaged in one and the same person towards the rule of law. Thus, if a fair assessment about Mwalimu's perspective of the rule of law and national development is to be made, a thorough analysis of the contribution of Mwalimu in handling rule of law and national development issues alongside the challenges and threats to the rule of law between 1960s and 1980s must be done. This part, therefore, attempts to analyse the contribution of Mwalimu and challenges he experienced in handling rule of law and national development issues between 1960s and 1980s in Tanzania.

5.1The struggle for independence and the aftermath

Mwalimu considered freedom and development as completely inseparable. They are like chickens and eggs for without the former one cannot get the latter and the opposite is also true.²¹By freedom Mwalimu meant three interrelated things: national freedom which entails the ability of the citizens of Tanzania to determine their own future and govern themselves without interferences from outsiders; freedom from hunger, diseases and poverty; and individual freedom. Individual freedom involves the right of an individual to live in dignity and equality with all others, the right to freedom of speech, the right to participate in making all decisions that affect his life, and freedom from arbitrary arrests.²² Mwalimu emphasised that all

²¹ Nyerere J.K.(1974), *Man and Development* , Dar Es-Salaam, Oxford University Press, pp.25-26.

²² *Ibid.*

these aspects fall under freedom and the people of Tanzania cannot be said to be free until all of them are assured of same.

But the people could not be assured of freedom without development and the vice versa. Committed to ensuring freedom and development, Mwalimu undertook a number of economic and development policies including the Arusha declaration and Ujamaa and self-reliance. The object of Arusha Declaration and the Policy of Ujamaa and Self-reliance was to ensure the maintenance of freedom and economic development of the people.²³ Operation and execution of some these policies were unpalatable and somewhat seemingly inconsistent with the rule of law as discussed *infra*.

The creed to the Arusha Declaration puts it clear the desire and intent of Mwalimu to create and build a nation which is just, free and self-reliant as well as a nation with citizens who do cooperate amongst themselves in the spirit of brotherhood for mutual benefit and devoid of any forms of exploitation.²⁴ The desire and struggle for freedom and development by Mwalimu extended beyond the borders of Tanzania. He took active role in the liberation struggle in the Southern Africa, especially in Rhodesia, Namibia. He also took active role in the struggle against apartheid policy in South Africa. In several occasions, Mwalimu made open his belief and stand point which he practically lived that the right to freedom in Africa was

²³ Nyerere J.K.(1986), *Ujamaa Essays on Socialism*, Dar Es-Salaam, Oxford University Press, pp.91-105.

²⁴ Nyerere, (1974), *op.cit.* pp. 13-14. Also see Nyerere J.K.(1968), *Freedom and Socialism*, Dar Es Salaam, Oxford University Press, pp.231-240, 257-261.

indivisible and the failure of Tanzania to support freedom struggles in other African countries would be the denial of the basis of the 1961 independence of Tanzania.²⁵

The standpoint of Mwalimu was that, freedom is the core aspect of the rule of law. In event freedom is denied, re-course to armed struggle becomes inevitable.²⁶ In his support for freedom of Rhodesia, Namibia and other African countries, he made it clear that, it was immaterial whether upon independence such countries would be socialist or capitalists. What mattered to him was the attainment of freedom which the African people were denied.²⁷ To justify his position in support of liberation struggle, and the inevitability of fighting for freedom, Mwalimu said:-

...for the demand for freedom is instinctive in human beings ...it is part of the spirit of man. It cannot be defeated; and because it cannot be defeated, it will ultimately triumph. The question facing the fighters for freedom is when, and how, the people will achieve their own country, not whether they will do so.²⁸

From this discussion, it is clear that freedom of the people of Tanzania, Africa and other parts of the world was a cornerstone of the rule of law and national development in the perspective of Mwalimu. The perspective of Mwalimu seems to be justified. It is obvious that, only when the people of a country have the ability to determine their own future and govern themselves

²⁵ Nyerere, J.K.(2011), *Freedom and Liberation*, Dar Es Salaam, Oxford University Press, p.81.

²⁶ *Ibid.* pp. 69-78; 81, 112-116.

²⁷ *Ibid.* pp. 85-86.

²⁸ *Ibid.* p.152.

without outside interferences; are free from hunger, diseases and poverty; have the right to live in dignity and equality with all others; have freedom of speech; have the right to participate in decision making; and are free from arbitrary arrests that the rule of law can be said to exist. Therefore, in absence of freedom, there is no rule of law and national development. This has been the position of Mwalimu in as far as the rule of law and national development is concerned.

5.2 Human equality for all

Human equality was among the central values that Mwalimu believed and lived in practice. Mwalimu was a socialist who really believed in socialism and lived it. In his own words he said the basis of socialism is human equality and without acceptance of equality, there can be no socialism.²⁹ By equality he meant equal treatment and protection of all men, regardless of their colour, size, shape, skill, ability, or anything else.³⁰ Several times, Mwalimu popularised the TANU creed which declares that all human beings are equal and Africa is one. According to him, this meant that, the exploitation, humiliation and suffering of all men elsewhere must not be accepted for all men are reduced by it.³¹ He passionately argued that Africa must refuse to be humiliated, exploited and pushed around and, in the same

²⁹ Nyerere, (1986), *op.cit.* pp. 38-40.

³⁰ *Ibid.*

³¹ Nyerere, J.K. (1973), *Freedom and Development*, Dar Es Salaam, Oxford University Press, pp.370-373. Also see Nyerere, (1974), *op.cit.* p.108.

determination; Africa must refuse to humiliate, exploit and push others around.³²

In his address to the United Nations on Independence Day, 14th December, 1961, Mwalimu signified his commitment to honour and abide with the Universal Declaration of Human Rights 1948 in Tanzania's internal and external policies.³³ One of the principles enshrined under the Universal Declaration of Human Rights 1948 which Mwalimu implemented was human equality. He was accordingly aggrieved with the gross economic inequalities between the developed World and the developing countries.³⁴ He condemned the system of international trade which involves transfer of wealth from the poor to the rich countries as being immoral internationally as it is within nations.³⁵ In the perspective of Mwalimu, socialism was the practical acceptance and implementation of human equality. This was to go hand in hand with strengthening the country democratic procedures to ensure that every citizens plays direct and active role in the government of his local community and national government.³⁶

Besides socialism, Mwalimu's practical acceptance and implementation of human equality was also evident in his war against corruption. This has been notably clear from the time of struggling for political independence to the last minute of his life. In 1960, for instance, Mwalimu addressing the parliament,

³² *Ibid.* p.107.

³³ Nyerere, (1965), *op.cit.* pp.145-146.

³⁴ Nyerere, J.K. (2011), *Freedom and A New World Economic Order*, Dar Es Salaam, Oxford University Press, p.158.

³⁵ *Ibid.*

³⁶ Nyerere (1986), *op.cit.* p.103.

vigorously condemned corruption as an enemy of the people.³⁷ It is no wonder that in the midst of the 1980s economic crisis and following the widespread of corruption, Mwalimu adopted stringent measures including the enactment of draconian law to deal with economic saboteurs who threatened the Tanzanian economy and national development.³⁸

It cannot be gainsaid that amidst corruption, there is no equality; amidst inequalities, there is no rule of law; and where there is no rule of law, there is no national development. Therefore, the rule of law under socialism is to be viewed as an instrument that enables the state to adopt appropriate measures which would reasonably remove all forms of inequalities in the society for broader community interests. Equality is closely associated with the principle of justice which was also strongly defended by Mwalimu as discussed hereinafter.

5.3 Justice for all

The primary objective of Tanzania at independence was ensuring expeditious and viable national development along with the fostering of national unity and freedom. This was thought to be achieved by establishing socialism and self-reliance.³⁹ In Mwalimu's view, socialism could only be achieved where the people are equally assured of justice administered by an independent judiciary.⁴⁰ It is from this understanding that on his speech delivered on the inauguration of the Faculty of Law

³⁷ Nyerere (1965), *op.cit.* pp.81-84.

³⁸ Nyerere (1974), *Loc.cit.*

³⁹ Nyerere (1973) *op.cit.* p.199.

⁴⁰Nyerere (1986), *op.cit.* pp.130-132.

of the new University College of Dar Es Salaam, on 25th October, 1961, Mwalimu emphasised on justice for all and independency of the judiciary.⁴¹ He argued that, in a democratic society which believes in equality of all citizens like Tanzania, it is important that every individual must be subject to the law.⁴² Execution of the law should be without fear or favour, and the judiciary must at every level be independent of the executive arm of the state.⁴³

Mwalimu further emphasised that real freedom requires that every citizen feels confident that his case shall be impartially judged, even if it is a case against the Prime minister himself.⁴⁴ In his address to the Judges and Resident Magistrates conference in Dar Es Salaam, Mwalimu also underscored the role of the judiciary in ensuring respect to law and protection of individual justice which the people fought for in the struggle for independence. He maintained that justice demands many things including protection of the innocent and punishment of the guilty.⁴⁵ It further requires impartiality between individual citizens and that the law should be the same for all.⁴⁶

Besides the role of the judiciary in the administration of justice, Mwalimu also acknowledged that, the duty of administration of justice is not one of the judiciary alone. It is also the responsibility of the legislature to make sure that the law itself is

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Nyerere (1968), *op.cit.* p.110.

⁴⁶ *Ibid.*

just.⁴⁷ Mwalimu conceded the substantive conception of the rule of law that justice is the driving force of the rule of law. Notwithstanding the enactment of draconian law during his reign, Mwalimu believed that '*a bad law is not better than no law.*'⁴⁸ In his speech at the Jawaharlal Nehru University New Delhi, India, on 26th August, 1985, he expressed his discontent with unjust law as he said:-

I leave to the philosophers to argue as to whether a bad law is better than no law. As a teacher and politician, I knew one cannot serve justice by acquiescing in a whole system of laws based on injustice. And, I believe that, ultimately, such laws cannot prevail. Sooner or later, men will decide to die, and to kill, rather than live under unjust law.⁴⁹

From the foregone discussion it is apparent that in the perspective of Mwalimu, the fountain of justice and equality of all people is socialism and self-reliance. However, socialism could only be achieved where the people are equally assured of justice administered by an independent judiciary. Being aware of the importance of the judiciary in the administration of justice and maintenance of the rule of law, Mwalimu purposely undertook review of the judicial system as discussed in the next item.

5.4 Review of the judicial system

⁴⁷ Nyerere (1965) *op.cit.* pp.131-132.

⁴⁸ Nyerere (2011), *op.cit.* pp.190-191.

⁴⁹ *Ibid.*

At independence, Tanzania (the then Tanganyika) adopted the British colonial judicial system which was based on racism. The British maintained the Germany approach of a two-tier court system which included native courts at one end, and the High Court and subordinate (magistrates) courts at the other end. Native courts were specifically meant for the natives. They were manned by local African chiefs and administrative officers and applied local customary laws. Appeals from the native courts lay to the District commissioners, Provincial commissioners and with leave of the Provincial commissioners to the central Court of appeal. Thus in as far as native courts were concerned, there was no separation of power and independence of the judiciary for these courts were manned by the executive not trained in law and no legal representation was allowed.⁵⁰

Unlike native Courts, subordinate (magistrates) courts were manned by magistrates and were under the direct supervision of the High Court.⁵¹ These courts were meant for the white and therefore applied statutory law made by the Legislative Council (LEGCO) or the Governor, common law, equity and statutes of general application in England by 22 July, 1920.⁵² Whereas the subordinate courts were manned by magistrates appointed by the Governor of Chief secretary, the High Court was manned by Judges appointed by the Governor.⁵³ There was no independence of the judiciary, neither in the subordinate courts, nor, in the

⁵⁰ Ruhangisa, E.J.(2017), *Human Rights in Tanzania: The Role of the Judiciary*, University of London: ProQuest, pp.19-24.

⁵¹ *Ibid.* p.25.

⁵² See the Tanganyika Order in Council, 1920. Art 17(2).

⁵³ *Ibid.* Art 19 &23; Ruhangisa, *op.cit.* pp.25-26.

High Court because all the magistrates and judges held office at the pleasure of her Majesty.⁵⁴

Immediately, after independence, Mwalimu abolished this racist judicial system by integrating all the native courts and subordinate courts under the supervision of the High Court.⁵⁵ Mwalimu wanted to create an appropriate new judicial system for the implementation of new government development policies.⁵⁶ Since there were no trained judges and magistrates, the government had to train its own judges and magistrates.⁵⁷ He wanted to develop a legal profession with great integrity and knowledgeable with the basic philosophy of the country (socialism and self-reliance).⁵⁸ This, as I have already noted above, necessitated the faculty of law to be the first faculty to be inaugurated at the University College of Dar es salaam on 25th October, 1961.⁵⁹

Besides courts integration, Mwalimu appointed the Judicial Review Commission in 1974 to review several aspects of the legal system of Tanzania and recommend changes aimed at improving the administration of justice and the war against crime.⁶⁰ Among the areas that the commission reviewed were criminal investigation and prosecution of suspects, Courts structure and jurisdictions, judicial administration and training

⁵⁴ *Ibid.*

⁵⁵ Ruhangisa, *op.cit.* pp. 66-67.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Nyerere (1965), *Loc.cit.*

⁵⁹ *Ibid.*

⁶⁰ Msekwa, P.(1977), *Report of the Judicial System Review Commission Report*, p. viii.

of judicial administration personnel, defense counsel, criminal law and procedure as well as the law of evidence.⁶¹

Even though there is no evidence on whether all the commission's recommendations were implemented, it suffices to say that it was one of the government endeavors to ensure justice and upholding the rule of law in Tanzania between 1961 and 1985.⁶² There were nonetheless several threats to the rule of law in Tanzania between 1961 and 1985 that compelled Mwalimu to take some stringent measures that somewhat seems to be inconsistent with the rule of law as discussed hereinafter.

6.0 Threats to National Development and the Rule of Law

It has been noted in the introductory section that despite Mwalimu's commitment to upholding the rule of law in his efforts to bring national development in Tanzania, his reign was also seriously criticized for breaching the rule of law.⁶³ The main criticisms and complaints against Mwalimu premised on rejection of the Bill of Rights at independence,⁶⁴ extension and application of oppressive colonial legislation,⁶⁵ enactment of new draconian legislation that curtailed freedoms and civil rights

⁶¹ *Ibid.* pp.25-310.

⁶² *Ibid.*, pp. 312-319.

⁶³ Bisimba H. & Maina, P. C. (2005), *Justice and the Rule of Law in Tanzania: Selected Judgments and Writings of Justice James L. Mwalusanya and Commentaries*, Dar Es Salaam, LHRC, pp.4-36; Shivji, I. G. (2006), *Let the People Speak: Tanzania Down the Road to Neo-Liberalism*, Senegal, CODESRIA, pp.1-13, 239-244.

⁶⁴ Maina, C.P.(1997), *Human Rights in Tanzania: Selected Cases and Materials*, Rudiger Koppe Verlag Koln, pp.1-23.

⁶⁵For instance, the Penal Code of India, 1945; the Collective Punishment Ordinance of 1921; the Townships (Removal of Undesirable Persons) Ordinance of 1944; and the Deportation Ordinance of 1938.

of individuals,⁶⁶ abolition of independent cooperative societies, implementation of forceful collective village programme in the 1970s, and forceful nationalization of private properties in the implementation of the Arusha declaration.⁶⁷

The complaints made against Mwalimu real happened. Even Mwalimu himself admitted that in his reign, there were some incidents or weaknesses in upholding the rule of law. For instance, in his speech, ‘*The principle of justice must be the basis of law*’,⁶⁸ Mwalimu once said:

It would be absurd to claim that I have never erred or I have never failed in my endeavors...I undertook to guard the constitutions and the laws of my country. But I do not pretend that injustice never takes place in Tanzania, only that we have tried... to create systems whereby, when it does take place, it can be corrected through peaceful means.⁶⁹

The fact that there were incidents of breach of the rule of law between 1961 and 1985 is not, in itself, a sufficient reason to conclude that Mwalimu did not respect the rule of law. All the incidents had justifications. This section therefore attempts to expose the threats to national development and the rule of law that justified the measures taken by Mwalimu.

⁶⁶ For instance, the Preventive Detention Act of 1962 which allowed detention of persons without trial; the Regions and Regional Commissioners Act of 1962; Areas and Area Commissioners Act of 1962; and the Economic and Organised Crime Control Act, 1984, Act No. 13 of 1984.

⁶⁷Bisimba, *op.cit.* p.104.

⁶⁸ A speech made when receiving Honorary Doctorate of Laws by the Jawaharlal Nehru University New Delhi, India on 26th 1985.

⁶⁹ Nyerere (2011), *op.cit.* p.191.

6.1 Poverty and threats to national unity

It has already been noted under item 5.3 above that, at independence, the primary objectives of the government were to speedy national development and to consolidate national unity and freedom. To achieve these objectives, Mwalimu chose to adopt socialism and the policy of self-reliance. The idea was to maintain economic independence and human equality along with waging war against poverty, ignorance, diseases and corruption.⁷⁰ This justifies the attitude of Mwalimu towards the Bill of Rights at independence, because, let alone the fact that the judiciary was at independence dominated by English judges, the acceptance of the Bill of Rights at independence could be a stumbling block to the Government to make and implement such policies like socialism and the Arusha declaration of 1967.⁷¹

It was also like a mockery of the people of Tanzania for the departing British colonial master to propose a Bill of Rights to Tanganyika at their departure. Throughout their stay in Tanganyika, they never mentioned the Bill of Rights, notwithstanding having the same in their home country since 1689.⁷² Thus, Mwalimu was skeptical that the Bill of Rights would be used by the judiciary mannered by English judges to

⁷⁰ Nyerere (1986), *op.cit.* pp. 22-24, 38-41; Nyerere (1965), pp. 81-83.

⁷¹ Maina, *op.cit.* p.105.

⁷² Britain adopted Human rights from 1689 following the enactment of the English Bill of Rights Act, 1689 which was signed into law in 1689 by William III and Mary II as co-rulers in England after the overthrow of King James II. See the English Bill of Rights (1689). Available at <https://www.history.com/topics/british-history/english-bill-of-rights>[accessed on 17th July, 2022].

frustrate most of the government economic policies.⁷³ And of course, the implementation of socialism through the Arusha Declaration and self-reliance policies which involved nationalization of all privately owned properties, compulsory resettlement of villages and self-help development schemes would not stand the test of legality under the Bill of rights.

Apart from rejecting the Bill of Rights, Mwalimu, committed to consolidation of national unity, abolished multi-party democracy and replaced the same by single party democracy-Tanganyika African National Union (TANU) in early 1960s.⁷⁴ He believed that single party democracy could safeguard national unity against disruptive and divisive politics that were thought to be negative to national unity and national development.⁷⁵ As discussed in the subsequent item, next to the abolition of multi-party democracy was the abolition of the autonomous trade union-Tanganyika Federation of Labour (TFL) which was replaced by the National Union of Tanganyika workers (NUTA).⁷⁶

Notwithstanding the undesirable consequences of the rejection of the Bill of Rights at independence and Abolition of TFL in 1964, it is my standpoint that such incidents were necessary. Mwalimu and other TANU nationalist leaders decision was not

⁷³ Ibid.

⁷⁴ The Interim Constitution 1965. Art3.

⁷⁵ Ruhangisa, *op.cit.* p.92-93.

⁷⁶ Rugeiyamu, R., Bahati, E., & Mohamed, k. (2018), *The Major Milestones for Development of Trade Unions in Tanzania: Is the Environment for the Operation Conducive?* European Journal of Business and Management, vol.10(24), p. 41.

without justification. It was based on the desire to attain wider community interests than individual interests.⁷⁷

6.2 Increased crimes, corruption and the early 1960s army mutiny

The attitude of Mwalimu towards corruption was obvious since the time of struggle for independence in 1960s. For instance, in his address speech to the LEGCO on 17th May, 1960, Mwalimu declared corruption as the fourth (after poverty, ignorance, diseases) enemy of the people.⁷⁸ In this address Mwalimu condemned corruption as degrading the public confidence on their leaders and hence defeating the war against poverty, ignorance, diseases.⁷⁹ He called for ruthlessness against corruption because he believed that corruption and bribery is a greater enemy to the welfare of the people in peace time than war.⁸⁰

Besides corruption, there were several other crimes involving cattle theft and conducts which seemingly were threats to peace and order. According to Issa Shivji, one of such conducts was the army mutiny of 1964 in which Mwalimu's government came very close to being overthrown.⁸¹ The 1964 army mutiny made Mwalimu to build a new army which was almost recruited from TANU youth league and weed out the opposition based trade

⁷⁷Bisimba H. & Peter, C.M., Mwalimu Nyerere and Challenges of Human Rights. Available at <https://www.pambazuka.org/pan-africanism/mwalimu-nyerere-and-challenge-human-rights> [accessed on 17th July, 2022]

⁷⁸ Nyerere (1965), *op.cit.* pp.81-82.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Shivji (2006), *op.cit.* p.3.

unions.⁸² The Tanganyika Federation of Labour (TFL) was abolished and replaced by the National Union of Tanganyika workers (NUTA) vide the National Union of Tanganyika (workers establishment) Act, 1964.⁸³ Several members of the TFL were arrested and detained because they were suspected to have been behind the mutiny.⁸⁴

Let alone the government response to the army mutiny, to prevent crimes, corruption and maintenance of peace, Mwalimu was forced by the prevailing circumstances to adopt and continue the application of some colonial legislation including the Deportation Ordinance;⁸⁵ the Witchcraft Ordinance, 1928;⁸⁶ the Expulsion of Undesirables Ordinance, 1930;⁸⁷ the Corporal Punishment Ordinance, 1930;⁸⁸ the Collective Punishment Ordinance, 192;⁸⁹ the Destitute Persons Ordinance, 1923;⁹⁰ the Township (Removal of Undesirable Persons) Ordinance, 1944;⁹¹ and Stock Theft Ordinance, 1960⁹² which were in one way or other authoritarian.⁹³

⁸² *Ibid.*

⁸³ The National Union of Tanganyika (workers establishment) Act (Act No.18 of 1964) s7.

⁸⁴ Shivji (2006), *op.cit.* p.3-7.

⁸⁵ CAP.38, as amended by Act No. 3 of 1991.

⁸⁶ CAP. 18.

⁸⁷ CAP. 39.

⁸⁸ CAP.17.

⁸⁹ CAP.74.

⁹⁰ CAP.41

⁹¹ CAP.104.

⁹² CAP 422.

⁹³ Ruhangisa, *op.cit.* p.81. Also see Nyalali Commission Report (1991), Volume 3, pp.1-23.

Apart from adoption of oppressive colonial legislation, Mwalimu Government enacted new draconian legislation⁹⁴ the application of which had far reaching consequences on individual liberty as well as the rule of law. It is not that Mwalimu was not aware of the evil of these legislation and their inconsistencies with the rule of law. He was very aware but, as he himself once admitted, there was a system and mechanisms through which abuse of power could be checked.⁹⁵

The government purposely established the Permanent Commission of inquiry in 1966 as an ombudsman to investigate and report to the President on administrative malpractices in Tanzania.⁹⁶ Besides the ombudsman, there was the judiciary with inherent powers of judicial review of administrative action. For instance, in *Hamisi Masisi & Others v Republic*,⁹⁷ the applicants, succeeded to challenge the order of the District Court at Musoma in which the Resident Magistrate cancelled bail which he had earlier granted to the accused following an order of the Regional commissioner of re-arresting the accused.

6.3 Rural lawlessness and community sanction

One of the major problems that haunted the rural areas in the 1970s was increase of crimes especially animal theft which resulted into a sense of insecurity and lawlessness in the rural Tanzania.⁹⁸ This culminated to the formation of *Sungusungu* as a form of self-help or community sanctions in order to provide

⁹⁴ See note 66 above.

⁹⁵ See note 25 above.

⁹⁶ The Interim Constitution 1965, Art 7&8.

⁹⁷ [1978] TLR 24.

⁹⁸ Bukurura, S.H. (1994), *The maintenance of Order in Rural Tanzania: A Case of Sungusungu*, Journal of Legal Pluralism, vol. 34, p. 1.

order and security among rural communities.⁹⁹ This traditional army originally emerged as a result of government failure to maintain law and order and protect rural communities.¹⁰⁰ Nonetheless, the government co-opted them as patrols in towns, streets and cities, notwithstanding their very inhuman methods of punishment.¹⁰¹ *Sungusungu* performed various activities associated with prevention of crimes in rural areas such as searching and return of stolen cattle, settlement of village disputes, dealing with suspected witches and returning of dissenting wives.¹⁰²

Although these groups were meant to provide order and security in the rural areas, their operation had serious adverse impact on the rule of law because of very inhuman methods of punishment used.¹⁰³ The procedures used to deal with suspects involved self-incrimination. Criminal suspects were forced to admit or confess in public the complaints against them and upon confession, the accused had to punish himself by mentioning the fine that he shall pay having regard to the gravity of the crime he is accused of.¹⁰⁴ If one did not confess, or confessed but failed to pay the fine, he was subjected to ostracism from the community. Ostracism was also extended to the whole family members as a mean of enforcing the suspects to confess guilty or pay fines.¹⁰⁵

⁹⁹ *Ibid.*

¹⁰⁰ Shivji, I.G. (1995), *The Rule of Law and Ujamaa in the Ideological Formation of Tanzania*, SAGE Journal of Social & Legal Studies, vol. 4. p.147.

¹⁰¹ *Ibid.*

¹⁰² Bukurura, *op.cit.* pp.13-20.

¹⁰³ Shivji(1995), *Loc.cit.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

The whole village community had to participate and cooperate or else be punished.¹⁰⁶

Generally, the presumption of innocence and natural justice were alien to the operation of *Sungusungu*. However, despite their inhuman punishments, they were later adopted by the Government of President Ally Hassan Mwinyi and extensively used by Augustino Lyatonga Mrema, Minister for Home affairs.¹⁰⁷ *Sungusungu* could not stand the test of constitutionality after the adoption and justiciability of the Bill of Rights in 1988, in Tanzania.¹⁰⁸ In *Mwita v. Mresi*¹⁰⁹ and *Nyamuganda v. Kilingo*,¹¹⁰ the operation of these vigilante groups was declared unconstitutional by Justice Mwalusanya.¹¹¹

6.3 The 1980s economic crisis and army mutiny

Tanzania like many other African Countries experienced serious economic shakes in the 1970s and 1980s. In Tanzania, the situation was even worse following the 1978-1979 Kagera war which heavily disrupted the country economy.¹¹² This economic crisis led to discontents including the Dar Es Salaam University students' demonstration in 1978. Even though demonstration

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ Shivji, I.G. (1991), *Contradictory Development in the Teaching and Practice of Human Rights Law in Tanzania*, Journal of African Law, vol.34(1), p. 116.

¹⁰⁹ Civil Case No. 15 of 1988, High Court Tanzania at Mwanza (unreported).

¹¹⁰ Civil Case No. 22 of 1988, High Court of Tanzania at Mwanza (unreported).

¹¹¹ Shivji (1995), *Loc.cit.*

¹¹² Brian Van Arkadie, B.V.(1995), *Economic Strategy and Structural Adjustment in Tanzania*, World Bank, p.10.

was suppressed by the Field Force Unity (FFU) and students expelled from studies, the public supported the students concerns.¹¹³ Besides students demonstration, in 1982 there was another attempted military coup which came very close to succeeding.¹¹⁴

Worse still, while the economy was in such severe difficulties and people suffering from acute shortages, some individuals, including government officials took advantage of the situation to make quick money through smuggling and corruption.¹¹⁵ Smuggling and corruption necessitated Mwalimu to enact the Economic Sabotage (Special Provisions) Act, 1983¹¹⁶ which latter came to be known as Economic and Organized Crime Control Act, 1984.¹¹⁷ Let alone the imposition of very severe punishments for economic crimes, the Act was made to operate retrospectively and established special tribunals to deal with suspects of economic crimes.¹¹⁸ Thousands of people remained under detention for months because, neither bail, nor, legal representation was allowed.¹¹⁹

There were several other incidents which were somewhat contrary the rule of law during Mwalimu's leadership between 1961 and 1985 but all had justifications. As correctly observed by Bisimba and Peter, the incidents complained about were not actions of a dictator who wanted to oppress his people and

¹¹³ Shivji (2006), *Loc.cit.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ Act No. 9 of 1983.

¹¹⁷ Act No. 13 of 1984.

¹¹⁸ Shivji (2006), *op.cit.* pp.3-7; Shivji, I.G. (1991), *op.cit.* pp.117-118.

¹¹⁹ Shivji, I. G. (2006), *ibid.* pp.3-7.

remain in power.¹²⁰ It was rather the interests of the wider community that guided Mwalimu in his decisions and actions.¹²¹ There was no any sign of personal gain or interest in anything which Mwalimu did.¹²² The good he did overrides the shortfalls. Therefore, Mwalimu stands to be among the best African leaders and a role model in handling rule of law issues and national development between 1961 and 1985 in Tanzania.

5.0 Conclusion

This paper discussed the discourse about the perspectives of Mwalimu on the rule of law and national development. It has been noted that scholarly works present Mwalimu with two incompatible images towards the rule of law in his endeavors to bring national development in Tanzania. Whereas one side portrays Mwalimu as a role model in handling rule of law issues and national development, the other side portrays him negatively. Those who criticize Mwalimu for breaching the rule of law premise their arguments on rejection of the Bill of Rights at independence by Mwalimu and other TANU nationalist leaders; extension and application of some oppressive colonial legislation after independence; enactment of new oppressive laws after independence; abolition of independent cooperative societies; implementation of forceful collective village programme in the 1970s; and the forceful nationalization of private properties in the implementation of the Arusha declaration.

¹²⁰Bisimba, *Loc.cit.*

¹²¹ *Ibid.*

¹²² *Ibid.*

It has been noted from the discussion of this paper that all the complained events really happened but had justifications. Right from independence, the primary objective of the independent government was to achieve expeditious and viable national development along with consolidation of national unity and the maintenance of independence through the policy of socialism and self-reliance. Let alone the peace and security threatening events of the 1960s and 1980s, it was also necessary for Mwalimu to adopt some measures like the extension and application of some colonial legislation, enactment of hash laws, adoption of the Arusha declaration, abolition of independent cooperative societies, and the implementation of collective village programme.

The measures taken by Mwalimu between 1961 and 1985 were therefore not actions of a dictator who wanted to oppress his people and remain in power. It was the interests of the wider community that guided Mwalimu in his decisions and actions. There was no any sign of personal gain or interest in anything which Mwalimu did. Mwalimu was fully committed towards realization of the fruits of independence- freedom, equality and access to justice. In the view of Mwalimu, these fruits could only be realised through socialism and self-reliance. To him, socialism was the practical acceptance and implementation of the principle of human equality and justice.

Having regard to Mwalimu's struggle and commitment to ensuring freedom, human equality and justice for all throughout his lifetime, this paper concludes that, despite the few weaknesses noted in his regime in respect to handling rule of law issues and national development, Mwalimu remains to be

one of the best African leaders and a role model in handling rule of law issues and national development. If we are to honour his legacy, the present African leaders must do exactly as he did and not by mere words alone.

A Digest of Nyerere Doctrine of National Property: Its Parameters and Limitation in Land Laws of Tanzania

Masoud Jackson Issah*

Abstract

Nyerere Doctrine of National Property as a philosophy evolving around land ownership system was propounded in the socio-economic atmospheres which were completely different from those of the current days of our time. It is the doctrine that was considered useful and important for creating the state's political and socio-economic system in which national natural resources including land were to be commonly owned, the contemplation that has been limited by various factors as land ownership stands today. The reason that, the doctrine was promulgated in a pure philosophical context than legal perspective makes it important to analyse [it] in a legal paradigm so as to establish the Mwalimu's legacy in land legal regime of the country. Another reason that justifies this discussion is an idea that, public land ownership in the country has been subjected to several socio-economic changes surrounding land value and rights since its promulgation something that would have some effects on it.

It is from the above said justification that, this piece of academic writing was planned, crafted and communicated. It examines and presents the genesis, development, reflection and relevancy of the Mwalimu's doctrine in the land laws of Tanzania as they stand today. The doctrine is portrayed and argued to be important as nature of land would always need a limited individual land ownership for the efficient and

sustainable development of the individuals and nation in general. In its final analysis the paper concludes that , the doctrine has significantly been limited by the socio-economic changes that have had been sweeping across land rights and value to the extent that, public land ownership is now limited down by these emerging forces embracing individual land ownership in the country. To protect public land use and access the paper recommends that, it is necessary to be accommodating these socio-economic changes within the land laws of the country while avoiding unnecessarily usurp with public land ownership at the same time. This is because of the public compelling needs and access to the land use for the purpose of building important public socio-economic infrastructures and promotion of sustainable development in the country.

1. About Nyerere and his Doctrine of National Property

The Nyerere doctrine is the philosophical ideology that is said to have been propounded by the former President of Tanganyika and Tanzania thereafter; the late Mwalimu **Julius Kambarage Nyerere**. Because of his various official capacities he has had, Nyerere is referred to by using different official titles including Mwalimu, Ant colonialism Activist, a Politician, the Former President of Tanganyika and Tanzania, a Father of the nation and the Mediator. Nyerere is one of a few Presidents who have had presented and acted themselves as both the senior leaders of their countries on the first instance and scholars in the second part. As a scholar, Nyerere has contributed a lot in academics via both intellectual and

philosophical publications.¹ As the academician, Nyerere earned some academic titles including Mwalimu, the prominent Scholar and Philosopher of the 20th century. Nyerere under this justification therefore was not only a good politician of his time but a Philosopher and Academician too.

As a philosopher, Nyerere portrayed and proved himself to be a believer and defender of human rights and dignity. The human rights related philosophy which Mwalimu is remembered of and probably than all other his philosophical attributes is Socialism and self-reliance which he strongly advocated for , emphasized and implemented in 1967 during his political reign as the President of Tanganyika; Tanzania mainland by then. Socialism and self-reliance, thus, is a philosophy that has a close connection with his National Property Doctrine that makes basis of the discussion in this piece of writing.

Being a believer and advocate of socialism and self-reliance it was not a surprise that Nyerere in one of his several publications came out with his famous doctrine of National Property.² According to him and his doctrine, land in its nature and way of acquisition is a property that was given by the

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¹Nyerere has had written various books including Freedom and Socialism/*Uhuru na Ujamaa* ; *A Selection of Writings and Speeches* [1965-67] ; *Ujamaa-Essays on Socialism* (1971) ; *Man and Development* (1974) : *Freedom and Development/Uhuru na Maendeleo*; *A Selection From Writings and Speeches* [1968-73] :& *Nyerere on Socialism* (1985)

² NYERERE JULIUS K, *National Property*, A selection From Writings and Speeches Oxford University Press, p.53

Almighty God as a gift to a human kind. The doctrine was promulgated by Mwalimu as his reactionary comments on the proposed land holding system in the colonial Tanganyika in 1958. Since its promulgation the doctrine has always been summarised in the following phrases:

“What is the origin of the right to possess wealth? From where does a man derive the right to possess something, and to refuse the whole world this right of ownership? This right originates from only one factor; the fact that man is nobody’s property. He owns himself and cannot be in someone else’s possession. If therefore man possesses himself, it is clear that his health, his intellect and his ability can not be someone else’s property.”³

And that;

“...Land is a free gift from God to all His living things to be used now and in the future. When I use my energy and talent to clear a piece of ground for my use it is clear that I am trying to transform this basic gift from God so that it can satisfy human need. It is true however, that the land is not mine, but the efforts made by me in clearing the land ...”⁴

It is true also however that the Nyerere doctrine was not completely new in terms of its novelty. There have had been in place, various philosophical contemplations on property ownership that resembled very much Mwalimu’s philosophy.. **Aristotle** and **John Locke** had their philosophical

³ *Loc.cit*

⁴ *Loc.cit*

contemplations on property so many years before Mwalimu. The summary of their philosophical thoughts in that particular trend are presented below to prove this assertion.

Aristotle⁵ was the ancient Greek Philosopher whose contribution to property ownership forms the basis and important foundation of many property philosophies including that of Nyerere. According to him, private property ownership is very far important than public because of three different considerations which are that;

- a) The value of a property is measured in a smaller number of the same property owners
- b) It is the human nature that, a man will always value and be more concerned with a property that he owns in his personal capacity, than that which he jointly own with others and
- c) That it is prudent and convenient to place property ownership in a private sphere of ownership prone to the communal access than placing its ownership under the public sphere of ownership.⁶

Despite Aristotle's belief in private property ownership he still appreciated the public access to the properties so owned within the private sphere of property ownership. It is from this consideration it may generally be concluded that, the philosophical contemplations on property ownership cutting across private and public spheres of ownership did not start

⁵ [384-322 BC]

⁶ RWEGASIRA Abdon;(2012) *Land As A Human Rights;A History of Land History in Tanzania*,Mkuki na Nyota Publishers Dar es Salaam p.3

with Mwalimu as it started growing immensely from the ancient Greek period as it has been illustrated.

Close to Aristotle and his view on property, there is another important English philosopher whose academic and philosophical contemplation has had a significant contribution on various aspects of law especially constitutional⁷ and property laws as well. This is **John Locke**⁸ a great philosopher of his period. Locke views property as a results of private individual efforts which entitle him a reward of ownership within it. Locke looks at property in terms and value of labour that one has applied in transforming a property from its pure nature of its existence and form into a new and different form. It is from his laborious and intellectual efforts applied, that a man is entitled to exclusive claim of the same property against the entire world. This philosophical observation is captured in quotes of Locke as presented in an acknowledged important academic writings and analysis, that:

“For as a man has a right to all he could employ his labour upon, so he had no temptation to labour more he could make use of. This left no room for controversy about titles, nor for encroachment on the right of others. What portion a man curved to himself was easily seen; and it was useless, as well as dishonest, to curve himself too much, or take more than what he needed.”⁹

⁷ RWEGASIRA ABDON, *Op.cit* p.4

⁸ [1632-1704]

⁹ RWEGASIRA ABDON, *Op.cit* p.4

To this point therefore, it may strongly be established that, the Locke's philosophical contemplation balances very well private and public provinces of property ownership. According to this school of thought there are two important premises that may be extracted and subsequently established from it and these are:

- a) That, the efforts which an individual applies in acquisition of property is what entitles him with the exclusive ownership within it. Meaning more that, when a thing is in its natural form of existence in most cases there can be no exclusive claim of its ownership by any individual. This is perhaps an approach that would assist too much to differentiate a property from a mere thing. Therefore, where a man uses his intellect and efforts to transform a thing from its natural form into a more desirable form and use of it, he is on that reason entitled to establish an exclusive claim of ownership within it. The use of transforming a property from its natural forms depicts and includes the modern forms of property acquisition such as a purchase of property under that particular trend of consideration.
- b) That, a man is therefore entitled to exclusive ownership of the property not beyond the degree of his efforts and labour applied in transforming the same from its natural into the more artificially made useful form. Therefore what a man owns in a property according to this philosophical paradigm, is

those efforts and labour behind its acquisition and transformation.

- c) And lastly that, a man's exclusive ownership in property should not be too much curving neither extended to what he does not deserve in the given property.

It is through the philosophical thinking above that, through eminent domain principle the state can acquire properties that are privately owned through various philosophically and legally recognised approaches including compulsory purchase of a property, compulsory acquisition of a property, land compulsory acquisition and compulsory land resumption depending on the subject matter under acquisition and the purpose upon which a particular acquisition is made. That is John Locke and his philosophical view on property ownership that had been in existence for decades before the Nyerere Doctrine on National Property.

To this end therefore, Aristotle and Locke are considered to have established philosophical foundation of property ownership. Their established philosophical foundation therefore is extended to land ownership which is philosophically coined within the Nyerere Doctrine. The general inference that may be drawn from their philosophical contemplations much as land ownership is concerned is that, an individual would be allowed to own land in a way that does not usurp the public access and use of it on the first part. A person would be entitled to a claim of labour that he might have used in developments made

on his piece of land excluding a bear part of land to that effect on the second instance of it.

According to these two philosophical views an individual would only be entitled to claim of his energy that he has had used in clearing the piece of land and not the physical part of land itself. Nyerere doctrine therefore seems to be an extension of these philosophical approaches. The Nyerere Doctrine on National Property on that important reason would probably have been influenced by various factors including the philosophical influence from those philosophers and their philosophical contemplations on property ownership plus his socialist ideology that he has had been portraying in his political life¹⁰

2. The Nyerere Doctrine in Land Laws of Tanzania

As it was stated before, a promulgation of the doctrine was made in 1958 as the Nyerere's recommendation to the British colonial government regarding land use in Tanganyika. Nyerere as a scholar, a politician and above all in this context, as a philosopher, had given his opinion regarding those state administrative issues much as land ownership system in the colonial Tanganyika was concerned. This remained a mere opinion until its later influence and popularity that raised

¹⁰ Nyerere in his entire life is mostly described of his socialist personality and his commitment to live and cherish socialism. The Socialist elements we have in our laws and country in general have a direct connection to the commitment he has had in his entire life. The Arusha Declaration is the descriptive political episode on this and it is through the same Declaration that Socialism had its dominance within the political and socio-economic setups of our country

gradually reflecting Nyerere's political position and influence in political and socio-economic life in that context.

When Nyerere raised into state powers, the doctrine as it would have been expected, gained more influence in the government and state governance systems and thus official justification of the doctrine gained its momentum in 1967 when the government of Tanganyika under the Nyerere reign came out with the so called Arusha Declaration. This had a purpose of promoting equality among men in the country. It is through this political move that, the Freehold Titles (Conversion and Government Leases) Act¹¹ and the Nyarubanja Tenure (Enfranchisement) Act¹² were for that reason enacted to facilitate the acquisition of lands against individuals for the establishment of Ujamaa villages in which the villagers would cooperatively live. The movement was so harsh against individual land ownership to the extent that in some occasions courts' intervention in that regard was considered important.¹³

¹¹ No 24 of 1965, this law was enacted for the purpose of transforming land ownership that was previously granted to the individuals for indefinite period and other Right of Occupancy that could last for a specific period not exceeding 99 years.

¹² No 1 of 1965, where under this law, land that was held under Nyarubanja system (the mode of land ownership in which land lords had indefinite land ownership) in west Lake Region was abolished as an attempt of doing away with the freehold system of land ownership that was said to be an alienation of public ownership of land in Tanganyika.

¹³ Numerous cases were instituted against the government's forcibly reacquisition of land against the individuals and these include *The Attorney General v Lohay Akonaay and Another*(1995)TLR 80;*Lalata Msangawale vs Henry Mwamlima* (1979)LRT 3:and *Ntiyahela Boneka vs Kijij cha Ujamaa Mutala*(1988)TLR 156

The government of a day scrambled much to prevent court's intervention into protection of individuals' land rights against the government encroachment in such political move to build a socialist country. Various legislative initiatives were taken by the government for that particular purpose and this involved enactment of the Regulation of Land Tenure (Established Villages) Act¹⁴ which ousted judicial jurisdiction in land disputes that emanated from the government land acquisition for establishment of the Ujamaa villages in the country. The promulgation of the Nyerere doctrine therefore has a direct link with the government political move to build socialism in the country.

During its communication and influence however, the doctrine reflected what has had been the general land holding system in the colonial Tanganyika. This is because through all the Germany East Africa Imperial Decree,¹⁵ the Tanganyika Order in Council¹⁶ and the Land Ordinance¹⁷ land was recognised as public. This would also mean that land ownership in both Germany and British colonial governments land had been treated as the public property the legal position that was the philosophical central theme of the Nyerere doctrine.

Despite many other factors that have had swept across the political and socio-economic context of the country, land rights allocation and regulation in Tanzania still takes a recognition that, all land in the country continue to be public. This is the

¹⁴ No 22 OF 1992

¹⁵ OF 1895,see Article 1

¹⁶ OF 1920,see Article 2

¹⁷ No 3 OF 1923,see section 3

position held under all laws relating to land ownership and management in the country. It is a legal position which is reflected by different laws including the Constitution of the United Republic of Tanzania¹⁸ under which, it is expressly provided that, all natural resources and wealth to which land relates, must be utilized in a way that is beneficial to the public as a gear towards poverty eradication and fighting against ignorance and diseases which were initially considered to be the three giant enemies of a nation¹⁹. It is a legal position that is built on a recognition of the fact that, economic activities shall not be conducted in a manner concentrating wealth or major means of production in hands of a few.²⁰

The constitutional position on protection of public property is also held by a legal spirit of Article 30(1) of the same Constitution²¹ which reads to the effect that, all basic rights that have been provided within the bill of rights including the right to property ownership, must be enjoyed by the individual in a legal limited scope. This legal limitation allows individual enjoyment of the same basic rights in a way that does not jeopardise the rights of others or public interest. All these constitutional stipulations regarding the limitation of the individual land ownership to the public domain of land use have their roots and justification under Article 9 (k) of the same

¹⁸ OF 19977[CAP 2 RE 2019]

¹⁹ Article 9(c) and (i) of the Constitution of the United Republic of Tanzania, 1977

²⁰ Article 9(k) *Loc.cit*

²¹ *Loc.cit*

Constitution.²² It recognises and states socialism as the state political ideology in the country.

Proclamation of Socialism in the country as it has been stated before in this treatise was made for the first time by the Mwalimu through the Arusha Declaration. It is in that particular line of articulation it may, therefore, be emphasised that, there is a casual connection between constitutional position on land ownership in the country and the Nyerere doctrine of National Property as it stands today.

Individual landownership in the country as it stands now is subjected to a recognition and appreciation of public ownership in land. The practical reflection of this legal position may be traced in various aspects surrounding the conditions upon which the same individual land ownership is granted. These conditions includes payment of annual land rents by the land owners on the first instance.²³ On the same justification also, an individual owns estates in land and not the physical soil of land itself;²⁴ and lastly the fact that, the government can acquire any piece of land against any person is nothing except the justification of this legal and philosophical position that, all land in the country has remained public much as its ownership is concerned.

It is from that constitutional basis above that, various legislations as presented were crafted in line with the constitutional spirit on all matters relating to the regulation and

²² *Loc.cit*

²³ *Op.cit*, section 33

²⁴ *Op.cit* , section 32

protection of land rights in the country. This constitutional reflection is one of the fundamental constitutional principles and it is called, the constitutional supremacy. In Tanzania, the principle is embodied in Article 64 (5) of the same Constitution.²⁵ This is to the effect that, every enactment should comply with the constitution otherwise will be considered null and void to the degree of its inconsistency with it.

Together with the Land Acts ²⁶ that stand in line with the doctrine and the constitutional position, there are other many sectoral legislation that were enacted to protect certain public lands against private land use encroachments. These laws include The Road Act ²⁷ that is there to reserve certain portions of land for road use and safeguard them against land encroachment by the individuals. The Wild Life Conservation Act²⁸ which recognises certain portions of land useful for wild Flora and Fauna conservation and subsequently protect them from the encroachment of private land use. The Environmental Management Act²⁹ which seeks to regulate the human activities and general dispositions in order to safeguard against the environmental pollution including land degradation in the country where protection of wetlands is also covered under the auspices of this law. To that end, it suffices to opine that, the Nyerere Doctrine as the philosophical contemplation has been reflected in the land legal regime in the country which is built on

²⁵ *Loc.cit*

²⁶ *Loc.cit*

²⁷ No 13 OF 2007

²⁸ No 12 OF 1974

²⁹ No 7 OF 2004

a way recognizing the supremacy of public land ownership over the individuals' ownership of land.

Despite the legal reflection of the Mwalimu Doctrine in the land legal regime of the country, it should still be noted at this juncture however that, the same reflection does not mean the presence of direct influence of Mwalimu in that particular legal context. The land system of ownership in the country is built on different factors both the historical and socio-economic factors. The historical factor is coined within the colonialism which has to the great extent of its existence affected the land tenure in the country. The colonial land tenure might have had been affected by the philosophical contemplations similar to that of Mwalimu which had has been in existence before.

3. Limitation Of Nyerere Doctrine in the Land Laws Of Tanzania

Despite its logical and practical justification in the above context of discussion, the doctrine encounters numerous shortfalls from both the philosophical and legal perspectives. This shortfalls, therefore, communicate an idea that, the doctrine is of limited relevancy much as the philosophical and legal perspectives are concerned. Philosophically, the so called '*the tragedy of common*' is the economic theory which contrasts very much with the doctrine. The statutory limitation of the doctrine is so obvious and comes from the reason that land laws have been subjected to numerous socio-economic changes which might have adversely affected the relevancy of this doctrine. The doctrine therefore has limited relevancy in our

land legal regime as it stands today because of those factors which have their detailed discussion below.

3.1 The National Property Doctrine *vis-a-vis* The Tragedy of Commons

Tragedy of common is the most celebrated economic theory ever since its promulgation by William Forster Lloyd, the British author in 1833 for the first time. Basing on this theory, individuals having access to public owned property, the national property so to speak, will always use their access for its exploitation on their own interest, something that subjects the property to the extreme level of maximization by these individuals whom William called *the commons*. Since its conceptualisation, the theory did not become as viral as it did after its redefinition in 1968 by Garrett Hardin, the American ecologist who practically portrayed this theory by showing a destiny of a common field used by various herdsmen to feed their animals; as a way of demonstrating the challenges related to the common property or public property so to speak. In relation with land, much as the national property doctrine is concerned, the critique paused by the tragedy of commons theory may be viewed into two waves of consideration which are that:

- a) Subjecting land to the common ownership may in its end jeopardise the good intended use of it. The simple way to exemplify this tragedy may be made in reference to the challenges surrounding the reserved lands such as the Wild Life Conservation Areas and Road Reserves whose protection has not been smooth despite their importance

for life ecology and economic development of the country.³⁰

- b) Holding land as a public property would among other things need the viable management and administration system. It is the same problem again that individuals who are appointed to serve in land administration system like any other commons, may end up caught in their personal interest at a detriment of effective land use and management. This land administrative tragedy is illustrated by Mgongo Fimbo who portrays that, one of the observation which was made by the Presidential Land Inquiry Commission in respect of land holding system in the country was the centralisation of land management in the country. The Commission was in a view that, making all land public had unnecessarily subjected land control to the executive which however had has been abusing its power of land management and administration in the country.³¹

To this point therefore the important reference that may be drawn from the above discussion is that, the Mwalimu Doctrine of National Property is contrasted by the tragedy of commons in both of its two versions of 1833 and that of 1968. The doctrine seems to impose the administrative challenges in its essence and existence. The idea that public property is a subject of extreme maximization for the interest of whoever gets access to it, makes the doctrine unreliable and full of risks much as

³⁰ See <https://dailynews.co.tz/strategic-plans-set-to-secure-wildlife-corridors/> as retrieved on 15th NOVEMBER 2022

³¹ FIMBO GAMALIEL MGONGO,(2013) The Land Law of Tanzania; Casebook, Law Africa Publishing (T) Ltd, p.9

protection of the public property or national property is concerned.

3.2 Statutory Limitation of the Doctrine in Land Laws of Tanzania

Although the Nyerere doctrine is reflected in various laws of Tanzania including the Constitution,³² and the Land Act³³, still there are many limitations surrounding its contents and context in these laws of the country. These statutory limitations come from a recognition that, there have been several socio-economic factors that necessitated the changes in these laws. The laws have married the important socio-economic changes so as to reflect the modern socio-economic context of the country into a states' legal regime. Commercialisation of land and a need to expand a protection of human rights, a right to property in a particular, are among the factors that have outweighed the relevancy of the doctrine in the current legal regime cutting across land regulation in the country, and thus, entrenchment of the bill of rights in the Constitution of the United Republic of Tanzania, 1977³⁴ stands as the important board on which the revamping initiatives against legal implications relating to the doctrine within the land legal regime in the country were drawn and mapped. This is because ever since its adoption in the Constitution, there have been various legal initiatives adopted to protect and promote human rights in the country. The state's curtailment of individuals rights including the right to own property on whatsoever reason has

³² *Loc.cit*

³³ *Loc.cit*

³⁴ *Op.cit*, Article 24

always been avoided and remedied . It is from this constitutional position that, all rights in land have been treated as the property protected under Article 24 of the Constitution³⁵ and the Land Act.³⁶ These legal initiatives surrounding human rights protection therefore have had something important connected with avoiding unnecessary limitations surrounding individual land ownership including those which would accrue at a back of this doctrine.

Redefinition of land compensation schemes is another area that has outshined the relevancy of the Mwalimu doctrine in the land laws of Tanzania. Before 2001 the land compensation scheme was that recognised and so held under the Land Acquisition Act³⁷ which among others, limited land compensation for unexhausted improvement made on land. This would mean that a bare land was not subject to compensation upon its acquisition against the owner.³⁸ In the same legal context it was provided that where the government would enter into a possession of land that it had acquired from the individual before payment of compensation due to that person against whom land was so acquired, the only interest of 6% would be paid.³⁹

The Land Act⁴⁰ has however come with a different legal paradigm much as land compensation scheme in the country is concerned. This law and its related Regulations recognises

³⁵ *Loc.cit*

³⁶ NO 4 OF 1999 [CAP 113 RE 2019]

³⁷ NO 47 OF 1967 [118 RE 2019]

³⁸ *Op.cit*, section 12(1)

³⁹ *Op.cit*, section 15(1)

⁴⁰ *Op.cit*

compensation for the bear land upon its acquisition against any individual holding it⁴¹.the payment of interest rate has been subjected to the market price as stated under section 173 of the Land Act⁴² and the Land (Assessment of the Land Value For Compensation) Regulations ⁴³ stating that, where there has been a delay to pay compensation to a person against whom land acquisition was made the interest offered by the commercial banks for that purpose will be used as far as its calculation basis is concerned.

Commercialisation of land is a concern that had has been noticed by the Presidential Land Inquiry Commission⁴⁴ which subsequently had recommended that , individualisation of land ownership was important for stimulation of land market in the country. It is the recommendation that had been built on the socio-economic justification and it was therefore later on captured as one of the state objectives much as the transformation in land tenure at that time was concerned. It is under this trend that the same land concern had its way into the National Land Policy.⁴⁵Therefore, when the Land Acts⁴⁶ were subsequently enacted had these elements of commercializing land in the country which include:

⁴¹ See KENNEDY GASTON, ‘‘The Constitutionality of CLA And Compensation Practice in Tanzania: The 2009/10 Kipawa Land Eviction and Road Sector Compensation Disputes as Prototype’’; St Augustine Law Journal, Vol.1 No.2 December,2011

⁴² *Loc.cit*

⁴³ GN No 78 of 2001

⁴⁴ FIMBO, *Loc.cit*

⁴⁵ OF 1995, Objective 2.4

⁴⁶ [CAP 113 &CAP 114 RE 2019]

- a) The stringent legal protection of individual land rights in the country so as to give land a value as held under section 4(3) of the Land Act.⁴⁷
- b) Assigning market price to the land rights as reflected under section 3(1) (f) –(g) of the Land Act.⁴⁸
- c) To have a reform in Land Compensation Scheme that would be built on the real property market value covering compensation for a vacant land the idea that had been ignored before.

4. Concluding Remarks

The Nyerere Doctrine has remained a famous philosophical paradigm which has a very limited relevancy in the context of property law today. This is because of several socio-economic changes that have had swept across the country much as allocation, protection and enforcement of land rights are concerned. The introduction and expansion of human rights including the right to property ownership made an adverse blow on the contents and context of the doctrine on the first instance. This is because the doctrine tended to limit individual's rights in land to the general public welfare including the public use of land in that context. On the second part of its limitation, Commercialisation of land and its subsequent rights that are very well legally reflected in the country since the enactment of the Act in 1999, is another blow that contributed very much to put the doctrine within its eternal coffin as discussed above in this piece of writing.

⁴⁷ *Op.cit*

⁴⁸ *Op.cit*

Despite these limitations surrounding the doctrine reflection in the land legal regime however does not on that reason alone mean the non-existence of some several elements of it within the land laws of the country . The presence of Compulsory Land Acquisition (CLA); the leasehold system of the individual landownership subjected to various legal conditions including payment of land annual rents are nothing except the reflective elements of the doctrine within the land laws of the country.

Something important that has to born in mind at this concluding stage is that; the Mwalimu's doctrine as discussed in this piece of academic work, has been gradually diminishing in the land laws because of the intense growth of individual land rights and commercialization of the land interests and rights in the country as a state's movement to align land management and regulation within the world growing demand of rule of law and Commercialisation of proprietary rights. Now Because of the importance of the doctrine much as land rights are concerned, a call is made to caution the accommodation and reflection of these legal and economic forces that have been limiting public land ownership to the individual legal entitlements and interest in land. These changes are necessary to have been reflected in our land legal regime but their reflection must take into account the importance of public land in building the national socio-economic infrastructures in the country. Commercialization of land rights and expansion of individual land rights in the country therefore should reflect the public need and use in order to avoid a complete usurp with the supremacy of public land ownership in the land laws of the country as held within the Mwalimu's doctrine.

The socio-economic context reflecting the rule of law and commercial atmospheres of the contemporary world. portrays that individual land ownership in the country as it has been gradually extended in the land legal regime need be legally redefined and expanded when a need comes but this expansion must be effected in a way that does not usurp with public use over it. This is a central theme of Mwalimu's doctrine which is logical and of relevancy by taking into account the place of public land for building various socio-economic infrastructures for effective and sustainable development of the individuals and national in general.

International Human Rights Avenues for Enhancing the Realisation of Older Persons' Rights in Tanzania

Prof. Andrew Mollel* and Alphonse Paul Mbuya**

Abstract

This article explores international human rights avenues which have the potential to enhance the realisation of older persons' rights in Tanzania. Although the national legal system is the primary means of protecting human rights and ensuring their realisation, supra-national human rights processes and mechanisms are increasingly playing a significant role in inducing the realisation of human rights at the domestic level. International human rights law is primarily meant to set standards for adoption by states to ensure that human rights take root at the domestic level. However, states often fail to live up to their obligations to protect and realise human rights due to, inter alia, inadequate human rights protection and enforcement systems. In the African human rights system, avenues under the African Commission on Human and Peoples' Rights are state reporting on the African Charter on Human and Peoples' Rights and its substantive protocols, complaints mechanism and special mechanisms. Under the United Nations human rights system, there are also avenues for state reporting, complaints mechanisms and special procedures. The author observes that, coverage of older persons' issues in Tanzania's

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state reports to the African Commission, the United Nations Human Rights Council and United Nations Treaty Bodies has been insignificant. Nonetheless, Tanzania has received important recommendations from the treaty monitoring bodies for improving the human rights situation of older persons. Moreover, complaints mechanisms have seldom been used by older persons and civil society in defending older persons' rights. The author further observes that ratification and domestication of relevant international human rights treaties which guarantee older persons' rights is necessary.

Key words: International human rights avenues, realisation, older persons, older persons' rights.

1 Introduction

The emergence of international human rights law after WWII marked a revolutionary turning point in the history of the world. The power of the idea of human rights has been manifested by the influence of human rights norms in shaping global and domestic frameworks on different aspects of life including social welfare and development.¹ The ultimate impact of international human rights law has to be measured in the very place where human rights should be realised and enjoyed by people—the domestic level. Among other things, human rights monitoring mechanisms have been established at the global and regional levels to improve human rights protection at the domestic level. Despite the known weaknesses of international human rights

¹ HEYNS, Christof & VILJOEN, Frans (2001), *The Impact of the United Nations Treaties on the Domestic Level*, Human Rights Law Quarterly, Vol. 23. p. 2.

law², studies show international human rights law has had a remarkable impact on the domestic level. It has influenced constitutional bills of rights, adoption of legislation, policies, programmes and plans and above all, the language of human rights has largely permeated documents, processes and laws in virtually all spheres of life. In short, a human rights-based approach to many aspects of life, including socio-economic development, has become a common call in many countries across the world.³

The guarantee and realisation of human rights at the national level has never been an automatic process; it requires enormous

² These include weak enforcement mechanisms for enforcing international human rights obligations and decisions and or recommendations of monitoring and adjudicatory mechanisms.

³ HEYNS, Christof & VILJOEN, Frans (2001), *The Impact of the United Nations Treaties on the Domestic Level*, Human Rights Law Quarterly, Vol. 23.

https://www.academia.edu/3134560/The_impact_of_the_United_Nations_human_rights_treaties_on_the_domestic_level - accessed on 14 December 2020; KAZOBA, Grace & MMBANDO, Charles (2016), "The Impact of the African Charter and the Maputo Protocol in Tanzania" in: AYENI, Victor (ed.), *The Impact of the African Charter and the Maputo Protocol in selected African States*, Pretoria University Law Press.

<http://www.pulp.up.ac.za/edited-collections/the-impact-of-the-african-charter-and-the-maputo-protocol-in-selected-african-states?highlight=WyJrYXpvYmEiLCJncmFjZSJD> – accessed on 15 December 2020; NAZILA, Ghana *et al.* (2016), Big Promises, Small Gains: Domestic Effects of Human Rights Treaty Ratification in the Member States of the Gulf Cooperation Council, Human Rights Quarterly, Vol. 38 (2016) 21-57, Hopkins University Press.

https://www.researchgate.net/publication/294575959_Big_Promises_Small_Gains_Domestic_Effects_of_Human_Rights_Treaty_Ratification_in_the_Member_States_of_the_Gulf_Cooperation_Council - accessed on 13 December 2020; and KILLADER, Magnus (2013), *How International Human Rights Law influences Domestic Law in Africa*, Law, Democracy and Development, University of the Western Cape, Vol. 17 (2013).

effort and it is always a work in progress. There are many situations where national systems become inadequate in protecting, fulfilling and respecting human rights and even addressing human rights violations. Against this background, this article examines international human rights avenues which can enhance the realisation of older persons' rights in Tanzania.

2 Avenues under the United Nations Human Rights System

The Second World War World saw suffering, loss of life and destruction at a scale that shook the human conscience.⁴ Out of the ashes of the war, it became clear that a stronger supra-national mechanism for ensuring peace and security across the world was necessary. This realisation motivated the international community to forge an international architecture for maintaining peace and security through the establishment of the United Nations in 1945. The UN's core mission is to maintain international peace and security⁵ through, among other means, promoting respect for human rights⁶ and fundamental freedoms.⁷ Under the UN such promotion takes place through two courses namely; the charter-based system which involves the organs of

⁴ The opening recital to the UN Charter affirms that WWI and WWII brought "untold sorrow to mankind."

⁵ Article 1(1) of the UN Charter.

⁶ According to DUGARD, J (2013), *International law: A South African Perspective*, JUTA, p 87, the promotion of human rights at the international level took root only after WWII. Before this time, the manner in which a state treated its own citizens was not a primary concern in international law. To cement the author's point, the founding instrument of the League of Nations contained strong provisions against interference of internal affairs of states (Article 10 of the Covenant of the League of Nations).

⁷ Articles 1(3) and 55(c) *ibid*.

the UN and the treaty-based system which comprises the UN core human rights treaties⁸ and their monitoring mechanisms.

2.1 The Charter-based System

2.1.1 Universal Periodic Review of the Human Rights Council

The UN Charter establishes the Human Rights Council for monitoring human rights situations in all Member States of the United Nations. The Council performs this function through the Universal Periodic Review (UPR) process during which the human rights records of the UN Member States are reviewed. Each State gets an opportunity to make a submission of the actions it has taken to improve the human rights situation of its people. The process is designed to ensure all countries are treated equally during the assessment with the ultimate goal of improving the human rights situation in the countries under review and addressing all forms of human rights violations.⁹

⁸ In its various publications the UN uses the phrase ‘Core UN human rights treaties’ to refer to the nine human rights treaties that have been designated by the UN as core human rights treaties. In some literature the words ‘main,’ ‘primary’ or ‘major’ treaties are used. See for example United Nations, (2014) *The Core International Human Rights Treaties*, United Nations, p. 1. http://www.ohchr.org/Documents/Publications/CoreInternationalHumanRightsTreaties_en.pdf - accessed on 19 July 2020. See also UN, (2012) *Human Rights Indicators: A Guide to Measurement and Implementation*, United Nations, p. 14, which states that “these nine conventions and their optional protocols constitute the core international human rights instruments of the United Nations.”

⁹ United Nations Human Rights Council, Universal Periodic Review. <https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> - accessed on 23 May 2021.

So far, Tanzania has participated in the UPR process twice, in 2011 and 2016. It submitted its first report in July 2011 and was reviewed in December 2011. The reporting process provides a unique opportunity for the country to conduct an introspection into its own human rights situation and gets an opportunity to state the progress it has made and what it needs to do to improve its situation. The reporting process is an opportunity to present and discuss matters relating to older persons' rights particularly because of their vulnerability to human rights violations. The importance of the process at the national level is reflected in section one of the 2011 report which shows how different stakeholders were involved; it provides:

“The Government with the support of the United Nations under the one UN system, held several consultative workshops for purposes of gathering information on the situation of human rights for inclusion in the National Report. Participants were drawn from the Government Institutions, Civil Society organisations and the National Human Rights Commission. The final Draft of the Report was validated by a cross section of all the relevant stakeholders. The UPR process was publicised in order to raise awareness and ensure public participation in the country. Press releases were issued in both English and Swahili languages. UPR programmes were broadcast on the national Television stations in order to invite contributions and inform the public about the process.”¹⁰

¹⁰ Human Rights Council (2011), United Republic of Tanzania National report, section I, p. 2.

As far as older persons are concerned, the report presents the killing of elderly women due to superstitious beliefs as one of the human rights challenges in Tanzania. The Government stated it was sensitising and raising the awareness of the communities in which such incidents are prevalent.¹¹ Tanzania also reported on the progress it has made in the health sector including its efforts to enhance primary healthcare, reduce maternal and child mortality, increase health facilities, and address malaria and HIV/AIDS.¹² Based on these, and other submissions, Tanzania received constructive recommendations as outlined in the Council's report.¹³ It is observed that in the first reporting cycle, older persons' issues were not significantly covered in the report particularly given the enormity of the challenges they face, including in the area of healthcare. During the second reporting cycle, Tanzania submitted its report in February 2016 and was reviewed in July 2016. During this time a range of issues touching on older persons and health were covered. In the report, Tanzania, *inter alia*, reported that: the Law Reform Commission of Tanzania was in the process of reviewing laws on elderly social care; the marking of the International Day of Older Persons is used in Tanzania as an opportunity to raise public awareness on the rights of older persons as a vulnerable group; the Government was undertaking a review of legislation to combat killings of elderly women due to witchcraft allegations; the Government has been supporting elderly persons through social protection framework; and the Government was taking measures to increase healthcare facilities and healthcare

¹¹ *Ibid*, section C, p. 14.

¹² *Ibid*, section F, p. 7.

¹³ Human Rights Council (2011), Report of the Working Group on the Universal Periodic Review, United Republic of Tanzania.

personnel and enhance access to healthcare services across the country.

The coverage of older persons in the 2016 report was improved compared to the 2011 report. It is recommended that in future reports, more information on older persons is included and that older persons, through their organisations, should significantly participate in the preparation of the reports. Based on its submission and discussion of the Tanzania report, the Human Rights Council made several recommendations for improving the human rights situation of older persons. The Human Rights Council advised Tanzania to: finalise the law on the protection of the elderly, including women accused of witchcraft, and ensure its strict application; continue to promote the rights of women and girls, the elderly and children; strengthen the legal protection of individuals belonging to groups in the most vulnerable situations in comprehensive anti-discrimination legislation; establish a national intergovernmental independent mechanism responsible for monitoring public policies in the field of human rights; and accelerate ongoing efforts to ensure access to clean and safe water, and to healthcare, countrywide.

Undoubtedly, reporting and receiving recommendations is one thing while implementing them is quite another. In March 2016, some civil society organisations in Tanzania called on Tanzania to implement the 2016 UPR recommendations including those concerning older persons. The CSOs noted with concern that Tanzania has not enacted a law for protecting elderly persons and that older persons continue to lack appropriate healthcare

services including access to medicines, diagnostic services and management of geriatric conditions and chronic diseases.¹⁴

To increase the impact of the process at the national level, the submission of reports should be done timely. Moreover, issues relating to older persons' rights should be substantially covered, particularly the measures that the Government has taken to protect and realise their rights. This will open doors for constructive dialogue and issuance of recommendations which can help to emphasise the need to strengthen the protection of older persons' rights.

2.1.2 Special Procedures of the Human Rights Council

The special procedures comprise independent human rights experts with specific mandates and who report and advise on human rights matters based on their thematic or country-specific mandates. They are elected for three-year mandates. As of September 2020, there were 44 thematic and 11 country mandates. With the support of the Office of the United Nations High Commissioner for Human Rights (OHCHR), the functions of the independent experts are to: undertake country visits for purposes of collecting information or any activity necessary for fulfilling their mandates; act on individual cases of reported violations; conduct annual thematic studies, seek information from calls for input and convene

¹⁴ Legal and Human Rights Centre, Tanzania Human Rights Defenders Coalition & Save the Children (2021), Tanzania Civil Society Report on The Status of the Implementation of the 133 UPR Recommendations of March 2016 which were Accepted by The United Republic of Tanzania (CSOs' Joint Submission to the 39 UPR Working Group Review of the United Republic of Tanzania, March 2021). p. 8.

expert consultations; contribute to the development of international human rights standards, engage in advocacy, raise public awareness, and provide advice for technical cooperation.”¹⁵

Generally, the work of special procedures can significantly advance human rights at the domestic level in different ways including influencing legislative and policy adoption and reform; raising awareness on human rights matters; preventing human rights violations; improving access to mechanisms for redress of human rights violations; mainstreaming human rights in government frameworks and actions; facilitating setting human rights standards/norm setting; and facilitating dialogue on human rights issues.

In 2010 the Open-Ended Working Group on Ageing was established by the General Assembly¹⁶ and has been examining the existing international framework on the human rights of older persons in order to identify gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures.¹⁷ Besides, in 2014 the first Independent UN Expert on the enjoyment of all human rights by older persons was appointed.¹⁸ The Expert was appointed by (and reports to) the UN Human Rights Council in Geneva to

¹⁵ Special Procedures of the Human Rights Council, <https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> - accessed on 17 May 2021.

¹⁶ Resolution 65/182 of 21 Dec. 2010.

¹⁷ See website of the working group. <https://social.un.org/ageing-working-group/index.shtml> - accessed on 13 September 2019.

¹⁸ See website of the Independent Expert.

<https://www.ohchr.org/EN/Issues/OlderPersons/IE/Pages/IEOlderPersons.aspx> - accessed on 13 September 2019.

assess the human rights implications in relation to the implementation of the Madrid International Plan of Action on Aging (MIPAA), examine the manner in which the existing international human rights instruments have been implemented with regard to older persons' rights and find out good practices and implementation challenges. The broad mandate of the Expert is to undertake fact-finding country visits and issue recommendations, prepare thematic reports on older persons' human rights issues, raise people's awareness on the challenges older persons face in realising their rights, and report to the UN Human Rights Council annually. Various recommendations and findings of the Independent Expert can significantly improve human rights practices at the domestic level. Tanzania is therefore advised to use this opportunity in its efforts to strengthen the protection of older persons' rights.

2.1.3 Human Rights Council Complaint Procedure

On 18 June 2007, the Human Rights Council adopted Resolution 5/1 entitled "Institution-Building of the United Nations Human Rights Council" by which a new complaint procedure was established to address consistent patterns of gross and proven violations of all human rights occurring in any part of the world. The complaint procedure addresses communications submitted by individuals, groups, or non-governmental organisations that claim to be victims of human rights violations or that have reliable knowledge of the violations. The procedure is kept confidential in order to enhance cooperation with the State

concerned.”¹⁹ Older persons in Tanzania can directly or through their organisations submit complaints to the Human Rights Council in situations where there are verifiable patterns of violation of their rights.

2.2 The United Nations Treaty-based System

Each of the core human rights treaties of the UN and AU establishes a monitoring body (treaty body) charged with the responsibility of monitoring the implementation of treaties by states parties. A treaty body performs this task by considering reports that are submitted by states parties indicating the steps taken to give effect to treaty provisions at the domestic level. After considering reports, treaty bodies issue recommendations or observations for consideration by the state concerned. Moreover, under some of the treaties, a complaints procedure exists whereby a treaty body can receive and consider individual (as sometimes inter-state) complaints. This is another opportunity for older persons in Tanzania.

2.2.1 State Reporting to the United Nations Treaty Bodies

Each of the core human rights treaties of the UN and AU establishes a monitoring body (treaty body) charged with the responsibility of monitoring the implementation of the treaty in question by states parties. A treaty body performs this task by considering reports that are submitted by states parties indicating the steps taken to give effect to the treaty in question at the

¹⁹ Human Rights Council Complaints Procedure, <https://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx> - accessed on 14 May 2021.

domestic level. After considering reports, treaty bodies issue recommendations/observations for consideration by the state concerned. Moreover, under some of the treaties, a complaints procedure exists whereby a treaty body can receive and consider individual (as sometimes inter-state) complaints. Tanzania has been participating in the state reporting process under the UN treaties ratified by Tanzania.

State reporting serves a variety of functions. State reporting establishes an avenue and framework for constructive dialogue between Tanzania and the monitoring body. The process is non-confrontational and therefore an opportunity to make observations and find ways through which a particular treaty can better be implemented. State reporting also enables the monitoring of a state's compliance with its human rights obligations under a specific treaty. It further helps in conducting public scrutiny on a state's performance with regard to its human rights obligations. Besides, the process covers not only the progress that has been made but also factors that make the implementation of rights.²⁰

At the domestic level, the Tanzanian Human Rights Action Plan sets out the framework for state reporting to treaty bodies and the Universal Periodic Review of the UN Human Rights Council. There has been very limited coverage of older persons' issues and rights in Tanzania's reports particularly those submitted to the Committee on the Elimination of Discrimination Against Women and the Committee on the

²⁰ UN Human Rights Treaty Bodies.

<https://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx> - accessed on 4 May 2021.

Rights of Persons with Disabilities. Given the fact that older persons are a vulnerable group, more needs to be done to ensure older persons' groups are substantially covered in the state reports.

2.2.2 Complaints Mechanisms under the Core UN Human Rights Treaties

Of the nine core UN human rights treaties, Tanzania has ratified six namely: International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities. Each of the above treaties has a complaints procedure that allows individuals to directly submit complaints to the relevant treaty alleging violation of the treaty provisions by a state in question. However, for this to happen, a relevant state must have accepted the individual complaint procedure, usually, by making a declaration or by ratifying an optional protocol to a particular treaty. Of the six ratified treaties, Tanzania has only ratified two optional protocols on individual complaints namely; the Optional Protocol to the Convention on the Elimination of Discrimination against Women; and the Optional Protocol to the Convention on the Rights of Persons with Disabilities. This allows older persons to directly submit individual complaints or communications as the case may be, to the Committee on the Elimination of All Forms of Discrimination against Women and the Committee on the Rights of Persons with Disabilities. Tanzania is advised to ratify all the

protocols on individual and inter-state complaints mechanisms to enhance accountability on human rights implementation by allowing all its people, including older persons, to access the mechanisms in the event of failure to get redress for human rights violations at the domestic level.

3 Regional Level (Africa)

The African human rights system was set in motion with the adoption of the African Charter on Human and Peoples' Rights²¹ (African Charter) in 1981 under the then Organisation of African Unity (OAU). The African Charter, which has two protocols,²² is the main human rights treaty of the AU to which fifty-two²³ members of the AU are parties. Apart from the African Charter, the AU has also adopted the African Charter on the Rights and Welfare of the Child (African Children's Charter).²⁴ Tanzania has ratified the African Charter and its two protocols and the African Children's Charter.

3.1 African Commission on Human and Peoples' Rights

3.1.1 State Reporting to the African Commission

African regional human rights treaties require states parties to recognise the rights in the treaties and take legislative,

²¹ Tanzania signed and ratified it on 31 May 1982 and 18 Feb 1984 respectively.

²² The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2003 and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights of 1998.

²³ South Sudan has neither signed nor ratified the Charter.

²⁴ Tanzania signed and ratified it on 23 Oct 1998 and 16 Mar 2003 respectively.

administrative and other measures to give effect to them. This broad obligation has been further elaborated to mean states parties should protect, respect, fulfil and promote the rights at the domestic level. A related obligation is state reporting to treaty bodies indicating the steps taken to give effect to the treaty norms. The obligations aim to exert pressure on states parties to ensure that human rights take root at the domestic level. Tanzania's ratification of the three AU treaties represents a commitment to live up to the obligations imposed by the treaties. Such commitment is animated when a country complies with its obligations.

The AU human rights treaties relevant for older persons are the African Charter and the Maputo Protocol. The treaties set out the substantive human rights norms for adoption by states that are members of the AU and parties to the said treaties. At the African regional level, Tanzania has ratified the core human rights treaties of the AU namely; the African Charter (and its two Protocols—the Maputo Protocol and African Court Protocol) and the African Children's Charter.

Since the ratification of the African Charter, Tanzania has reported twice to the African Commission.²⁵ In 1992 Tanzania submitted its initial report and in 2006 a consolidated report which comprised of the second to the tenth reports that were all due by 2006. Five reports are now overdue.²⁶ In its Concluding

²⁵ According to Article 62 of the African Charter, States Parties to the Charter are required to submit, every two years, a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognised and guaranteed by the Charter.

²⁶ African Commission, State reporting; <http://www.achpr.org/states/> - accessed on 15 May 2018.

Observations (on the consolidated report) the African Commission urged Tanzania to take urgent measures to domesticate the African Charter and other international instruments in order to guarantee the rights contained in the treaties. With regards to the Maputo Protocol, Tanzania was supposed to have reported on it when it submitted its consolidated report in 2006 because the Protocol (under article 26(1)) provides that states parties shall submit reports in accordance with article 62 of the African Charter. Older persons' issues have been negligibly reflected in the reports. Like the case with the reporting to UN treaty bodies, state reports to the African Commission have not substantially covered issues on older persons' rights. Tanzania is therefore advised to ensure this gap is addressed in future reports.

3.1.2. Complaints Procedure of the African Commission

Tanzania has ratified all the core human rights treaties of the African Union namely: the African Charter on Human and Peoples' Rights; the African Charter on the Rights and Welfare of the Child; and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. The individual complaints mechanism of the African Commission is embedded in the African Charter in that ratification of the Charter by a state automatically represents its acceptance of the mechanism, unless there is a specific reservation. In this regard, Tanzania has accepted the mechanism by ratifying the Charter. Moreover, given the fact that the Maputo Protocol supplements the normative content of the African Charter on Human and Peoples' Rights, the scope of the implementation mandate (which includes considering individual and inter-state

complaints) of the African Commission remains the same. In this regard, by ratifying the Maputo Protocol, Tanzania has also accepted individual mechanisms with respect to the Protocol.

The African Commission on Human and Peoples' Rights—the treaty body responsible for overseeing the implementation of the African Charter and its substantive Protocols—is mandated to receive and consider communications alleging violation (by a state party) of the African Charter and the Maputo Protocol. These communications can be submitted by older persons or organisations after the exhaustion of domestic remedies. This avenue can be used by older persons in Tanzania to challenge Government actions which violate the African Charter in relation to older persons' rights.

3.1.2. Special Mechanisms of the African Commission

Special mechanisms (for AU) or special procedures (for UN) operate under the AU and UN systems respectively and have similar goals. The main difference is that, the special procedures under the UN function under the auspices of the Human Rights Council which is a creature of the UN Charter. However, under the AU, special mechanisms are created and overseen by the African Commission²⁷; the treaty body created by the African Charter. The relevant special mechanism of the African Commission is the Working Group on the Rights of Older Persons and People with Disabilities which was established in 2007. The Working Group's mandate includes to: hold comprehensive brainstorming sessions to articulate the rights of

²⁷ The Commission has the mandate to create subsidiary mechanisms such as special rapporteurs, committees and working groups.

older persons and people with disabilities; facilitate and expedite comparative research on the various aspects of human rights of older persons and people with disabilities on the continent, including their socio-economic rights; collect data on older persons and people with disabilities to ensure proper mainstreaming of their rights in the policies and development programmes of Member States; and identify good practices to be replicated in the Member States.²⁸

The work of the Working Group can be utilised to improve domestic systems and practices towards improving the human rights situation of older persons. For example, in 2019 the Working Group conducted a Seminar on the Ratification of the Protocol on the Rights of Older Persons in Africa and the Protocol on the Rights of Persons with Disabilities in Africa to the member states of the African Union and thereafter issued recommendations for implementation by states.²⁹ These recommendations can be considered by Tanzania in deciding the possible ratification of the two key AU treaties namely, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa.

3.2 African Court on Human and Peoples' Rights

²⁸ Working Group on the Rights of Older Persons and People with Disabilities. <https://www.achpr.org/specialmechanisms/detail?id=12> – accessed on 1 September 2020.

²⁹ African Commission on Human and Peoples' Rights. <https://www.achpr.org/news/viewdetail?id=196> – accessed on 12 October 2020.

One of the prime responsibilities of the state is to protect all people within its borders—their security and peace, property, dignity and general welfare. This can be achieved through, among other means, guaranteeing and protecting human rights. The state has the machinery to make, enforce and interpret laws and is, therefore, the primary duty bearer as far as human rights protection is concerned. Around this arrangement, one paradox is apparent—while states are the custodians of rights, they remain the primary violators of the same rights. Consequently, and oftentimes, citizens need to pursue different measures to defend their rights against the state.³⁰ In a situation, it may be necessary to use supra-national avenues.

The African Court is the main judicial institution of the African Union mandated with a human rights jurisdiction. Cases involving a violation of older persons' rights can be filed before the Court because Tanzania has signed and ratified both the African Charter and the African Court Protocol. The violation of older persons' rights by Tanzania can therefore form a basis for a claim before the African Court subject to applicable procedures and conditions. However, it should be noted that on 14 November 2019, Tanzania submitted to the African Court a notice of withdrawal of its declaration under Article 34(6) of the Court Protocol the effect of which is that individuals and NGOs with observer status with the African Commission will not be able to directly file cases before the Court. Cases (against Tanzania), can however be filed by other states that have ratified

³⁰ VILJOEN, Frans (2012) *International human rights law in Africa*, Oxford University Press, p. 4.

the Charter by the African Commission and African Intergovernmental Organisations.

3.1. Key African Union Treaties on Older Persons' Rights

On 31 January 2016, the Twenty-Sixth Ordinary Session of the AU Assembly adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (African Protocol on Older Persons). Moreover, in 2018 the AU adopted another protocol namely, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa. The Protocol on Older Persons contains two important provisions on older persons generally and older persons with disabilities. For older persons generally, the Protocol sets out three broad obligations which require States Parties to: guarantee the rights of older persons to access health services that meet their specific needs; take reasonable measures to facilitate access to health services and medical insurance for older persons within available resources; and ensure the inclusion of geriatrics and gerontology in the training of healthcare personnel.³¹

As of 25 March 2022, the Protocol on Older Persons Rights had been signed and ratified by eighteen and six countries respectively.³² Fifteen ratifications are needed for the Protocol to enter into force.³³ Moreover, as of 28 March 2022, the Protocol

³¹ Article 15 of the Protocol.

³² https://au.int/sites/default/files/treaties/36438-sl-Protocol_to_the_African_Charter_on_Human_and_Peoples_Rights_on_the_Rights_of_Older_Persons.pdf - accessed on 14 May 2022.

³³ Article 26(1) of the Protocol on Older Persons.

on the Rights of Persons with Disabilities had been signed and ratified by eleven and three countries respectively.³⁴ Likewise, fifteen ratifications are needed for the Protocol to enter into force.³⁵ Tanzania has neither signed nor ratified the two Protocols. However, since it has been at the forefront in signing and ratifying core regional and global human rights treaties and it is therefore expected that the same spirit will remain alive towards the ratification of the two Protocols.

Given the fact that Tanzania is a dualist state, the ratification of the two Protocols will not be an end in itself but a means towards another end. The most desired and appropriate end is the enactment of comprehensive legislation for the protection and promotion of older persons' rights. The legislation should have been in place by now because the Government adopted a national policy on ageing way back in 2003. However, the delay may now somehow be regarded as a blessing in disguise because the Protocols provide for a broad normative framework making it a sure point of reference for purposes of informing the letter and spirit of domestic legislation. Moreover, between 2003 when the National Aging Policy was adopted and now a lot has taken place in terms of research, Government policies and laws and international and regional developments all of which are at the Government's disposal in the event a legislative process is initiated. In this regard, the time for ratification and domestication of the Protocols is now ripe than ever before.

³⁴ https://au.int/sites/default/files/treaties/36440-sl-Protocol_to_the_African_Charter_on_Human_and_Peoplesautm_Rights_on_the_Rights_of_Older_Persons.pdf pdf - accessed on 14 June 2022.

³⁵ Article 38(1) of the Protocol.

Although Tanzania has set a good example in ratifying international human rights treaties, very little has been done to domesticate them. In the event the Protocols are ratified they must be domesticated by an Act of Parliament. If such a law is enacted, this will be the most direct and important impact of the Protocol. The practice has been that, in domesticating human rights treaties, only certain chosen aspects are domesticated.³⁶ It will be necessary to prepare a bill that substantially domesticates all the substantive aspects of the Protocols to ensure the normative spectrum in the Protocol is truly extended to older people in Tanzania who are the ultimate beneficiaries of the Protocols. In this regard, meaningful domestication remains the most important factor for enhancing impact. Without domestication by an Act of Parliament, the Protocol may not be expected to make a significant difference in Tanzania. Studies show undomesticated human rights treaties have had a very limited impact in Tanzania.³⁷

4 Conclusion

This article has explored international human rights avenues for improving the realisation of older persons' rights in Tanzania. It reveals that international human rights systems at the regional

³⁶ See for example the Law of the Child Act 21 of 2009. Although its long title indicates that the purpose of the Act is, among other things, 'to give effect to international and global conventions on the rights of the child'—which essentially means the African Children's Charter and the Convention on the Rights of the Child—the content of the Act does not cover some essential norms in the two treaties.

³⁷ See for example G Kazoba & C Mmbando 'The Impact of the African Charter and the Maputo Protocol in Tanzania' in V Ayeni (ed.) *The Impact of the African Charter and the Maputo Protocol in Selected African States* (2016) 249.

and global levels can play a significant role in strengthening the domestic system for the protection and realisation of older persons' rights. It has generally been observed that coverage of older persons' issues in the UN's Universal Periodic Review (UPR) and state reporting to various treaty bodies has been insignificant. This is also the case with reports submitted by Tanzania. The main issue covered is violence against older women based on witchcraft beliefs. Nonetheless, the Human Rights Council, which oversees the UPR, and some treaty bodies have issued recommendations touching directly on older persons' rights in Tanzania. Regarding complaints procedures, there are chances for filing complaints to treaty bodies through prescribed procedures. It has also been shown that the AU has made remarkable progress in recognising older persons' rights through the adoption of the Protocol on Older Persons' Rights and the Protocol on the Rights of Persons with Disabilities. Once they enter into force, these treaties will trigger continuous continental scrutiny of older persons' rights and will provide states with an opportunity to examine their systems in the context of older persons' rights. It is expected that Tanzania will ratify and domesticate the treaties and the same will have a positive impact on the human rights situation of older persons in Tanzania.

An Appraisal of the Viability of the Legal and Institutional Frameworks in Fostering Affordable Mortgage Financed Housing Amongst the Low- and Medium-Income Earners in Tanzania

Joseph Jerome Muna*

Abstract

This Paper appraises the capability of the Tanzanian legal and institutional frameworks in fostering the national policy, objective and agenda for affordable mortgage financed housing among the low- and medium-income earning population in the country. The undertaking of the work was triggered by the reality on the ground, that, despite of the existence of the policy, legal and institutional frameworks that aim at fostering the national policy for affordable mortgage financed housing, the same is still not affordable to the target population. Logically and reasonably, this raises concern on, among other things, the viability of the said policy, legal and institutional frameworks in upholding the national policy and agenda for affordable mortgage financed housing among the low- and medium-income earning population. This paper is developed on the strength of data and information collected through diverse approaches including studying of the relevant policies, institutional strategic

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plans, reports and the review of the relevant laws. The objective of this paper is to scrutinise the legal and institutional frameworks with the views to identifying the problems which hinder them from effectively facilitating people's efforts in accessing affordable mortgage financed housing. In the evaluation of the relevant laws and institutions it is discovered that the problem with the laws and the relevant institutions is basically the non-embodiment of the theme of affordable housing. In the end, this paper proceeds to recommend for enriching the country's legal and institutional frameworks with the relevant themes with the view to making mortgage financed housing affordable to the low- and medium-income earners in the country.

Keywords: Legal and Institutional Frameworks; Low- and Medium-Income Earners; Mortgage Financed; Affordable Housing.

1.0. Introduction

Housing being an indispensable human need, its affordable accessibility by all categories of the population regardless of their social-economic status should not be an unwieldy dialogue. Even the economically challenged people are expected to affordably access decent housing. Contrary to this perception, however, the low- and medium-income earners access to mortgage financed housing in Tanzania has at all the time been restrained. To them, mortgage financed housing has indeed been unaffordable. To facilitate such category of population's exertions to access mortgage financed housing at affordable rates a number of measures involving devising legal and

institutional frameworks have been undertaken by the prime duty holder – the government. The devising of legal and institutional frameworks for purposes of facilitating affordable acquisition of mortgage financed housing is opted because laws and institutions are considered to be important tools to uphold and effectuate the government policies and objectives such as the government objective for affordable mortgage financed housing among the low- and medium-income earning bracket in Tanzania. Regardless of all these measures, however, mortgage financed housing has remained un-affordable.

The present paper, thus, intends to enquire and respond to the queries on the viability of the legal and institutional frameworks in upholding the national policy and objectives for affordable mortgage financed housing among the low- and medium-income earners in the country. The paper is structured in sequential form: it starts by explaining the national policy, objective and agenda regarding affordability of mortgage financed housing then a portrayal of the state of affordability of mortgage financed housing in Tanzania is done. The paper then states the legal and institutional frameworks regulating the mortgage financed housing and thereafter an evaluation of the viability of the legal and institutional frameworks in their quest to facilitate affordable acquisition of mortgage financed housing in the country, is done. In the final part of this paper, recommendation for the improvement of the legal and institutional frameworks is offered.

2.0. The National Policy, Objective and Agenda for Affordable Mortgage Financed Housing

Tanzania as a nation has wishes regarding affordable mortgage financed housing among the low- and medium-income earners. They form the state policy, objective and agenda. They can be assembled from various legal and policy instruments including the Constitution of the United Republic of Tanzania, 1977 (the Constitution), the Land Act, 1999, the Village Land Act, 1999, the National Land Policy (NLP), 1995, the National Human Settlements Development Policy (NHSDP), 2000 and other sectoral policies, guidelines, programmes and projects and strategic plans. In their totality, all these present and suggest for affordable mortgage financed housing as a national policy, objective and agenda. In striving to realise such policy, objective and agenda, thus, the instruments propagate for the arresting of the existing impediments and consequently creation of conducive environment for the realisation of the policy, objective and agenda through diverse ways including administrative, legal and institutional. While in the Constitution the relevant provision is embedded in the provision that entrusts upon the government the responsibility to ensure well-being of the people, in the Land Act, 1999 and the Village Land Act, 1999 the relevant policy, objective and agenda is embodied in the part on fundamental principles of national land policy. This is to the effect that all persons exercising powers under the Land Act, 1999 and the Village Land Act, 1999 should have regard to the objective of the law which is to facilitate an equitable distribution of and access to land by all citizens.¹

¹See Land Act, 1999 RE 2019, s. 3 (1) (c) and the Village Land Act, 1999, RE 2019, s. 3 (1) (d).

Furthermore, in line with the policy incorporated in the laws as demonstrated here in above, the NLP 1995 asserts that the government's efforts should be focused in resolving the problem of affordable housing by designing special areas for low-income housing with simplified building regulations and affordable level of services.² The Policy seems to discourage village titling as that will act as an impediment to individuals who intend to use their land for mortgages because they cannot get titles for their lands.³ The NLP 1995, however, advocates for individual in the village to be allowed to obtain a certificate of village land for purposes of using them as collaterals in mortgage business.⁴ The NHSDP 2000 is, also, concerned with mortgage financing and affordable housing. It acknowledges the fact that the country is characterised by absence of formal mortgage financing, inadequate housing stock and affordable housing especially in the urban areas causing majority of the urban population in Tanzania to live in overcrowded and substandard dwellings.⁵ The overall goal of the NHSDP 2000 among others is to facilitate the provision of adequate and affordable decent shelter to low income groups in Tanzania.⁶

To augment and promote the view as embraced in the policies enumerated herein above, there are also several other general and sectoral, direct and indirect policies in existence. They

²United Republic of Tanzania, (1995), National Land Policy, Dar es salaam, Government Printer, Para 6.4.1(ii).

³ See the National Land Policy, 1995, para 4.2.27.

⁴The National Land Policy, 1995, Para. 4.2.28.

⁵National Human Settlements Development Policy (NHSDP), 2000, paras 2.2.4, 2.2.7 and 2.2.5, 2.2.5 (a).

⁶National Human Settlements Development Policy (NHSDP), 2000, para 3.1(ii) and 3.2 (xii).

include the Tanzania Development Vision (TDV) 2025 and its Five-Year Development Plan, the National Strategy for Growth and Poverty Reduction (NSGPR), the Property and Business Formalisation Programme (PBFP), the Financial Sector Development Master Plan (FSDMP), the Housing Finance Project (HFP) and the NHC and the WATUMISHI housing strategic plans. All these, mould and uphold the national policy for the affordable mortgage financed housing in different ways among the low- and medium-income earning population in Tanzania. Though policies have a character of not being self-executory, their role in streamlining the national objective for affordable housing, however, cannot be overemphasised. They have actually set the baseline for the executory power of the legal instruments and institutional bodies.

3.0. The State of Affordability of Mortgage Financed Housing in Tanzania

Regardless of the presence of the national policy, objective and agenda for affordable mortgage financed housing coupled with the supposedly pro-affordable housing laws and institutions, Tanzania, just like many other third world countries, is still challenged by the problem of un-affordable housing. Furthermore, though housing sector is fast growing and mortgage financing market has relatively increased in the country, mortgage financed housing has remained un-affordable.⁷ The low-income earning people and who comprises of the majority of Tanzanians, are unable to access the mortgage

⁷ Bank of Tanzania and Tanzania Mortgage Refinance Company Tanzania mortgage market update-31 march 2022.

financed housing in the country. It is estimated for example that in Tanzania, a country with a population of around 61.7 million people, only 3% can afford mortgage.⁸ The problem is greater in urban areas than in rural areas. Shortage of affordable housing causes majority of people to live in poor housing with poor services such as water, energy and roads. The conclusion that can be drawn out of the situation is that the legal and institutional frameworks have not been able to transform the situation as anticipated. In this paper's evaluation part, the role and the hinderances faced by the legal and institutional frameworks in facilitation of affordable acquisition of mortgage financed housing, are unfolded.

4.0. The Legal and Institutional Frameworks for Mortgage Financed Affordable housing

The implementation of the national policy, objective and agenda for mortgage financed affordable housing is backed up by both legal and institutional frameworks. While the legal framework serves as a tool to direct, guide and streamline the implementation of the objectives and agenda; the institutional framework, on the other hand, works as an apparatus to effectuate the said policies. The relevant legal framework in this context is composed of two kinds (sets) of laws: the first set is land administration-based laws, and, the second set is tax and fee-based legislation. The earlier includes the Land Act, 1999; the Village Land Act, 1999; the Unit Titles Act, 2008 and the later comprises of the Bank of Tanzania Act, 2006; the Banking

⁸ <https://www.habitat.org/where-we=build/tanzania>, Habitat for humanity, housing needs in Tanzania (accessed on 10th October 2022).

and Financial Institutions Act, 2006 and the Value Added Tax, 2014. In their varied nature, all these pieces of legislation impact the supply of affordable mortgage financed housing in the country by either constraining or facilitating creation and accessibility.

The Land administration-based statutes such as the Land Act, 1999; the Village Land Act, 1999 and others connected to these directly affect housing costs through their tendency of enforcing compliance and procedural requirements to various land acquisition, building, use and disposal. The impact of the tax-based statutes and others connected to them is seen in their imposition of tax levies of various kinds on housing, related products and transfer.

As hinted earlier, besides the legal framework for upholding the national objective for affordable housing, also in existence is the institutional framework. This is composed of a number of institutions devised to carry on the affordable housing objective in Tanzania. The relevant ones are the National Housing Corporation (NHC), the Watumishi Housing Company (WHC), the Tanzania Building Agency (TBA) and other financial and non-financial institutions such as banks and Non-Governmental Organisations (NGOs). The NHC was established in 1962 by the Act of Parliament for the primary purposes of creating affordable housing for the low-income Tanzanians. Its successor, the NHC 1990, though with some modifications of the objective but still upholds the mission to facilitate acquisition of affordable housing by the low-income earners.

The TBA on its part was devised in 2002⁹ also to uphold the idea for affordable mortgage financed housing in the country. It works with financial institutions, banks and pension funds to negotiate an affordable interest rate for mortgages to public servants.¹⁰ The WHC was established in 2002 under the Companies Act, 2002 to facilitate employees' access to affordable quality homes through mortgage.¹¹ The THB, a financial institution upon whose foundation other banks operate was also established for the same purpose to facilitate low income earners labours to acquire affordable mortgage financed housing.

5.0. An Appraisal of the Legal and Institutional Frameworks

It was presented in the preceding paragraphs, that, the legal and institutional frameworks are instrumental in upholding the national policy, objectives and agenda. In respect to affordable mortgage financed housing, however, the effectiveness of the relevant Tanzanian legal and institutional frameworks is questionable. In this part, an examination is done to ascertain the extent of their effectiveness and impediments (if any) in fostering the national policy for affordable mortgage financed

⁹ Executive's Agency Act, No. 30 of 1997, Cap 245.

¹⁰ Tanzania Building Agency (TBA) Strategic Plan, 2012-2017, pp. 21 and 35.

¹¹ Watumishi Housing Company Real Estate Investment Trust (WHC-REIT) Fund, *Annual Report for the year ended 30th June 2018*. WHC-REIT Fund, 2018, p. iii. See also Watumishi Housing Company, available at: <https://www.whc.go.tz/>, accessed on 14th.July 2019. See also IPP Media, watumishi housing has all unit titles for Dar, Dodoma projects, available at: <https://www.ippmedia.com/en/business/watumishi-housing-has-all-unit-titles-dar-dodoma-projects>. accessed 3rd May 2022.

housing in the country. For the purposes of examination, some criteria are set; they include the prominence accorded to the concept of affordability in the relevant laws; the impact of taxation of housing and other housing products; the amortisation period of the mortgage loan (funding) that goes into housing projects; the land use, planning and building regulations process and costs; the interests' rates on home loans and other charges and the other is availability and un-reliability of mortgage security. The criteria affiliated with the institutional framework include the sufficiency of relevant and reliability of mortgage providers; the availability and sustainability of long-term housing financiers; economic status of the people and the last in this context is the responsiveness of the adjudicative and ADR arrangements in addressing relevant business sector disputes. The choice and use of the enumerated criteria is grounded on the fact that such criteria have a bearing on housing costs and therefore are likely to affect the affordability of mortgage financed housing.

5.1. The Prominence of the Concept of Affordability in the Relevant Laws

The policy statements regarding affordable housing are found in the National Land Policy, 1996; the National Human Settlement Development Policy, 2000 and in the other general and sectoral policies such as the Tanzania Development Vision (TDV), NHC and Watumishi housing strategic plans. In the legal instruments the theme is scarce. Example: In the Constitution the concept can only be inferred from the provision on welfare of the

people.¹²Worse still, even the relevant laws such as the National Housing Corporation Act, 1990(NHC Act 1990) and other housing financing laws which are supposed to be embodying and upholding the concept do not adequately do that. Contrary, the NHC Act¹³expressly declares that housing shall be delivered to the people on purely commercial terms.¹⁴This is contrary to the initial objective for the enactment of the National Housing Corporation Act, 1962 (NHC Act 1962),¹⁵the predecessor law to the National Housing Corporation Act, 1990. The NHC Act 1962 was intended to facilitate acquisition of affordable housing by the low-income people.¹⁶As a result of the aforesaid changes in the law, the NHC which was also established for construction of low-cost houses for renting to the urban low- and middle-income people,¹⁷was later on made to operate in disregard of its original objective. In connection to the above said, the repeal of the Rent Restriction Act 1984 further aggravates the situation of un-affordable housing in the country by giving a room for money monger landlords to unreasonably raise housing rents.

At this juncture, it is worthy asserting that in Tanzania the policy, objectives and agenda for affordable mortgage financed housing is upheld more by policies and administrative directives than by the laws. This is not meritorious in so far as enforcement of the national plans and objectives is concerned. This is due to

¹²The Constitution of the United Republic of Tanzania, 1977, see art. 8.

¹³Cap. 290.

¹⁴The National Housing Corporation Act, 1990 as amended by the Written Laws (Miscellaneous Amendment) No. 2 of 2005.

¹⁵ Act No. 45 of 1962, Cap 481.

¹⁶See the long title.

¹⁷ Para. 2.3.6 (i)-(4) of the National Human Settlements Development Policy, 2000.

the fact that policies lack the enforcement character; they are just guidelines with no legal force. Policies need laws to effectuate them.

5.2. The Effects of Taxation on Housing and Housing Products

Taxes in their varied forms are usually imposed by laws. Levying of tax by state government is therefore a legal issue. They arise from housing rent, purchase of housing and also transfer and purchase of housing goods. In Tanzania, a number of taxes are levied including, capital gain tax; transfer fees; tax on services including power and water; the value added tax and the stamp duty. Taxes be direct or indirect impacts on housing affordability. Taxes, such as VAT have a tendency of raising housing costs.¹⁸

If taxes are cut down, it is believed housing costs will be cut hence the state objective for affordable housing will be achieved.

5.3. The Amortisation Period of the Mortgage Funding that Goes into Housing Projects

Housing funding in the form of mortgage loan requires not only a huge amount of money at once but also a time long enough within which to repay the mortgage loan. This is called amortisation period; it refers to the length of time it takes to

¹⁸Centre for Affordable Housing Finance, Housing Finance in Tanzania, available at: <https://housingfinanceafrica.org/countries/tanzania/> (accessed 20th July 2020).

fully repay a mortgage loan. Amortisation period may be set to be short, say 5 years or long, say 25 years and above. This paper takes a view that mortgage financing works at its best if its amortisation period is long, say 25 years and above. The essence of this is that though longer amortisation period attracts higher interest rates but it is also true that the longer amortisation period offers a space to re pay the loan without compromising other needs and also assures financial stability. All these, lead to a true meaning of affordability.

In Tanzania, mortgage market is characterised with lack of long-term funding by the financial institutions. This is attributed by the restriction imposed by the mortgage regulations; these set the mortgage loans to amortise within a maximum period of 20 years only.¹⁹ This is very short time for running housing projects. This contributes much to the un-affordability status of mortgage financed housing in the country. Insurance obligations over loan may act as an impediment to long amortisation period.

5.4. Land Use, Planning and Building Regulations, Process and Costs

Laws are used to guide all land uses including planning and erection of buildings in Tanzania. The relevant laws are the Urban Planning Act No. 8 of 2007, the Land Act, 1999 and the Village Land Act, 1999. The Land Act in this respect generally

¹⁹The Citizen Reporter, Why Low-Income Earners Can't Easily Access Housing Loans in Tanzania, *the Citizen*, online, Sunday, May, 22, 2022, accessed from, <https://www.thecitizen.co.tz/Tanzania/news/business/why-low-income-earners-can-t-easily-access-housing-loans-in-tanzania-3823528>, accessed on 20 October 2022.

provides that using land contrary to the directions of the law is violation of the terms and conditions for ownership of a right of occupancy a thing which may invalidate the ownership of such right of occupancy. Furthermore, the Planning Act has in it that building a house without first obtaining a building permit issued by the relevant authorities is a violation of the law.²⁰ Using land and building houses contrary to the stipulated legal requirements invalidates one's ownership of the right of occupancy and renders the structures so constructed on the plot that one has a right of occupancy, prone to demolition. There is causal effect of the land use and building regulation on one side and costs of acquiring mortgage financed housing and hence their affordability on the other hand. Housing become less affordable when there is over regulation. Regulations come with financial implications; overregulation is even worse. It is these which in the end raise the costs of acquisition of mortgage financed housing making them un-affordable.²¹

5.5. The Effects of Interest Rates on Home Loans and other Charges

Mortgage financing is ordinarily associated with some costs. Interests on loan, loan processing fee, advocate's professional fee and insurance are some of the said mortgage loan related costs. All these costs are borne by the mortgage applicant. The interest rates, advocate's professional fee and insurance are both statutory and institutional; statutory because they are provided in the laws and they are institutional because they are determined

²⁰The Urban Planning Act, No. 8 of 2007, s. 33.

²¹The National Human Settlements Development Policy, 2000, para 4.1.2.1 and 4.1.2.2.

and supervised by the relevant institutions such as the Bank of Tanzania (BOT).²²Such interest rates charged by banks on home loans and other mortgage services charges are exorbitant in Tanzania. Currently interest rates in Tanzania ranges from 15% to 29%.²³ These rates are certainly high. Though interest rates are determined by the inflation rates, cost of funds, operational costs, non-performing loans, provision for bad loans and Statutory Minimum Requirement Ratio (SMR),²⁴ but it is obvious that exorbitant interest rates and the associated costs are upsetting and consequently impede the realisation of the national objective for affordable mortgage financed housing.

Furthermore, the recently introduced and highly withdrawal charges and the government levy on bank transactions, even worsen the situation. All these costs have impact of raising the costs of mortgage financed housing among the low- and medium-income earners in the country.

5.6. The Availability of Mortgage Security and Reliability of Borrowers

Mortgage loan and market pre supposes possession of certain property as security by the mortgage market participants.²⁵Land is, with no doubt one of the prominent properties used as security for mortgage loans. The immovability nature of land

²²The Bank of Tanzania Act, No. 4 of 2006, see s. 41, 42 (2).

²³Bank of Tanzania and Tanzania Mortgage Refinance, Tanzania Mortgage Market Update-31 March 2022.

²⁴ Bank of Tanzania, Determinants of Banks Interest Rates in Tanzania: an investigation using banks' balance sheet data, 2019.

²⁵See the NHC Act, Cap. 295, s. 24(4).

gives it advantage over other securities. A regularised (formalised) land, in particular, is even the best security in this context as compared to the non-regularised one. This is because a regularised land greatly assures repayment of the loan as compared to non-regularised one whose security value is low hence less trusted.

Regardless of the said, however, vast land in Tanzania is not regularised. More than 70% of the urban population is accommodated in the un-regularised settlements.²⁶In Dar es salaam alone, for example: people who live on an unregularised land accounts for 75%.²⁷The abundance of un-surveyed land, is a fundamental constraint to a robust land market in Tanzania.²⁸All the Tanzanians without regularised land are placed on a disadvantaged position in so far as their participation in the mortgage market is concerned.

Lack of land and the prevalence of non-regularised land greatly impact the affordability of mortgage financed housing in the country; they exclude and restrict participation of many people in the mortgage market, respectively. Possession of un-regularised land in particular has effect of raising the mortgage interest rates. This answers the question why interest rates, in Tanzania, are high. This too contributes to un-affordability of mortgage financed housing in the country. Recognising the

²⁶Magina, Fredrick B, Kyessi, Alphonse G, and Kombe, Wilbard J., The urban land nexus-challenges and opportunities of regularizing informal settlements: the case studies of dar es salaam and mwanza in Tanzania, 2019, journal of African real estate research, 5.1:32-54, doi.10.15641/jarer.v5i1.837, accessed 13 sept 2022.

²⁷USAID, Country Profile, Land Tenure and Property Rights Tanzania.

²⁸USAID, Country Profile, Land Tenure and Property Rights Tanzania.

prevalence of the aforesaid challenges, the government initiated a special programme to formalise property and businesses of the Tanzanians. This programme is known as the Property and Business Formalisation Programme (PBFP) well named in Kiswahili as *Mkakati wa Kurasimisha Rasilimali na Biashara Tanzania* abbreviated as MKURABITA. Among other properties, the PBFP is concerned with formalisation of landed properties. This was expected to, among others, elevate the status and value of land of the weak and hence improve their status as mortgage security.

In connection to the issues of security, also, the issue of reliability of the borrowers is pertinent. Reliability is a key factor in taking a decision whether to issue a mortgage loan or not and at what amount. In Tanzania, most of the potential borrowers are not reliable. There is no database of the potential borrower's performance, profile and history of their credibility is unknown as well. This, affects the affordability of mortgage financed housing in that it raises loan interest rates.

5.7. The Availability and Relevancy of Mortgage Providers and Follow up Institutions

The problem of un-affordable housing is also conceived as attributed by existence of few licensed housing financing institutions in Tanzania. As earlier presented, the acquisition of housing greatly depends on accessibility of housing loans as self-serving for housing construction is not practicable due to its being done step by step thereby considerably taking a long-time. Home acquisition through self-serving in turn renders the whole process costly. The identified problems with housing financing

institutions basically are two: first, out of many financial institutions that exist very few are licensed mortgage financing institutions. In fact, out of over 400 registered and in operation financial institutions in Tanzania only 34 are licensed mortgage providers.²⁹ Furthermore, out of the said 400 only 5 namely CRDB BANK, Stanbic Bank, Azania Bank, NMB and Commercial Bank of Africa account for 70 of the loan debts in the country.³⁰ The second identified problem with the housing financing institutions is that traditional financial institutions such as banks are usually not supportive of low-income people; security is usually needed for them to access housing loan a thing which is rare to find among them. Further, most of the banks are private business entities with the intention to maximise their shareholders interest. Low income Institutions which would be friendly to the low-income earning are the microfinance institutions. Unfortunately, these are rare to be found in Tanzania.

Together with the above said, the problem of non-existence of institutions to make follow up of the use of proceeds of mortgage money is as well noticed. Despite of the good move of the relevant laws in requiring borrowers to use mortgage loan

²⁹The Citizen Reporter, Why Low-Income Earners Can't Easily Access Housing Loans in Tanzania, *the Citizen*, online, Sunday, May, 22, 2022, accessed from, <https://www.thecitizen.co.tz/Tanzania/news/business/why-low-income-earners-can-t-easily-access-housing-loans-in-tanzania-3823528>, accessed on 20 October 2022.

³⁰The Citizen Reporter, Why Low-Income Earners Can't Easily Access Housing Loans in Tanzania, *the Citizen*, online, Sunday, May, 22, 2022, accessed from, <https://www.thecitizen.co.tz/Tanzania/news/business/why-low-income-earners-can-t-easily-access-housing-loans-in-tanzania-3823528>, accessed on 20 October 2022.

for acquisition or development of a home but absence of specific follow up mechanism retards the pace of affordable housing development as loans are still re-routed to other projects.

5.8. Availability and Sustainability of Long-Term Housing Financiers

As intimated in the preceding paras, for a well flourishing mortgage industry that can promote affordable mortgage financed housing, the need and availability of long-term financing institution is paramount. This can only be made possible when there are reliable and economically stable institutions. Most of the Tanzanian mortgage financing institutions fall short of this quality. Because of this, they are unable to extend loans for long period of time.

Recognising the problems of economic instability and non-sustainability of most financing institutions, the Government of Tanzania through Bank of Tanzania (BOT) embarked on a project to establishing the Tanzania Mortgage Refinance Company (TMRC). This was established to play a role of mortgage lender to primary mortgage lending institution (whole sale or secondary market lending). Since its establishment in 2010, TMRC, has solved a great deal of the problem though not at 100%. The ever-arising need for long term housing financing has always increased the magnitude of the problem. The scarcity of the long-term housing financing institutions, thus, has remained a problem to date.

5.9. The Income Status of People

Tanzania just like most of the developing countries, the majority of its population is low income earners. The income earning of the people determines their purchasing power of products including mortgage financed housing. Worth noting in this respect is that mortgage market has an institutionalised feature to favour the middle- and high-income earning people; it marginalises the low-income earning people and who are, as presented earlier, the majority of the entire population.³¹ Majority low income earners, thus, continue to build from self-financing initiatives which not only take considerably long time but also comparatively cost full. The un-affordability of mortgage finance housing, thus, must be felt by this category of people.

5.10. Responsiveness of the Dispute Settlement Arrangements in Addressing Concerns of the Mortgage Business

Acquisition of mortgage financed housing by a home buyer from a property developer using money gotten from banks as loan is a business transaction in nature. Treatment of transactions of business nature such as settlement of disputes related to mortgage financing, in Courts of law, requires speedy processes. Sluggish and protracted processes result into loss. In Tanzania, the judiciary, which is the relevant dispute settlement institution, is un-responsive to the needs of the mortgage financing industry as a business. Settlement of mortgage

³¹The Citizen Reporter, Why Low-Income Earners Can't Easily Access Housing Loans in Tanzania, the Citizen, online, Sunday, May, 22, 2022, accessed from, <https://www.thecitizen.co.tz/Tanzania/news/business/why-low-income-earners-can-t-easily-access-housing-loans-in-tanzania-3823528>, accessed on 20 October 2022.

financing disputes are usually slow and protracted thereby defeating the interests of the relevant stakeholders. Though the newly established commercial division of the High Court was expected to solve the problem but its limitations renders it not much successful in this. Very limited matters penetrate the registry as the rules of admission into the registry segregate many cases which otherwise and ordinarily would be termed commercial. Most of commercial cases are thus heard by ordinary Courts of law such as the Primary Court, the Court of Resident Magistrate, the High Court and the Court of Appeal of Tanzania. Some cases are also heard by the tribunals such as the District Land and Housing Tribunal. Determination of cases by ordinary Courts of law, because of their nature and design, results into delay of cases on mortgage business.

In connection to the delay of cases, the ADR mechanisms are weak and not efficient in Tanzania. The strong and reliable ADR mechanism could be preferred to settle most of commercial disputes involving mortgage financing. The sluggish judiciary and absence of competent ADR mechanisms prolong the commercial dispute settlements mechanisms hence affecting their operation in the sense that they are compelled to raise interest rates and this in turn affects in a negative way prices of mortgage financed housing to the target population.

6.0. Conclusion and Way forward

This research paper dwelt on appraising the legal and institutional frameworks regarding mortgage financed housing with the view to ascertain their viability in fostering the national policy, objective and agenda for affordable mortgage financed

housing among the low- and medium-income population in Tanzania. Through this work, it is exposed that, basically it is the weaknesses in both legal and institutional frameworks that attributes to the un-affordability of the mortgage financed housing among the low-income earners in the country. It is further shown that they have not been able to play their roles because they are stained with multiple hitches whose effect is to detach the theme of affordable housing from them and hence impede the realisation of affordable housing among the low- and medium-income earners in the country. In particular, the problems associated with the legal framework are the imposition of taxes on housing and products; short loan amortisation period; cost full processes associated with land use, planning and building regulations; exorbitant interest rates on housing loans and un availability and un re liability of mortgage security. The impediments affiliated with the institutional framework includes the scarcity of relevant and reliable mortgage providers; rare long-term housing financiers; prevalence of many low-income earners in Tanzania and the last in this context is the prevalence of un responsive dispute settlement mechanisms coupled weak ADR arrangements.

In this paper, thus, various measures whose effect is to make the legal and institutional frameworks reflect and uphold the national policy and objective for affordable mortgage financed housing, are recommended. In particular, the recommendations aimed at reforming the legal framework includes addressing the issue of taxation; re introduction of the rent control mechanisms; lengthening the loan amortisation period; reduction of the land use and building costs and lowering of the housing loan interest

rates. In connection to institutional framework measures that are believed to warrant the desired goals are the establishment of the microfinance institutions to serve the lower segment of the population, and the establishment and economic empowerment of the relevant mortgage financing institutions so that they can lend for longer period and economic empowerment of the people. Further, measures should be undertaken to strengthen ADR systems to enable it promptly deal with the settlement of relevant commercial disputes. If all these are effected, then the legal and institutional framework will be able to play their role and hence foster the national objective for affordable mortgage financed housing among the low and medium income earning population in Tanzania.

Reflections on the Relevancy, Strength and Weaknesses of the Tanzanian Competition and Consumer Protection Legal and Institutional Regimes

Dr. Neema Bhoke Mwita*

Abstract

Public goods such as utilities, roads, ports, water, telephone, electricity and natural gas regardless of whether they are provided by state owned monopolistic enterprises or otherwise, are all subject to regulation, where public goods are provided with a motive of making profit, regulation is even more necessary. The USA for instance, where the origin of competition law is traced, has regulatory authorities since 1890s. Due to economic reforms in 1980s, many countries re-organised their public sector with the aim of achieving greater competition, quality services, affordable prices and conducive environment for private sector investment.¹ The reforms led to an increased number of foreign investors in developing countries, as well as private business undertakings in the market. This made it necessary to have a legal and institutional framework to regulate markets, for the purpose of ensuring effective competition to all players in the market as well as promotion and protection of consumer welfare. In doing this, monopolistic behavior of the state-owned enterprise and agreements leading to cartels, are they controlled.

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¹ MASEBU, H. Overview of Fundamentals of Regulation, Rationale for and Understanding Regulation. Training Module for Newly appointed FCT Members, 15/07/2021, Bagamoyo

This paper, therefore, analyses the objectives of competition law in relation to its relevance as far as consumer protection is concerned. It further acknowledges the multiplicity of both the laws and institutions with regard to the regulation of the market. The paper finally argues that competition and consumer protection laws and policy are relevant in Tanzania regardless of their multiplicity and challenges facing the implementation of the laws. Additionally, the paper points out advantages and recommends possible ways of addressing the disadvantages of competition and consumer protection.

1.0 Introduction

Competition law can be defined to mean the rules set out to regulate the market, to ensure that the conducts of the market players (suppliers in particular) do not distort competition. These rules are intended to ensure a fair and equal ground to all parties involved in the market. Therefore, the law establishes agencies charged with powers to punish violators of the rules.² It controls the market power of companies and individuals by limiting them from engaging in anti- competitive activities including entering into agreements restricting competition by fixing prices and dividing the available market between them; mergers with an aim of creating a dominant position as well as abuse of dominant position by dominant companies.³ By regulating the conduct of business, the rules aim to achieve the following goals: improving efficacy in the manufacture and supply of goods and services; promote novelty; maximise

² Furse, M, (2008), **Competition Law of the EC and UK**, 6th ed, Oxford University Press, New York p.1

³ JUDGE, S (1999) Business Law, 2nd Ed, Macmillan, London p.503

efficient allocation of resources and also protecting consumers.⁴ Replicating this goal in the market **Tenga**⁵ stated that:

“In a perfect market, the theory goes, sellers are engaged in a positive kind of ‘beauty contest’ and struggle to improve the quality of what they offer under most affordable prices as they naturally undercut each other. Out of the lot, buyers get the best deal and generally this promotes consumer welfare and positive economic development, progress in the sciences, and efficient allocation of resources”

As noted, competition and consumer protection rules are set to operate for the best interests of consumers.⁶ This, the consumer, is a legal or natural person who purchases or hires either goods and or services for the sole purpose of making use of such goods. Tilson, in regard as to who a consumer is, however, opine that it is only a natural person who can be a consumer since the status of a consumer describes a behavioral relationship between suppliers and receivers of goods and services.⁷ A consumer is normally construed as poor, unaware, inexperienced, thoughtless and imprudent individual.

Consumer protection, seeks to further a fundamental competition law objective. It is at the heart of competition law to

⁴ Section 3 of the Fair Competition Act, 2003

⁵ Tenga, R.W **Consumer Protection in Tanzania: Challenges and Prospects for the National Consumer Advocacy Council (NCAC)**, 2007

⁶ Ibid fn 3

⁷ TILLSON, J (2011) *Consumer and Commercial Law*, Law express, Pearson, p. 4

regard interests of consumers by seeking a balance between competing demands of the industry and the consumer.⁸

Consumer protection, thus denotes actions taken by the state to address injustices suffered by consumers as a result of the conduct of the sellers and producers. It is basically a consolidation of reliefs obtainable in tort, contract and criminal law which are protective or remedial.⁹

The idea of consumer protection involves controlling the relationship between suppliers of goods and services, with influence over what goods and services can be brought to the market, on one hand and on the other hand, those who are buying or are likely to be affected by goods or services or monopoly of suppliers. So, to say, the concept ranges from protection of consumers from unreasonably high prices of goods and services to prevention of health threatening products or acts in the market which also has negative impacts on an individual's economy, it also ensures that there is fair competition and free flow of truthful information in the market.¹⁰

The primary objectives for consumer protection is to attain: first transparency that enables consumers to understand the prices, terms and conditions, and risks associated with use of goods and services they purchase. Secondly, it aims at fair dealing that the

⁸ RODGERS, B, J Etal (2009) *Competition Law and Policy in the EC and UK*, 4th Ed Routledge-Cavendish, 2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN, p.17

⁹MWITA, N. B (2016) *The Constitutionality of Consumer Protection in Tanzania*, Orient Journal of Law and Social Sciences, Volume X, Issue 12, November 2016, p. 54

¹⁰ Kazoba, G. K (2014) *Combating Counterfeit Phamaciticals in Tanzania: Consumer Protection within the Framework of the East African Community Single Customs Territory, Regional Integration and Law East African and European Perspective*. Dar es salam University Press. Pg 168

goods and services on offer are not deceptive or unsafe and the conducts of these goods/service suppliers and their employees and agents are not abusive or aggressive, reflecting appropriate ethics, and are respectful of consumers' rights. Thirdly, to ensure risk mitigation goods/service suppliers take reasonable steps to identify, monitor and mitigate customer risks such as fraud or inadequate handling of customer data, which evolve with innovations in products and business models and with the entry of new market actors; and lastly to ensure effective recourse, when customers have queries, complaints or other problems, financial service providers have access and effective systems in place to address them.¹¹ The hereinabovementioned objectives are laid down by provisions of all legislation controlling consumer welfare in the Tanzania as discussed herein next.

2.0 The Legal Framework for Competition and Consumer Protection Laws in Tanzania

In Tanzania, competition and consumer protection are two sides of the same coin. Both the competition and consumer protection law as well as policy are administered by the same authority, that is, the Fair Competition Commission of Tanzania.¹² The Fair Competition Commission is an independent government body established under the Fair Competition Act (hereinafter referred to as the Act),¹³ to promote and protect effective competition in trade and commerce and to protect consumers

¹¹ <http://www.cgap.org/topics/protecting-customers> - Accessed on 22/08/2022

¹²KISYOMBE, M. *Emerging Issues in Consumer Protection: Complementarities and areas of tension*, Ad Hoc Expert Meeting on Consumer Protection: The interface between competition and consumer policies

Geneva, 12 to 13 July 2012

¹³ Act No. 8 of 2003

from unfair and misleading market conduct. The drafting of the competition and consumer protection law in Tanzania took into consideration best international practices. The Act derives its principles from UNCTAD Model law. The Act incorporates universal consumer rights in its consumer protection provisions.¹⁴

Competition and consumer protection management in Tanzania is built on the following pillars: First, consumer education and awareness; this is achieved through empowering consumers to make informed decisions by providing them with knowledge, skills and attitudes through seminars, workshops and the media. The second pillar is dispute resolution where disputes between consumers and suppliers are resolved. These do not involve litigations. They are done through alternative dispute resolutions methods by either mediation or arbitration. The third pillar is enforcement by way of investigating unfair market conducts and suing or imposing sanctions on the culprits as provided for by the Fair competition Act and other sectorial legislations.¹⁵

Apart from the Act, competition and the three pillars on consumer protection are also provided for in other sectorial legislation, which also establish organs to regulate competition and supervise consumer affairs depending on the kind of goods or services. Such sectorial legislation include, the Land Transport Regulatory Authority Act,¹⁶ The Energy and water Utilities Regulatory Authority Act,¹⁷ Tanzania Communications Regulatory Authority Act,¹⁸ the Tanzania Civil Aviation

¹⁴ The rights are; Right to choice, Section 9 (2) (b) and (c); Right to be heard, Section 93 (10) (a) and (b); Right to redress, Parts V to VII; Right to be informed, Section 93; and Right to safety, Parts VIII and IX

¹⁵ Ibid fn 12

¹⁶ No. 3 of 2019

¹⁷ No. 11 of 2001

¹⁸ No 12 of 2003,

Authority Act,¹⁹ the Merchandise Marks Act, 1963 and the East African Community Competition Act.²⁰ In addition to the laws, Tanzania has piece-meal organs that are established by above laws with the aim of enforcement of the law by controlling the market and protecting the process of competition for the benefit of consumers, by making sure that, there are incentives for business to run well.

2.1 The Fair Competition Act

In 1983, the Parliament of the United Republic of Tanzania repealed the Price Control Act, 1973 to introduce market-based economy in Tanzania, and afterward the Fair-Trade Practices Act was enacted to oversee the functioning of the market-based economy. During its implementation it was observed that the Fair-Trade Practices Act was characterised with some loopholes that required major amendments. The amendments included its title which changed to the Fair Competition Act of 1994, which was again repealed and replaced by the current Fair Competition Act, 2003.²¹

The Fair Competition Act, (the FCA) which is the principal competition and consumer protection law in Tanzania, is an Act to promote and protect effective competition in trade and commerce, to protect consumers from unfair and misleading market conduct and to provide for other related matters.²² The Act arguably has two Acts in one. The first part of the Act deals with competition matters and adjudication thereto²³ and the other part deals with consumer

¹⁹ Cap 80 R.E 2006

²⁰ of 2006

²¹ www.competition.or.tz - Accessed on 18/05/2022, see also Section 102 of the Fair Competition Act.

²² The preamble to the Act.

²³ Part II, X, XI, XII and XVI of the Act

protection.²⁴ In other jurisdictions, especially in developed economies these two parts of the Act form two distinct legislation.

The primary purpose of the Act includes enhancing the welfare of the Tanzanian; promoting and protecting effective competition in the market; preventing unfair and misleading market conduct; increasing efficiency in production and supply of goods and services; promote innovation; maximise efficient division of resources and protecting consumers.²⁵

The Act also creates two institutions: one is the Fair Competition Commission and the other is the Fair Competition Tribunal.²⁶ These institutions are charged with powers to calm down clashes between consumers and suppliers, or between suppliers *inter se*. Any aggrieved person has to commence his claim with the FCC and if not satisfied with its verdict, may appeal to the Fair Competition Tribunal.

2.1.1. Competition Matters

As already pointed, competition law prohibits specific Anti-Competitive practices such as cartels, abuse of dominant position, monopoly and mergers that create a dominant position or stifle competition.²⁷ Under the FCA the prohibited practices include anti-competitive agreements, agreements which are prohibited irrespective of their effect on competition,²⁸ abuse of the dominant position and merger control. They are described hereunder:

²⁴ Part III – X, XIV of the Act

²⁵Section 3 of the Act.

²⁶ Sections 62 and 83 of the Act.

²⁷ International Trade Centre (2012) Combating Anti- Competitive Practices, A guide to Developing Economy Exporters. Geneva, p3

²⁸ These two agreements are known as CARTELS

Cartel is term for various agreements between companies that are forbidden by competition law. They are also known as anti-competitive agreements. OPEC²⁹ oil cartel is a good example of such agreements.³⁰ The government of OPEC countries and petroleum firms both public and private agreed to manipulate the supply and the price of oil worldwide.³¹ The basic element to be proved in a cartel case is an agreement. The agreements however, are mostly made verbally which makes it difficult to detect. An agreement among competitors and the content of the said agreement materially restrains competition and is restricted by the law.³² There are usually two forms of prohibited agreements:³³ Those that can be allowed if they bring more benefit than the losses they cause to competition and the other include those which are prohibited *per se*.

With regards to agreements that can be allowed, the law provides that, a person shall not make or give effect to an agreement if the object, effect or likely effect of the agreement is to appreciably prevent, restrict or distort competition.³⁴ These agreements are known as Vertical Agreements. They are basically agreements between undertakings that operate on different levels of the manufacture–distribution chain and do not compete with each other. Examples include manufacturer and its suppliers, customers or both. The Act makes this agreement an

²⁹ Organisation of the Petroleum Exporting Countries

³⁰ MLULLA, A. S, (2016) Competition Enforcement and Efficiency in Relevant Markets: A Case of Tea Agro markets in Tanzania, A Thesis Submitted in Fulfillment of The Requirements for The Degree of Doctor of Philosophy of the Open University of Tanzania, p. 67

³¹ <http://energyeducation.ca>>OPEC – Accessed on 16/09/09

³² Ibid fn 30

³³ *ibid*

³⁴ Section 8 of the Act

offence.³⁵ However, the law gives a lenient interpretation that the agreement is only prohibited if it has negative effects on competition.³⁶ The negative impact on competition is determined by the rule of reason as it was held in the case of Serengeti Breweries Ltd vs. Tanzania Breweries Limited.³⁷ In the case, it was alleged that the respondent was entering into branding agreements with bar owners which excluded the complainant in the market. Such agreements fall within the category of vertical agreements since they are entered into between the manufacturer and retailers. These agreements are not prohibited *per se* unless they have an effect of preventing, restricting or distorting competition in the market. The FCC held that:

From the provisions of section 8(1) of the FCA, 2003 it is clear that the branding agreements whether in writing or oral, which the respondent (TBL) has entered into with bar owners had the object, the effect or likely effect of preventing, restricting and distorting competition in the Tanzania beer market. The agreements amount to exclusive dealing. The agreements in this case are restrictive vertical practices since they are agreements between parties who are in a vertical relationship (TBL with its suppliers/customer)’.

In the United States of America (USA) for instance, section 1 of the Sherman Anti-Trust Law is silent and does not make an exception to the rule. However, the Supreme Court of USA repeatedly opined that section 1 outlaws only unreasonable restraints. The court distinguishes the unreasonable restraints on the basis of impact on competition; an agreement will not be in restriction of competition if its pro-competitive effects are found

³⁵ Section 8(7) of the Act

³⁶ Section 8(4) of the Act

³⁷ *Complaint No. 2 of 2009, Fair Competition Commission*

to outweigh its anti-competitive effects, after a detailed analysis of the market. The court will look at among other things, the intent and purpose of the restriction and the competitive position of the defendant.³⁸

The maximisation of consumer welfare has been perceived as the only legitimate goal of the US antitrust law. In the case of *Chicago Board of Trade v. United States*³⁹ the Court held that an agreement between rivals limiting rivalry on price after an exchange was closed was reasonable and thus did not violate the Sherman Act. Additionally, in the case of *United States v. American Tobacco Company*⁴⁰ it was held that Section 2 of the Sherman Act, which bans monopolisation did not ban the mere possession of a monopoly but banned only the unreasonable acquisition or maintenance of monopoly.

In the European Union, Article 101 of the Treaty on the Functioning of the European Union (TFEU), resembles the US antitrust law and application, in the sense that some agreements are characterised as *per se infringements*. Whereas, others are subject to a rule of reason analysis. The disparity in EU law is that, even if an agreement in its object has the restriction of competition, in other words, it is a *per se* infringement, thus the parties to the agreement can still ask for an exemption under Article 101(3) of the TFEU. This means that the rule of reason applies to all kinds of anti-competitive agreements both horizontal and vertical agreements.⁴¹

Therefore, in the US and EU, the *per-se infringements* is lacking. The rules of reason are applied to every agreement

³⁸ <http://www.bonalaw.com/insight/legal-resources/antitrust-standard-of-review-the-per-se-rule-of-reason-and-quick-look-tests> -Accessed on 9/9/2022

³⁹ (1918) 246 U.S 231

⁴⁰ (1911) 221 U.S 106

⁴¹ <http://www.concurrences.com> – Accessed on 9/9/2022

between traders. In Tanzania, agreements under this category are forbidden if only they have an impact on competition by way of market foreclosure for potential entrants' market, if they drive competitors out of the relevant market or if they weaken competition and that may end up creating cartels or joint dominance hence a negative impact on competition.⁴²

On Agreements Which Are Prohibited Irrespective of Their Effect on Competition are referred to as *per-se prohibition* or *horizontal agreements*.⁴³ Such agreements include those relating to price fixing, collective boycott by competitors and collusive bidding. These are prohibited irrespective of their effect on competition. The Act provides an expansive definition of “price fixing” as “to fix, restrict or control the price tariffs, surcharges or other charges for, or the terms of condition upon which a party to the agreement supplies or acquires.”⁴⁴

Price fixing does not only harm consumers who may be forced to pay for higher prices than they would normally pay, but may also stifle innovation including packaging and improvement of service delivery in order to attract customers. The function of price competition is to keep prices down to the lowest possible level. Prohibition of collusive bidding or tendering seems to complement anti-price fixing provisions. The Act defines collusive bidding mean “to fix or control the prices or terms or conditions of any bid or tender by any of the parties to an agreement at an auction or in any tender or other form of bidding, in competition with any other party to the agreement”⁴⁵

⁴² GABRIEL, G, Mandate, Operation and Dispute Settlement of the FCC, Training Module for Newly appointed FCT Members, 16/07/2021, Bagamoyo

⁴³ Section 9 of the FCA

⁴⁴ Section 9 (2) (a) of the FCA

⁴⁵ Section 9(2)(d)(i) and (ii) of the FCA

Collective boycott by competitors is another horizontal restrictive agreement prohibited by the Act. The practice is not uncommon in Tanzania. The collective boycott by oil marketing companies' case, where the Fair Competition Commission through investigation, found out that 13 oil marketing companies, through their association known as TAOMAC⁴⁶ agreed not to supply petrol and diesel for 3 days. The FCC ordered each oil manufacturing company to pay administrative fine of 5% of their annual turnover. Each Company disjointedly applied for settlement negotiations under the FCC rules⁴⁷ and the case was resolved through negotiations.⁴⁸

In respect to the said general rule there is an exception, not all horizontal agreements are banned. There are some agreements, although horizontal but have redeeming competitive qualities, hence allowed because they are beneficial to the consumer e.g inter airline agreements on baggage handling or standard setting agreements by companies. The law treats them as exceptions to the general rule against the per-se prohibited agreements.⁴⁹ Their assessment is based on the rules of reason and subjected to conditions, monitoring and timeframe when necessary.

Abuse of dominance refers to a behavior of a dominant business that engages in activity that prevents or reduces competition in a market. Such behavior can be predatory by incurring short term losses to eliminate a competitor and gain a future market; exclusionary, that is by trying to prevent a business from operating, disciplinarily by punishing a business or an intention to adversely affect competition by making other

⁴⁶ Tanzania Association of Oil Marketing Companies

⁴⁷ Rule 19 and 21 of the FCC Rules

⁴⁸ The incident took place in August 2011, the evidence used to establish the agreement was a statement by the Association's chairman and economic data as tacit agreement was used as collaborative evidence

⁴⁹ Section 12 of the FCA

companies compete less and denying consumers the benefit of competition.⁵⁰ Abusive behavior can also be exclusionary practices e.g. price discrimination or an exploitative practice such as charging excessive prices to buyers. Prohibitions of abuse of dominance differ across jurisdictions depending on nature and levels of market development. Competition laws do not punish formation of dominant position but its abuse. The law validly allows a firm that builds dominance/market power however becomes strong through innovation, investment, and marketing activities.

Abuse of dominance under the FCA has two aspects:⁵¹ **firstly**, exclusive dealing and refusal to deal. Exclusive dealing is a conduct by a dominant firm in a relevant market that requires or induces customers or suppliers to deal solely or predominantly with the dominant firm. E.g the manufacturer or customer agrees that customer will buy a product only from this manufacturer, or that manufacturer will supply a product only to this customer, or both. The manufacturer and dealer agree that the dealer will not carry products of other manufacturers, or manufacturer agrees not to supply products to competing dealers, or both.⁵²

Legal Aspects of Exclusive Dealing contains two characters namely, Dominance and Exclusive Dealing Arrangement.⁵³ No formal contract is required to prove either there exists a *de jure* or *de facto* exclusivity. It is anti-competitive effects hampering or removing actual or potential competitors' profitable access to the market that is prohibited by competition law. However, all these have justifications and defenses not limited to efficiency relationships, innovations, reduced transaction costs.

⁵⁰ <http://www.competitionbureau.gc.ca> – Accessed on 9/9/2022

⁵¹ Section 5 (6) and 10 (1) of the FCA

⁵² <http://www.fct.gov.bb/2003-09-04-abuse-of-domonant-position.pdf> – Accessed on 9/9/2022

⁵³ Section 5(6) (a) and (b) of the FCA

Secondly, refusal to deal is a conduct that refers to unilateral, unconditional refusals (actual or constructive) to supply (or continue to supply) a rival in the downstream market. Upstream market power is necessary in establishing a refusal to deal violation. Without the profits from the downstream sales, the firm may not have invested in the upstream asset. Refusal to deal may be either pro-competitive or anti-competitive. Important questions when analyzing refusal to deal cases are not limited to: (i) Does the firm have monopoly power? (ii) Will the refusal to deal cause prices to be raised or maintained at supra competitive level? (iii) Is there another market where the entrant is an actual or potential competitor of defendant? Answers to these proves abuse of dominance by way of refusal to deal.⁵⁴

However, competition law aims at preventing companies which have attained dominance in the relevant market from abusing such power and prevent or restrict competition. Like most of the provisions in the Act, abuse of dominance is not per-se illegal. An undertaking may be justified for a specified period during which the undertaking concerned has been given an exemption by the Commission.⁵⁵

Mergers and Acquisition is regulated by the Fair Competition Act through the FCC. A merger is defined as an acquisition of shares, a business or other assets, whether inside or outside Tanzania, resulting in the change of control of a business, part of the business or an asset of a business in Tanzania.⁵⁶ The law demands that where there is an acquisition of shares or a business or other assets within Tanzania and the value of the acquisition is above a value prescribed by an order laid down by

⁵⁴ <http://www.fct.gov.bb>2003-09-04-abuse-of-domonant-position.pdf> – Accessed on 9/9/2022

⁵⁵ Ibid fn 42

⁵⁶ Section 11 of the FCA

the Fair Competition Commission then the merger is mandatorily referable by way of notification to the FCC.⁵⁷

There are numerous and substantial perils for non-compliance with the merger rules. For example, failure to notify or of pushing ahead with a merger deal which the FCC has not been cleared. Where a person commits an offence under the Act or is involved in such an offence, that person may be subject to a fine not less than 5% of his annual turnover and not more than 10% of its annual turnover. This is severe when one makes a comparison between the Tanzanian regime and others like the European Commission.

The law permits the FCC to issue "compliance orders" of its own initiative where it is satisfied that this is required to avoid an infringement of the Act. This could include an order not to proceed with a pending merger which has not been notified to the FCC. Section 68(5) of the Act also provides that where the Commission is satisfied that a person has acquired shares or other assets in breach of the Act, it may within three years make an order that:⁵⁸

(a) the acquirer disposes of some or all of the shares or assets within such time as the Commission specifies in the order;

or

(b) declare the acquisition to be void, require the acquirer to transfer some or all of the shares or assets back to the vendor and require the vendor to refund some or all of the amounts received by the vendor in respect of the acquisition, as the FCC specifies in the order.

⁵⁷ Section 11(2) of the FCA, the current threshold is three billion five hundred million Tanzanian shillings

⁵⁸Section 58 of the FCA

The FCC has handled quiet a good number of cases for failure to notify. The Acquisition of assets of Iringa Tobacco Company including its cigarette brands of Nyati and Nyati Menthol by Tanzania Cigarette Company and its parents Japan Tobacco International in 2005, where the transactions of the upcoming competitors were closed consequently loss of revenue, employment and limited consumer's choice. The Tanga Fresh is another incident, where Tanga Fresh Limited acquired assets of Moran Dairy Limited without notifying FCC. Tanga Fresh was required to pay fine of 8% of each transaction, Tanga Fresh appealed to the Tribunal, the Tribunal upheld the decision of FCC.

2.1.2 Consumer Protection

The FCA incorporates universal consumer rights in its consumer protection sections. Some of these are the right to choice,⁵⁹ right to be heard,⁶⁰ right to redress,⁶¹ right to be informed⁶² and the right to safety.⁶³ Consumer protection sections in the Act are as embodied in the following headlines: Misleading and deceptive conduct, Unfair Business Practices; Unconscionable Conduct, Implied Conditions in Consumer Contracts, Manufacturer's Obligations, Product Safety and Product Information, Product recall, Offences, Penalties and Remedies, Appeals to the Fair Competition Tribunal and National Consumer Advocacy Council.⁶⁴

⁵⁹ Section 9 (2) (b) and (c) of the Act

⁶⁰ Section 93 (10 (a) and (b)

⁶¹ Parts V to VII

⁶² Section 93

⁶³ Parts VIII and IX.

⁶⁴ Ibid fn 9

2.2. The Tanzania Communications Regulatory Authority Act, No 12 of 2003

The Tanzania Communications Regulatory Authority Act (the TCRA Act) is enacted to establish the Tanzania Communications Regulatory Authority (TCRA);⁶⁵ for the purpose of monitoring of telecommunications, broadcasting, and postal services; to provide for allocation and management of radio spectrum, covering electronic technologies and other Information and Communication Technologies (ICT) applications and to provide for its operation in place of former authorities and for related matters.⁶⁶ The TCRA Act also amends among other laws, the communications Act, which was the major legislation regulating communications in Tanzania.

The TCRA which is a body corporate is entrusted to enhance the welfare of the Tanzanian society. Its responsibilities includes to protect interests of consumers of communication services in Tanzania, to promote and to ensure availability of regulated services to all consumers, including those with low income, those in rural areas and the disadvantaged consumers, and to enhance public knowledge, awareness and understanding of the communication industry, including; the rights and obligations of consumers and the suppliers, the way in which complaints and disputes are handled and taking into account the need to protect and preserve the environment.⁶⁷

Theoretically, the TCRA Act offers a shield to consumers of the communication sector by way of duties conferred to the authority; however, the reality is not as it is provided for in the

⁶⁵ Section 4(1)

⁶⁶ The preamble to the Act

⁶⁷ Section 5

Act, consumers are not aware of their rights and duties. The TCRA Act also establishes Consumer Consultative Council.⁶⁸

2.3 The Energy and Water Utilities Regulatory Authority Act, No 11 of 2001

The Energy and Water Utilities Regulatory Authority Act (the EWURA Act) was enacted to control energy and water utilities sector in the country and to establish a regulatory authority in relation to energy and water utilities and to provide for its operation in place of former authorities and for related matters.

The EWURA Act establishes EWURA; an autonomous multi-sectoral regulatory authority⁶⁹ responsible for technical and economic regulation of the electricity, petroleum, natural gas and water sectors in Tanzania as provided for under the EWURA Act and sector legislation; the Act also establishes the EWURA Consumer Consultative Council.⁷⁰ Members of the council are nominated and appointed by the Minister responsible for Energy and Water, by taking into consideration the ability of the council as a group of persons with knowledge and understanding of the interests of consumers and regulated services.

2.4 Tanzania Civil Aviation Authority Act, Cap. 80, R.E 2006

Tanzania Civil Aviation Authority Act (hereinafter TCCA Act) was enacted to regulate air transport and associated matters. Further the TCCA Act was brought into existence to implement

⁶⁸ Section 37

⁶⁹ Section 4 of the Act

⁷⁰ Section 30 (1) of the Act

the Chicago Convention.⁷¹ The convention establishes rules of airspace, aircraft registration, safety and rights of the signatories in so far as air travels are concerned.

In matters of consumer protection, the Act states that it is the duty of the Authority established under this Act to protect interests of consumers in Tanzania. The Tanzania Civil Aviation Authority (TCCA) was then established under the Act⁷² with the mission of ensuring safety, security and regularity of civil aviation in Tanzania by providing effective oversight and efficient air navigation services while maintaining quality, protecting the environment and safeguarding the interest of consumers and the public and the vision of making the civil aviation system in Tanzania to be amongst the safest, most orderly and sustainable in the world.⁷³ The Tanzania Civil Aviation Authority Consumer Consultative Council was also established by the Act to protect interests of consumers in Tanzania.⁷⁴

2.5 The Land Transport Regulatory Authority Act, No 3 of 2019

The Land Regulatory Authority Act (the LATRA Act) repealed the former Surface and Marine Transport Authority Act and its Authority to provide for its operation in place of former authorities and for related matters. The LATRA Act establishes LATRA which is a multi-sectoral regulatory agency to regulate the rail, road and cable transport services. The regulator is established with a vision is to be a world class regulator in land transport services and a mission to regulate the land transport

⁷¹ The Convention on International Civil Aviation of 1944

⁷² Section 24 (1) of the Act

⁷³ <http://www.tcaa.go.tz/> - Accessed on 12/10/2022

⁷⁴ Section 50 of the Act

sub sectors for efficient, safe and environmentally friendly transportation services. It also establishes LATRA Consumer Consultative Council.⁷⁵ Members of the council are appointed and nominated by the minister responsible for Land and Transport, by taking into consideration the ability of the council as a group of persons with knowledge and understanding of the interests of consumers and regulated services.

2.6 The Merchandise Marks Act 1963 [Cap 85 R.E 2002]

Competition and consumer protection law will create an oversight mechanism in the market to control trade in counterfeit and pirated goods.⁷⁶ Developing countries being not well developed in manufacturing industries, they always depend on imported goods to suffice consumer needs. Therefore, if markets are left to operate freely without a competition authority to oversee, they will be flooded with counterfeit and substandard products which in turn will exploit consumer and maximise profit to businessmen. Considering the geographical position of the countries like Tanzania, with a greater number of inlets and outlets, without effective control, then markets will be flooded with counterfeit products. The state, therefore, in 1993 took measures to enact the Merchandise Marks Act (MM Act),⁷⁷ and its enforcing regulations,⁷⁸ to combat trade in counterfeit and pirated goods. The Act became operational in 2005. The MM Act is implemented under the Fair Competition Commission,

⁷⁵ Section 29 (1) of the Act

⁷⁶ Counterfeit goods are product manufactured by a factory without the authorisation of the trade mark owner. These products are then shipped worldwide and put at the disposal of consumers at a less price compared to the original product. Products that may be counterfeited include electrical goods, medicines, tyres, motor vehicle spare parts, matches, shoe polish, alcohol, toothpaste etc.

⁷⁷ Cap 85 RE 2002

⁷⁸ Merchandise MARSK Act Regulations, 2008, (GN 20, 2008).

with the Director General of the Commission appointed as the Chief Inspector, with the powers to enforce the MM Act.

Being meant to battle counterfeiting in Tanzania, the Act criminalises dealings in counterfeits.⁷⁹ In particular, it prohibits manufacturing and importation of counterfeit goods.⁸⁰ In the years 2007 and 2008 the Act was amended for purposes of upgrading the penalties and fines and to define powers of the inspector for its better implementation. The 2007 Amendments⁸¹ brought some solution including empowering the minister to make Regulations and the Inspectors were given various powers i.e. investigate, seize, conduct summary proceedings and punish.

In Tanzania counterfeit can be traced back to 25 years ago. It is linked to trade liberalisation of the late 1980s and globalisation that opened doors for such goods to make into Tanzanian markets. Intellectual Property Rights is another concern for the need of having competition policy and law in developing countries in this area of counterfeit and pirated goods in the market. Under the Trade Related Intellectual Property Rights (TRIPS), member states to the World Trade Organisation have agreed to protect registered intellectual property rights in their countries. Therefore, with the current trend of counterfeit and pirated goods increasing in number, Tanzania clearly needs strict rules and competition authorities to restrain the flow of these products into market, as they would kill the market of genuine products because in their nature, they are sold in a low price compared to genuine products. Consequently, this will affect the meaningful protection of Trademarks and Patents, as the owners of trademarks and patents will be forced out of the

⁷⁹Section 3 of the Act expressly states that dealing in counterfeit is a crime

⁸⁰ Section 10 of the Act

⁸¹ Amended by The Written Laws (Miscellaneous Amendments) (No.2) Act, 2007

market as far as their products are sold in a higher price compared to the counterfeit or pirated products. This is because in most developed countries, consumers of the goods are poor, therefore, they tend to opt for cheap products even if they have a knowledge that they are counterfeit.

2.7 The East African Community Competition Act, 2006

The East African Community Competition Act (hereinafter EACC ACT) was enacted in the year 2006. By then Tanzania was the only partner state in the community with a law and institution on competition and consumer protection matters. Being one of the founding partners states of the East African Community, the Tanzania's FCA, therefore, was the model law used during the enactments of EACC Act.⁸² It should be noted that it is mandatory to ratify an international or regional instrument for it to be binding in national courts. With respect to this Act, there was no need for that, in Tanzania as Tanzania's FCA provisions are the same as those under the EAC Competition Act. The FCA and the EAC Competition Act both contain the Universal consumer rights and obligations; the difference is that the EACC Act deals with matters having cross-border effect while the FCA reigns in Tanzania Mainland only.

The EACC Act is of the view that where a case or legal dispute within the scope of application of the EACC is not yet under consideration by the EAC Competition Authority, Partner State's authorities or courts shall refer the case or the legal dispute to the Authority.⁸³ Note that here the EACC Act is superior where the dispute is in the scope of application of the

⁸² Haule , B, Acting Director, DTIPS, Ministry of Foreign Affairs and East Africa Corporation of the United Republic of Tanzania During Interview with the Reseacher.

⁸³ Section 44(4) of the Act

EAC Act. The EACC Act further provides that decisions made by the EAC Competition Authority shall be enforceable by Partner States' enforcement authorities and that Partner States are under obligation to enforce decisions of the Authority.⁸⁴

3.0. Relevance of the Legal Framework

The Tanzanian market is full of different goods and services ranging from transport be it air or land; communication services; goods such as food, drugs, clothing, electronics, building materials etc. All these poses risks of abuse of the market and violation of consumers legitimate rights and therefore needs to be regulated. On one hand, placing this burden on one law and institution has both cons and pros. On the other hand, having special/sectoral laws and institutions, in other words having multiple laws on the same matter but in different sectors has also pros and cons.

With all the above legislations in place, it cannot be disputed that consumer protection can be achieved very well since experts in the regulatory organs are involved in solving consumer problems. It is evident that all the laws on competition and consumer protection guarantees and protects consumers' rights which are internationally recognised. These rights are as provided for by the UN guidelines on consumer protection, the Consumer International and the Constitution of the United Republic of Tanzania.

The FCA provides for these rights generally, which are: the right to basic need, the right to safety, the right to be informed, the right to choice, the right to be heard, the right to redress, the right to health and sustainable environment and the right to education. Furthermore, the other legislation also guarantees

⁸⁴ Section 44(5)

these rights, for instance the Standards Act guarantees the right to be supplied with safe goods and services, that are in good quality and in both national and international standard, the Weight and Measures Act regulates quantity, where a consumer is entitled to value for his money, therefore needs to be supplied with goods or services worthy his money and the Food, Drugs and Cosmetics Act guarantees consumers' right to basic needs and safety.

For a consumer to enjoy his rights, there is a role that he has to play in the process. The following responsibilities are imposed upon consumers: they include; a duty to be alert and question about the price and quality of goods/services to ensure he is fairly treated, to use goods and services appropriately while knowing its environmental consequences, to develop the strength and influence to promote and protect his consumption, to carefully read instructions, to explore and apply available information for purposes of making an informed choice, to join consumer associations and make opinions and his voice heard, to fight for quality by complaining against sub-standard goods effectively and refusing to accept sub-standard goods and to minimise environmental damage through careful choice and use, reduce waste, re-use and recycle goods where possible.

It is also evident that the laws on competition and consumer protection states that any act against their provisions is an offence. It being established as an offence attracts penalties; these penalties serve as remedies for injured consumers. The law provides that when a person commits an offence he is ordered to comply, pay compensation or pay a fine. The punishment usually depends on the gravity of the offence so committed.

Suffices to say therefore, competition issues have their own channel of dispute settlement system. The rationale behind this is that, the disputes of this kind are business in nature, therefore

they need a quick resolution so that they do not restrict trade flow as well as causing a greater loss to parties involved. The other reason is based on the technicality involved in this kind of disputes need expertise in dealing with them.

Orders of the regulatory authorities serve as orders of the High Court. When the regulatory authorities have passed a decision, the aggrieved party can appeal to the Fair Competition Tribunal except in matters related to consumer complaints that goes to the regular courts. Consumer complaints take the form of civil cases since they have a contractual basis even though they are regulated by public laws.

Having various legislation dealing with one problem there has been a problem of causing overlapping of the laws in their implementation. The FCC do not have jurisdiction to deal with competition and consumer issues in sectors where there is a specific regulator.⁸⁵ The key sector regulators are LATRA, EWURA, TCRA and TCCA; all these are exclusively mandated to deal with issues of consumer welfare and competition in their respective sectors. In these regards, their laws among other things create a Consumer Consultative Councils to oversee consumer complaints.

Further, these regulators are not, in their operation, compelled to seek guidance and advice from the FCC, despite the fact that the FCC is the main authority mandated to oversee matters of competition and consumer welfare in the country. They have complete freedom whether to or not to consult the FCC. In case there is a competition issue in a regulated sector, the FCC needs to submit to the minister of industry and trade who has the

⁸⁵ Section 96 of the FCA

discretion to take the matter further, there is no appeal against the decision so reached by the minister.⁸⁶

Consumers have recourse though, if dissatisfied with the decisions so reached by the regulatory authority by way of appeal to the FCT as it was in the case of *John Mpuya v. Celtel Tanzania Ltd*⁸⁷ where the TCRA had decided in favour of the supplier, the consumer was aggrieved so he appealed to the FTC and succeeded.

in practice, regulatory authorities have opted to embrace their mandate and jurisdiction, there seems to be antagonism between the commission and regulatory authorities, there are a lot of tension and protection of territory, lack of corporation between the regulatory authorities and the commission. This has confirmed difficulties in meeting the objectives of promoting fair markets and consumer protection. Conclusively there seems to be a gap between theory and the law.

3.0 Conclusion

Having been faced with a lot of challenges in dealing with competition in Tanzania, currently there are suggestions to overhaul the FCC Act. The institutional weaknesses, particularly on authorities of the Commission like autonomy in its decisions on matters investigated, license revocation, extending its services out of Dar es salaam as well as inadequate number of staff and professional staff in competition matters like investigating and uncover cartel agreements are the notable reasons for the need to overhaul the Act. Another proposal for amendment of the Act is the need to introduce criminal

⁸⁶ The State of Play of Competition Policy and Law Reforms; The Case Of Tanzania at www.cuts-international.org/arc - Accessed on 05/09/2022

⁸⁷ Ibid

sanctions to shareholders of the company involved in cartel. Insisting on this, the then Minister for Trade and Industry, Dr. Kigoda said:

*“...well-functioning competition authority will instill investors’ confidence in the market.”*⁸⁸

The statement of the minister implies that, investors will always look on the situation of market and how they operate in terms of competition between business entities. Thus, without having a well-functioning competition authority in the market, investors will not be ready to dump their capitals in the countries where they cannot be assured of the competitive market.

There has been overlapping of jurisdiction in the processes of execution of the FCA and other sectoral legislation. The present paper recommends that, this requires a guiding policy to salvage the situation or alternatively the government should contemplate of ousting these powers and jurisdiction from the sector based regulatory authorities and vest them all to the FCC where they rightly belong, the other authorities should be left to focus on other economic roles their relevant sectors.

⁸⁸ In his statement when commenting on the amendment proposals brought by Tripartite Report on Review of Competition Laws and Policy of Zambia, Tanzania and Zimbabwe; titled; Tanzania: fair Competition Act for review-source Daily Newspaper of 27th November, 2021

Limited Access to Personal Electronic Devices for Purpose of Public Sector Auditing: A Critical Review of Tanzanian Legal Framework

Frank E. Sina*

Abstract

The Controller and Auditor-General (CAG) is a statutory auditor of all public entities. CAG and officers authorised by him have the constitutional and legal power and right to access and examine all information concerning any type of public entities for purpose of audit. Such auditor may obtain information contained in the personal ICT devices reviewed for audit only on written communication and upon being authorised by a person concerned.

They cannot access private or personal through the use of technological tools from ICT devices without consent, to do so will be a serious irregularity likely to impact the status and credibility of an SAI. Should the said person decline the request for disclosure, the best auditors can do is to report the matter to the CAG who will have to report the same to appropriate law enforcement organs for appropriate actions. Given the fact that perpetrators of cybercrimes are most of the time knowledgeable and well organized, voluntarily access to their personal devices may be very difficult.

To address this the article suggests improvement of audit planning particularly when the audit is likely to require information from personal devices including the involvement of authorized law officers that can access information contained in such devices; Development of cordial working relationships with law enforcement organs whose officers are vested with the legal mandate to search and seize personal ICT devices and use forensic tools to acquire required information on the identified devices and; Lastly amendment of the Cyber Crimes Act, 2015 to give forensic auditor powers and privileges of the Law Enforcement Officer in relation to search and seizure.

Key words: Public Audit, Access to Information, Right to Privacy

1.0 Introduction

A strong debate continues globally on the competing values of the privacy of the individual and the public's right to receive information.¹ Scholars and jurists have generally advocated for

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¹ See such debate in for example in ROOS, A (2008), *Personal Data Protection in New Zealand: Lessons For South Africa?* Potchefstroom Electronic Law Journal, (11)4; The South African Law Reform Commission, Privacy And Data Protection, Discussion Paper 109, Project 124, October 2005 available at <http://www.scielo.org.za/pdf/pej/v11n4/v11n4a04.pdf> (accessed May 5, 2022);

balancing these competing tenets.² In New Zealand for example, the court has held that: “the scope of privacy protection should not exceed such limits on the freedom of expression as justified in a free and democratic society” and that the defense of legitimate public concern is of paramount concern.³ In South Africa, the court has declared that “freedom and personal security are achieved both by protecting human autonomy on the one hand and by acknowledging human interdependence on the other”.⁴

In the US, the Supreme Court ruled that in considering unlawfulness of a (factual) infringement of privacy is adjudged “in the light of contemporary *boni mores* and the general sense of justice of the community as perceived by the Court”.⁵ In Kenya, the Supreme Court declared “the right to privacy embodies the presumption that, individuals should have an area of autonomous development, interaction, and liberty, a “private sphere” with or without interaction with others, free from arbitrary State intervention and excessive unsolicited

² See Generally NEETHLING, Johann POTGIETER JM & VISSER P.J. (1996) *Neethling's Law of Personality*, Butterworths Durban; DIONISOPOULOS AND DUCAT, (1976), *The Right to Privacy*, West Publishing Co.

³ *Hosking v Runtig* [2005] 1 NZLR 1 32 (CA).

⁴ *Bernstein ao v Bester ao NNO*. 1996 (2) SA 751(CC) 789 at para 151 referring to *Ferreira v Levin NO and Others*, *Vryenhoek and Others v Powell NO and Others* 1996 1 BCLR 1 (CC)

⁵ See *US v Dionisio* 410 US 1 (1975) 14 and *US v Mara* 410 US 19 (1973) 21. In these cases the Supreme Court held that a person had no reasonable expectation of privacy with respect to physical characteristics which he/she exposes to the public on a daily basis.

intervention by other uninvited individuals”.⁶ Activities that restrict the right to privacy, such as surveillance and censorship, can only be justified when they are prescribed by law, necessary to achieve a legitimate aim, and proportionate to the aim pursued.⁷

One of the spheres where personal rights to privacy may be interfered may be for purpose of accessing information which is required by law for public good or interests. This includes access to personal information for purpose of audit. In this article, an examination of law and practice regarding access to information contained in personal devices for purpose of public in Tanzania is done. The article explores the law governing privacy rights, public sector auditing and access to information. It points out the limitations and associated challenges and recommend possibilities for improvements

2.0 The SAI Tanzania and Access to Information

One of the fundamental obligations of Supreme Audit Institutions (SAIs) is to promote and enhance accountability and predictability of the governments’ performance. SAIs do this by

⁶ Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR

⁷ The court was making reference to the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 2009, A/HRC/17/34. See also See Universal Declaration of Human Rights, art 29; Human Rights Committee, General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9; Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988.

promoting accountable democratic institutions, preventing financial malpractice, corruption, and delivery of information to taxpayers about carrying out government policies and programs.⁸

The importance of SAI's independence has been emphasized through various proclamations issued by the International Organization of Supreme Audit Institutions (INTOSAI), which sets out the principles of independence in public sector audits. These INTOSAI's proclamations are found in the following International Standards of Supreme Audit Institutions (ISSAI): (1) ISSAI 1: The Lima Declaration; (2) ISSAI 10: The Mexico Declaration on SAI Independence; (3) ISSAI 11: Guidelines and Good Practices Related to SAI Independence. They recognize that SAIs' can accomplish their task objectively and effectively only if they are independent of the audited entity and are protected against outside influence.

In order for a SAI to undertake its obligations, it must have all the required information. This information may be in form of a hard copy (paper-based) or embedded in computerized/information systems. With technological development more and more information of audit information is being stored in digital platforms, eg. Computers, cloud storage facilities, organization servers, and even personal gadgets. This certainly has implications on access to information to such devices particularly when they are personal but have links with public computerized systems as it shall be further discussed in work.

⁸ See Preamble to the Public Audit Act, Cap 418 describing the strategic role of supreme audit institution in the United Republic of Tanzania

2.1 National Audit Office of Tanzania

National Audit Office of Tanzania (NAOT) is a Supreme Audit Institution of Tanzania and an Independent Department of the Government of the United Republic of Tanzania. The Office is headed by the Controller and Auditor General (CAG), whose duties and responsibilities are provided under Article 143 of the Constitution of the United Republic of Tanzania, 1977 and further elaborated in the Public Audit Act, CAP.418 and the Public Audit Regulations 2009, [GN 47 of 2009].

The Office is legally mandated to undertake various types of audits, including financial, compliance, performance, special audits, forensic audit and any other type of audit as the CAG deems fit.⁹ In addition to the above responsibilities, the CAG has been empowered to make recommendations to prevent or minimise unproductive expenditure of public monies, maximise the collection of public revenues, avert loss by negligence, carelessness, theft, dishonesty, fraud, corruption relating to public monies and resources. The Office undertakes the above duties and responsibilities to bring about greater accountability and transparency in the management of public resources.¹⁰

2.2 NAOT and Access to Information

The Lima and Mexico Declarations have underscored the importance of access to information by a SAI. The Lima declaration requires member states to ensure that Supreme Audit

⁹ Section 26- 29 of the of Public Audit Act. Under section 11 of the Act the CAG performs these functions on behalf of the National Assembly.

¹⁰ Section 12 of the Public Audit Act, Cap 418

Institutions have access to all records and documents relating to financial management and shall be empowered to request, orally or any information deemed necessary by the SAI for performing its audit mandates¹¹

Mexico Declaration on the other hand directs member states to ensure that SAIs have adequate powers to obtain timely, unfettered, direct, and free access to all the necessary documents and information, for the proper discharge of their statutory responsibilities.¹² The spirit of these international proclamations is well reflected within the current legal framework as hereunder described.

2.2.1 Constitutional Guarantees

The Constitutional of the United Republic of Tanzania, 1977 guarantees the Controller and Auditor General and all people working for him or on his behalf access to information for purpose of audit from any person within the United Republic of Tanzania. Article 143(3) states:-

The Controller and Auditor-General and **every employee of the Government** who is authorized by him shall have the right to examine books records, statements of accounts, reports and all other documents **concerning any type of account referred to in sub-article (2) of this Article. (Bold is for emphasis)**

¹¹ IV. Powers of Supreme Audit Institutions, Section 10.

¹² Principle 4

The literal interpretation of this article means that firstly, the persons who have the power to access and examine books of accounts, statements of accounts, reports, and any documents for purpose of an audit are: (1) the Controller and Auditor-General and (2) Persons authorized by CAG. Secondly, this right must be concerning the type of account referred to in 143 (2) of the constitution which means accounts of the Government of the United Republic, the accounts managed by all Officers of the Government of the United Republic, and the accounts of all Courts of the United Republic and the accounts managed by the Clerk of the National Assembly.

2.2.2 The Legal Authority - The Public audit Act, Cap 418

The Public Audit Act, Cap 418 perhaps has a very comprehensive provision regarding access to information for purpose of audit. Section 15 of the Act provides the Controller and Auditor-General or his representative with unrestricted access to such people, documents, computers, and other information systems and assets as the Controller and Auditor-General reasonably considers necessary for the proper performance of his functions, carrying on responsibilities and the exercise of powers.

The provision obliges the Accounting Officer of the audited entities to ensure that the Controller and Auditor-General has access at all reasonable times, to the documents of the auditee relating to the performance of functions, responsibilities, and the exercise of powers by the Controller and Auditor-General.

It obliges the internal auditor of the audited entity to submit to the Controller and Auditor-General quarterly copies of internal audit reports before the beginning of the next quarter. It further provides the Controller and Auditor-General with the power to require an auditee or any person employed by the auditee to produce any document in the auditee's or other person's custody, care, or control; and to provide the Controller and Auditor-General with information or an explanation about any information, system or asset.

Importantly, the Controller and Auditor-General is vested with powers to obtain such information as he considers necessary to fulfill the performance of his functions, responsibilities, and the exercise of his powers **from any person who is not a member, or employee of the office of the auditee.**

For purpose of obtaining information pursuant to subsection (5), the Controller and Auditor-General is required to (a) advise the person in writing of the nature of the information; and (b) state the reason for want of such information i.e clearly declare that the information is required for purpose of audit.

Under section 11 (1) of the Public Audit Act the Controller and Auditor-General for purpose of performing his functions and responsibilities is vested with powers:- to call upon any public officer for any explanation and information which the Controller and Auditor-General may require in order to enable him to perform those functions and responsibilities; summon and examine under oath any person as he may determine in connection with the receipt or expenditure of public monies or the receipt or issue of any public property affected by the provisions of the Public Audit Act and in connection with any

matter necessary for the proper performance of his functions; Further, he may authorize any person eligible to be appointed as an auditor as the requirements of the Accountants and Auditors (Registration) Act, to conduct an inquiry, examination or audit on his behalf and that person or officer shall report to him.

2.2.3 The Public Audit Regulations, 2009

These Regulations provide further and additional information regarding the powers of the Controller and Auditor General in accessing information required for purpose of audit. Regulation 43 vests the Controller and Auditor-General with unrestricted power to access and retain information from any person, authority or body when in the opinion of the Controller and Auditor-General such information is necessary for the performance of his audit function.

Regulation 44 goes beyond statutory restrictions on the provision of information by requiring a person, authority, or body required in terms of any legislation or any law applicable to maintain secrecy or confidentiality of certain information. This regulation requires persons required to avail information to the Controller and Auditor-General to do so. Regulation 45 shield such officers from liability when complying with directives of the Controller and Auditor General.

Regulation 46 obliges the Controller and Auditor General to undertake precautionary steps to guard against the disclosure of confidential or secret information obtained under these Regulations. However, precautionary steps are not to be regarded as restraining disclosure of any audit finding by the

Controller and Auditor-General or any authorized Auditor on any unauthorized expenditure irregular, expenditure or wasteful expenditure or any other irregular or criminal conduct relating to the financial affairs obtained in the course of official duties in any legal proceedings. The Controller and Auditor-General or any authorized Auditor is not obliged to disclose information in any legal proceedings unless is a party thereto.

Regulation 47 reiterates the requirement to inform in writing the Person, Authority or Body from whom the Controller and Auditor General wishes to obtain any information. Such communication needs to state clearly the nature of the information required and the date and place where that Person, Authority or Body shall deliver or make available the information for access and retention by the Controller and Auditor General. Regulation 48 provides for circumstances and procedures for reimbursing information providers for any lawful costs which such person may have incurred in the process of providing such information.

Clearly, Tanzania has an ideal legal framework regarding access to information by Controller and Auditor General. It provides such wide and discretionary power to CAG that enables him or his authorized officers to access information required for purpose of audit.

3.0 The Right to Privacy

The concept of privacy is “an amorphous and elusive one which has been the subject of much scholarly debate.”¹³ A person’s right to privacy entails that such a person should have control over his or her personal information and should be able to conduct his or her personal affairs relatively free from unwanted intrusions.¹⁴ Privacy, in its simplest sense, allows each human being to be left alone in an inviolable core.¹⁵

The most cited definition is perhaps one by Neethling, which describes privacy as “an individual condition of life characterized by exclusion from publicity. A condition which includes all those personal facts which the person himself or herself at the relevant time determines to be excluded from the knowledge of outsiders and in respect of which he or she evidences a will for privacy.”¹⁶

Privacy is a fundamental human right, protected in numerous international human rights instruments.¹⁷ It is essential to the

¹³ See for example discussions in DIONISOPOULOS AND DUCAT (1976), *The Right to Privacy*, West Publishing Co.

¹⁴ NEETHLING J, POTGIETER JM & VISSER PJ (2005), *Neethling’s Law of Personality*, Butterworths Durban, *National Media Ltd ao v Jooste* 1996 (3) SA 262 (A) 271-2; *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR at para 53 and 63

¹⁵ *Ibid.*

¹⁶ Generally NEETHLING J, POTGIETER JM & VISSER PJ (1996), *Neethling’s Law of Personality*, Butterworths Durban; DIONISOPOULOS and DUCAT, (1976) at 36. This definition has been accepted by various Courts for example in *National Media Ltd AO v Jooste A* (1996) (3) SA 262 A 271 and *Bernstein ao v Bester ao NNO* 1996 (2) SA 751(CC) 789.

¹⁷ These include Universal Declaration of Human Rights, art 12; United Nations Convention on Migrant Workers, art 14; Convention on the Rights of the Child, art 16; International Covenant on Civil and Political Rights, art 17; African Charter on the Rights and Welfare of the Child, art 10; American Convention on Human Rights, art 11; African Union Principles on Freedom of Expression, art 4; American Declaration of the Rights and Duties of Man,

protection of human dignity and forms the basis of any democratic society. It also supports and reinforces other rights, such as freedom of expression, information, and association.¹⁸ Premised on "the inherent dignity and ... the equal and inalienable rights of all members of the human family."¹⁹ Privacy has been closely related to the concept of identity. It has been submitted that "rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's own autonomous identity."²⁰

3.1 Privacy in Digital Era

A substantial part of privacy matters are now done online. Most people use computers and cell phones to conduct businesses, to communicate, impart ideas, conduct research, explore their sexuality, seek medical advice and treatment, correspond, communicate with loved ones, and express political and personal views. Internet is used for conducting many of their daily activities, such as keeping records, arranging travel and conducting financial transactions. Much of this activity is conducted on mobile digital devices, which are integrated into the citizen's personal and professional lives. They have replaced and consolidated fixed-line telephones, filing cabinets, wallets,

art 5; Arab Charter on Human Rights, art 21; European Convention for the Protection of Human Rights and Fundamental Freedoms, art 8; Johannesburg Principles on National Security, Free Expression and Access to Information; Camden Principles on Freedom of Expression and Equality.

¹⁸ Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR at para 53

¹⁹ RICHARD B. L. (1984), *The Human Rights of Aliens in Contemporary International Law*, 41 Manchester University Press

²⁰ Bernstein ao v Bester ao NNO 1996 (2) SA 751(CC) 789 at para 65.

private diaries, photo albums and address books. The internet has also enabled the creation of greater quantities of personal data. Communication(s) data is information about a communication, which may include the sender and recipient, the date and location from where it was sent, and the type of device used to send it.²¹

The technological evolutions has progressively posed threat to individual privacy. While technologies and convergence has facilitated dissemination of information it has equally same time, has brought about enormous threats to individual (and corporate) confidentiality.²² Innovations in information technology have enabled previously unimagined forms of collecting, storing, and sharing personal data. The right to privacy has evolved to encapsulate state obligations related to the protection of personal data.²³ A number of international instruments enshrine data protection principles, and many domestic legislatures have incorporated such principles into national law.²⁴

Protection of persons' right to privacy is all about safeguarding a person's right to privacy. It means providing legal protection to a person his person's particulars are not being deal with by

²¹ The supreme Court of Kenya has appreciated this trend in Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR at para 53

²² Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR at para 53

²³ Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy).

²⁴ Guidelines for the regulation of computerized personal data files (UN General Assembly Resolution 45/95 and E/CN.4/1990/72).

another person or institution i.e his information is been collecting, stored, used by another person or authority. While this the right to privacy is not absolute, a law which “encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights.”²⁵

3.2 The Law Relating to Privacy in Tanzania

The right to privacy is provided for under article 16 of the Tanzanian Constitution of 1977. The said article states;

“(1) every person is entitled to respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communications.

(2) For the purpose of preserving the person’s right in accordance with this Article, the state authority shall lay down legal procedures regarding the circumstances, manner and extent to which the right to privacy, security of his person, his property and residence may be encroached upon without prejudice to the provisions of this Article.”

The literal interpretation of this provision is that, firstly every person is entitled to respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communications. Secondly, such right may be derogated from

²⁵ *Ibid.*

by the state Authorities through established legal procedures. As such the right to privacy is not an absolute right.

This right is further subjected to general restrictions of Bill of Rights under Article 30 of the Constitution. This Article provides that the human rights and freedoms, the principles of which are set out in the Constitution, are not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest.²⁶

The Constitution allows for enactment of the laws and conduct of acts for ensuring that the rights and freedoms of other people or of the interests of the public are not prejudiced by the wrongful exercise of the freedoms and rights of individuals; ensuring the defense, public safety, public peace, public morality, public health, rural and urban development planning, the exploitation and utilization of minerals or the increase and development of property of any other interests for the purposes of enhancing the public benefit; ensuring the execution of a judgment or order of a court given or made in any civil or criminal matter; protecting the reputation, rights and freedoms of others or the privacy of persons involved in any court proceedings.

It also includes enactment of laws and conduct of acts aimed at prohibiting the disclosure of confidential information, or safeguarding the dignity, authority and independence of the Courts; imposing restrictions, supervising and controlling the

²⁶ Article 30(1).

formation, management and activities of private societies and organizations in the country; or enabling any other thing to be done which promotes, or preserves the national interest in general.²⁷ For purpose of this article, it can be argued that, the said protection and restrictions apply to personal electronic devices, computers and other related gadgets.

The law on the protection of personal data in Tanzania is still not well developed. The Country has no comprehensive data protection legislation. The draft Data Protection Bill pending since 2014.²⁸ Similarly, there is so far no substantial case law interpreting Article 16 on the constitutional right to privacy.²⁹ The High Court came close to interpret the scope of the constitutional right to privacy in the case of *Irene Uwoya v Global Publishers Ltd and Others*,³⁰ In this case the plaintiff sued the defendant for violation of her right to privacy due to the defendants' act of publishing of photographs, videos, and articles revealing her sexual life. Unfortunately this case was dismissed due to the plaintiff's lack of appearance in court.³¹ The only case available where High Court has offered interpretation of the right to privacy under Article 16 of the URT Constitution up this moment is the case of *Jamii Media*

²⁷ Article 30(2).

²⁸ MAKULILO, Alex Boniface (2020), *Analysis of the regime of systematic government access to private sector data in Tanzania*, Information & Communications Technology Law, 29:2, 250-278, p.258. The draft Data Protection Bill was prepared by the Ministry of Communications through the assistance of Support for Harmonization of the ICT Policies in Sub-Saharan Africa (HIPSSA).

²⁹ MAKULILO, *Ibid.*, p.258

³⁰ Civil Case No. 83 of 2013, High Court of Tanzania, Dar es Salaam (Unreported).

³¹ MAKULILO, *Ibid.*, p.258

Company Ltd v The Attorney General and Inspector General of Police, High Court of Tanzania,³² In this case the High court construed the scope of the ‘disclosure orders’ in relation to the law enforcement under the Cybercrimes Act, 2015.

4.0 Access to Information Contained in Personal Devices by Law Enforcement Authorities

The enactment of several pieces of legislation has progressively expanded the ability of law enforcement and intelligence agencies access to personal information/data contained in electronic devices.³³ Below is the discussion on these mandate as contained in the two basic laws:-

4.1 Powers under Cyber Crimes Act, 2015

A Law Enforcement Officer has power under the Cyber Crimes Act, 2015 to enter into any premise³⁴ and search or seize a device or computer system and **secure the computer data accessed**. Further, he is authorized to extend the search or similar access to another system where he has grounds to believe that the data sought **is stored in another computer system or part of it**.³⁵ To do this, a Law Enforcement Officer has to have the authorization of Police Officer in charge of a Police Station or a Law Enforcement Officer of a similar rank. Before issuance

³² Jamii Media Company Ltd v The Attorney General and Inspector General of Police, High Court of Tanzania, Dar es Salaam (Main Registry), Miscellaneous Civil Cause No. 9 of 2016 (unreported).

³³ MAKULILO, Alex Boniface (2020), *Analysis of the regime of systematic government access to private sector data in Tanzania*, Information & Communications Technology Law, 29:2, 250-278, p.265

³⁴ Including land, buildings, vessel or aircraft.

³⁵ Crimes Act 2015, Section 31(1)

of authorizing order for search, the said Officer has to be satisfied that there are reasonable grounds to suspect or believe that a computer system may be used as evidence in proving an offence; or is acquired by any person as a result of an offence.³⁶ Similarly, a Police Officer in charge of a police station or a Law Enforcement Officer of a similar rank is vested with power to issue an order to any person in possession of data that is required for the purposes of a criminal investigation or the prosecution of an offence.³⁷ This order is to be served by a Law Enforcement Officer to any person who is required to produce such data.³⁸

In a case where the disclosure of data through disclosure order cannot be made, the Law Enforcement Officer may apply to the court for an order compelling such person to submit specified data that is in that person's possession or control.³⁹ Likewise, the Law Enforcement Officer may apply to the court for an order compelling a service provider offering services to such person submit subscriber's information in relation to such services in that service provider's possession or control.⁴⁰

The application by Law Enforcement Officer to the court to compel the service provider to submit subscriber's information relates to the data stored in a computer system or device it shall deemed to require service provider to produce or give access to the device in a form which is legible and can be taken away.⁴¹

³⁶ *Ibid.*

³⁷ *Ibid.* Section 32(1)

³⁸ *Ibid.* Section 32(2)

³⁹ *Ibid.* Section 32(3)(b)

⁴⁰ *Ibid.* Section 32(3)(c)

⁴¹ *Ibid.* Section 32(4)

The proceedings for hearing of these applications are done in *ex-parte* and in camera.⁴²

While the constitutionality of Section 32 and 38 of the Cyber Crimes Act, 2015 have been called into question in *Jamii Media Company Ltd v The Attorney General and Inspector General of Police*,⁴³ the High Court of Tanzania has held the said provisions are neither unconstitutional nor arbitrary as alleged. The Court declared that the said legislation (including challenged sections) were lawfully enacted by the parliament hence lawful.⁴⁴

However, the court held that, section 32(4) does not empower the police to take away the device(s). The court was of the opinion that the words ‘shall be deemed to require the person to produce or give access to it in a form in which is readable and can be taken away’ under section 32(4) the Act are related to the required data and not the device used to store the it.⁴⁵

The court further opined that a person to whom a request for disclosure of information has been made may print the information such that it can be read and/or taken away by investigators in a printed form.⁴⁶ In a case disclosure of information has not been done the law provide for an option to

⁴² *Ibid.* Section 38

⁴³ *Jamii Media Company Ltd v The Attorney General and Inspector General of Police*, High Court of Tanzania, Dar es Salaam, (Main Registry), Miscellaneous Civil Cause No. 9 of 2016 (unreported), p. 17-18

⁴⁴ *Ibid.* pp.17-18

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*p. 20

law enforcement authorities to such to seek court intervention under section 32(3) and 36 of the Cyber Crimes Act, 2015.⁴⁷

This position of the court has been criticized by seasoned scholars in Information Technology Law who have argued that,:-

“High Court’s decision has failed to clarify the scope of Article 16 of the Constitution in relation to the provision of section 32 of the Cybercrimes Act, particularly subsection four. There are a number of issues the court failed to consider. First, the court erroneously narrowed the scope of section 32(4) of the Cybercrimes Act by holding that, a request of information through ‘disclosure orders’ shall only be met if the information holder prints such information and supplies it to the police, implying that the police could not take ‘data’ electronically held in a ‘data storage medium’.

To say the least, the court misconceived the nature of computer data and how the same may be rendered intelligible. As a starting point, the court ought to have considered the definition of ‘computer data’ provided in section 3 of the Cybercrimes Act 2015 i.e Computer data is any representation of facts, concepts, information or instructions, in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function.”⁴⁸

⁴⁷ *Ibid.*

⁴⁸ MAKULILO, Alex Boniface (2020), Analysis of the regime of systematic government access to private sector data in Tanzania, *Information & Communications Technology Law*, 29:2, 250-278,

Professor Makulilo further argues that the court ought to have considered other definition of the term “device” under section 3 of the Cyber Crimes Act, 2015 which describes the term device to include a computer program, code, software or application; component of computer system such as graphic card, memory card, chip or processor; computer storage component; input and output devices. Further the Court ought to have considered the meaning of the word “access” which is defined as entry to, instruct, communicate with, store data in, retrieve data from, or otherwise make use of any of the resources of the computer system or network or data storage medium.⁴⁹

He further argue that, critical reading of section 32(4) of the Cybercrimes Act,2015 in light of the above definitions requires an information holder to produce the material that holds data to which an investigation relates or gives the police access to data.⁵⁰

The underlying phrase in section 32(4) of the Act is the ‘form which is legible and can be taken away’. Print out is just but one of the forms which data may be legible and can be taken away. The other form is electronic. In this situation, a ‘data storage medium’ or ‘device’ has to be supplied to the Law Enforcement Officer. The said officer would then access the data aided with or without the aid of any other device or material. The court decision suggests that it tried to separate in access to data from the device which holds it.⁵¹

⁴⁹ *Ibid.* pp. 265-267

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

This argument suggests that, the spirit of section 34(2) was to enable the Police Officer to get access to a data device in any form be it print or electronic. This would necessarily require power to have access to the device and obtain information from it. Unfortunately, this is not the position until the other court of record declare otherwise.

The law provides for avenue to use forensic tools for collection of essential evidence which cannot be collected under the above described approaches. To do this, a Law Enforcement Officer is required to apply to the court for an order to authorize the use of a forensic tool. This application can be made only where such Officer is satisfied that he cannot obtain the said information through other means.⁵² This application is required to have particulars regarding the name and address of the suspect; a description of the targeted computer system; and a description of the intended measures, purpose, extent and duration of the utilisation.⁵³

The Law Enforcement Officer shall ensure that any modification made to the computer system or computer data of the suspect are limited to the investigation and that any changes reversed after the completion of the investigation is restored into the system. During this process the Law Enforcement Officer is required to log:- the technical means used and time and date of the application; the identification of the computer system and details of the modification undertaken within the investigation; any information obtained. The law requires the Law Enforcement

⁵² Crimes Act 2015, Section 37

⁵³ *Ibid.*

Officer to protect the obtained information from any modification, unauthorized deletion and unauthorized access.⁵⁴

The Authorization by the Court is valid for a period of fourteen (14) days and may be extended by the Court. This is done through an application supported by affidavit to substantiate the need to extend such time for such the period. The extension is for a further period of fourteen (14) days or for such other period as it deems necessary.⁵⁵

The Law Enforcement Officer referred in this Act means a Police Officer of the rank of Assistant Inspector or above or an investigator of equivalent rank of inspector and above, member of Tanzania Intelligence Service, prosecutor, or any authorized officer of the authority responsible for regulation of communication or **any other person authorised in any written law.**

4.2 Powers under Criminal Procedure Act, [Cap. 20]

The Police Officers are authorised to seize anything relating to an offence that is found in the course of search that is sanctioned by warrant under section 41 of the Criminal Procedure Act, Similar powers may be exercised by the police in section 42 of the Act without a warrant during emergencies. These powers are widely being used by the Police in Tanzania in confiscating computers or mobile phones as it was in several cases including

⁵⁴ *Ibid.* Section 37(3)(4)

⁵⁵ *Ibid.*, Section 37(6)(7)

ones involving prominent politicians.⁵⁶ It is argued that, the powers contained under this Act do not extend to access of information contained in the device. To achieve these, the police have to resort and use the powers provided for under Cyber Crimes Act, 2015.

5.0 Forensic Audit

5.1 An Overview

For purpose of this Article, forensic audit is to be understood as an audit which involves specific procedures and audit techniques carried out in order to produce evidence with the aim of proving, for example, for how long has fraud been conducted and how it was conducted by who and who concealed it.

Forensic audit involves a collection of evidence for purpose of substantiating issues that would be relevant in criminal legal proceedings. This usually involves an assessment of the suspect's motive and opportunity to commit fraud; whether there was collusion to commit fraud involving several suspects; whether there is any physical evidence at the scene of the crime. It also includes scrutinising the comments made by the suspect during interviews and/or at the time of arrest and if there are any attempts to destroy evidence of committed fraud.⁵⁷

⁵⁶ MAKULILO, Alex Boniface (2020), *Analysis of the regime of systematic government access to private sector data in Tanzania*, Information & Communications Technology Law, 29:2, P.269.

⁵⁷ For general discussion on forensic audit see SMITH, Stevenson and CRUMBLEY, Larry (2009), *Defining a Forensic Audit*, Journal of Digital Forensics, Security and Law, Vol. 4(1) 61.

With the advent of technology forensic audit has progressively evolved. More and more of technological tools and software are being used during a forensic audit.⁵⁸ Apart from normal Physical Forensic analysis which includes handwriting analysis, fingerprint analysis, ink sampling, document dating, simulated forgery of signatures analysis, now Computer Forensics includes hard disk imaging, e-mail analysis, search for erased files, analyse use & possible misuse of office computers for personal use, ensure chain of custody for electronic evidence are methods commonly used in forensic auditing.⁵⁹

Forensic auditor use both old and new generation tools including Audit Command Language (ACL), Idea Arbutus (almost like ACL) and Microsoft Excel or MS SQL. The new generation tools include SAS, R Project, the Python based solutions, Oracle Data Analytics, Verafin. Other tools are specific for text mining such as Semantria, Synapsys, Luminoso, etc. They also use devices like Cellebrite UFED to access, manage and analyze digital data from electronic devices such as computers and

⁵⁸ For discussion on digital forensic audit see for example KYEI K., ZAVARSKY P., LINDSKOG D., Ruhl R. (2013), A Review and Comparative Study of Digital Forensic Investigation Models. In: Rogers M., Seigfried-Spellar K.C. (eds) *Digital Forensics and Cyber Crime*. ICDF2C 2012. Lecture Notes of the Institute for Computer Sciences, Social Informatics and Telecommunications Engineering, vol 114. Springer, Berlin, Heidelberg. See also HERBERT, W. E., TSEGBA, I. N., ENE, E. E., & ONYILO, F. (2017), *The Rise of Fraud Examination and Forensic Accounting in Africa: The Nigerian Experience*, Archives of Business Research, 5(4), 1-18; ROGERS, M.K. & SEIGFRIED, K. (2004), *The future of computer forensics: A needs analysis survey*, Journal of Computer and Security, 23, 12-16.

⁵⁹*Ibid.* see also KABIR, Ibrahim (2019), Forensic Audit, Forensic Tools and Techniques for Internal Auditors.

mobile phones and tablets.⁶⁰ For auditors to use these tools they must have legal mandate to do so. Inevitably this will involve getting access to ICT devices that store the data.

In Tanzania, the Controller and Auditor General (CAG) has mandate to conduct forensic audit. His mandate is derived from provision of section 29 of the Public Audit Act which mandates him to undertake different types of audits and section 27 which provides for communication of incidences of fraud or related offences in the course of forensic or any other type of audit. Under Regulation 82 of the Public Audit Regulation, 2009, the Controller and Auditor General is mandated to perform forensic audit on Ministries, Independent Departments, Agencies, Local Government, Public authorities, and other Bodies. This is usually upon notification by an officer of NAOT on suspicions of fraud and upon being satisfied that it is probable that fraud might have occurred with regards to the accounts of any audited entity by the CAG.⁶¹

When CAG orders such an audit a new audit engagement to such entity is to be commenced. The nature, time, and scope of such audit are determined by CAG. The Reports of such audits

⁶⁰ For a general discussion see SZEŻYŃSKA M., HUEBNER E., BEM D., RUAN C. (2009), Methodology and Tools of IS Audit and Computer Forensics – The Common Denominator. In: Park J.H., Chen HH., Atiqzaman M., Lee C., Kim T., Yeo SS. (eds) *Advances in Information Security and Assurance*, ISA 2009, Lecture Notes in Computer Science, vol 5576. Springer, Berlin, Heidelberg.

⁶¹ Regulation 83

are to be submitted to the requesting authority or any other authority as the CAG may determine.⁶²

In practice, such copies of reports are communicated to investigative organs particularly the Prevention and Combating of Corruption Bureau, the Director of Criminal Investigations, and the Director of Public Prosecutions. Auditors who participate in forensic audits whose reports result in prosecutions are usually called to clarify the audit findings and procedures used and eventually to testify as expert witnesses in Courts of law.

Like many other Supreme Audit Institutions, NAOT strives to be a highly regarded center of excellence in public sector auditing.⁶³ In this regard, the office through its forensic audit function has continued to evolve with time. The office uses forensic tools and software for purpose of audit of public entities when required and particularly when it is called to establish whether there are fraudulent transactions that resulted in defrauding of public monies. For forensic auditors to execute computer systems audits, they require information and data stored in such computerised devices. Such devices include computers, personal computers (laptops), smartphones and tablets as the case may be. While there is no problem when such devices are public devices i.e they are owned by the audited entity or the government, a major challenge exists when devices

⁶² Public Audit Regulation, 2009, Regulation 82.

⁶³ National Audit Office Strategic Vision 2019-22 available at <https://www.nao.go.tz/index.php/about/category/dira-na-dhima> (accessed October 12, 2020)

alleged to have perpetrated fraudulent act are personal devices i.e owned by an individual person(s).

5.2 Forensic Audit and Access to the information contained in the Devices

As discussed above the Controller and Auditor-General and every employee of the Government who is authorised by him (including forensic auditors) have the constitutional and legal power and right to access and examine all books records, statements of accounts, reports, and all other documents concerning any type of public entities account (accounts of the Government of the United Republic, the accounts managed by all Officers of the Government of the United Republic and the accounts of all Courts of the United Republic and the accounts managed by the Clerk of the National Assembly) for purpose of audit.

The Controller and Auditor-General or his representative is vested with unrestricted access to such people, documents, computers, and other information systems and assets as the Controller and Auditor-General reasonably considers necessary for the proper performance of his functions, carrying on responsibilities, and the exercise of powers. He is bestowed with powers to obtain such information as he considers necessary to perform his functions, responsibilities, and the exercise of his powers **from any person who is not a member, employee or office of the auditee.**⁶⁴

⁶⁴ The Public Audit Act, section 15.

The controller and Auditor General or his authorised on his behalf is vested with the power to summon and examine under oath any person as he may determine in connection with the receipt or expenditure of public monies or the receipt or issue of any public property affected by the provisions of this Act and in connection with any matter necessary for the proper performance of his functions. ⁶⁵For purpose of obtaining information required for the audit the Controller and Auditor-General is required to advise the person in writing of the nature of the information; and state that the information is required for the purpose of the audit.

The failure to provide the Controller and Auditor-General the information required by purpose of audit or failure to provide the Controller and Auditor-General or a person authorised by him with all such explanation and information as reasonably required, wilfully obstruction of access to information required, interference or exertion of undue influence on any officer or employee of the National Audit Office or any person authorised by the Controller and Auditor General performing his functions constitute an offence punishable by a fine not exceeding five million shillings or to imprisonment for a term not exceeding two years or to both.⁶⁶

It is argued that forensic auditors like all other auditors have unrestricted access to such people, documents, computers and other information systems only when these documents are required for audit of public entities and when such persons are fully informed of the needs and purpose of such requirements.

⁶⁵ The Public Audit Act, section 11 (1).

⁶⁶ The Public Audit Act, section 47(1)(a)-(d);47(4).

An auditor may obtain information contained in the personal ICT devices only on written communication and on voluntary authorisation by the owner of the device. Such person must be informed of the purpose of the audit. Secondly, the Auditors will have to deal with only information that is relevant for purpose of the audit and not otherwise. Should the said person not heed to the written communication for disclosure, the best auditors can do is to report the matter to the CAG who will have to report the same to appropriate law enforcement organs for appropriate actions including resorting into criminal procedure search and seizure approaches discussed above. Auditors cannot access private or personal information through use of technological tools i.e tools that enable a third party to access and acquire information stored in a ICT device without voluntary consent of its owner. Doing so will be a serious irregularity likely to impact on the status and credibility of an SAI.

5.3 Practical Challenges and Way Forward

Perpetrators of cybercrimes particularly ones involving computer devices and other information systems are most of the time knowledgeable and well organised. Voluntarily access to their personal devices may be very difficult. This is because once the required written communication is sent to such persons, it signals them that something is wrong and they are being investigated. In such circumstances, they are likely to destroy the said ICT device or to the least delete completely the implicating information contained in such devices. In practice, it is almost not possible to voluntarily access information from

such persons. To resolve this practical challenge, the following are proposed:-

5.3.1 Proper Audit Planning

One of the key factors for an efficient and effective audit is proper planning. Proper audit planning enables the Auditor to devote appropriate attention to all important areas of audit and facilitates the identification of potential problem areas that are properly identified and expedites the completion of audit assignments. Auditors performing audit and particularly forensic audit that is likely to require information from personal devices need to well plan for the audit considering the legal and regulatory requirements for accessing information from such person. This would involve considering communicating with such persons for purpose of voluntary submission of information/ devices or involvement of authorised law officers that can access information contained in such devices.

5.3.2 Establishing Collaborative Frameworks with Law Enforcement Organs

The Office and Forensic Unit in particular has to develop cordial working relationships with law enforcement organs whose officers are vested with the legal mandate to search and seize personal ICT devices and use forensic tools to acquire required information on the identified devices under the Cyber Crimes Act, 2015. This would require the establishment of collaborative arrangements and sensitisation and the creation of awareness to officers from NAO and Law Enforcement Officers, particularly the police. Awareness creation could include aspects such as the

legal mandate of each institution, the legal frameworks and practical operation of the law on access to information, and the best approaches that can facilitate the acquisition of information from personal ICT devices consistent with legal requirements.

Where the audit requires information that can be obtained from the mobile phone network eg. Records of Mobile Money transactions, communication history, etc it can request such information from the Tanzanian Regulatory Authority (TCRA) which is legally empowered to acquire such information and submit the same to the person requesting them in line with privacy requirements. To facilitate the expedited acquisition of required information NAO should consider establishing a special working relationship with TCRA.

5.3.4 Consider Mindful Amendment of the Public Audit Act, 2008

Forensic audit necessarily requires access to a lot of information and recently access to ICT devices that are used for production, processing, and storing the same. This includes private ICT devices whose voluntary access is not easy and involuntary access by auditors is not provided for the public audit legislation either under the Cyber Crimes legislation or other legislation in the Country. In this regard, the authorities may consider amending the legislation in particular the Cyber Crimes Act, 2015 so as to give forensic auditor powers and privileges of the Law Enforcement Officer in relation to search and seizure as provided for under the sections 31 and 32 of Cyber Crimes Act, 2015. In the alternative, the Public Audit Act, 2008 may be amended so as to vest such powers to forensic auditors. Any such action will require careful thinking and must seek to strike

a balance between the right to personal privacy, the right to access information, and the traditional role of an auditor.

Electronic Filing of Cases in Courts of Law in Tanzania

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Abstract

Tanzania is among the jurisdictions in which electronic filing (e-filing) of cases is now in force. The guiding law and practice is provided under the Judicature and Application of Laws (Electronic Filing) Rules, 2018 as well as Case Laws. Such rules were made by the Chief Justice of Tanzania while exercising powers to make rules to regulate practice and procedures in the High Court and other courts of the land as stipulated under section 4 of the Judicature and Application of Laws Act.¹ So, the courts have now been appealing to Tanzanians to utilise the electronic case filing system so as to speed up hearing of cases.² Before promulgation of the rules, cases could only be filed manually in sense that people could not even file cases out of working hours let alone Saturdays and Sundays. As of now, there is no longer a need for litigants to rush into court premises. However, despite such tremendous changes adopted about four years ago, there are still legal challenges hence this paper. It is the authors' views that the said legal challenges make the e-filing system ineffective and questionable. With that in mind, this paper clearly addresses the historical development of e-filing system in Tanzania, the rationale behind e-filing system, the importance of e-filing of cases system, the legal

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¹ Cap. 358 R.E 2019.

² See “High Court Judge Pushes for E-Filing System” retrieved on 20th October, 2022 from <https://allafrica.com>> stories.

challenges facing electronic filing of cases and the measures proposed to be taken so as to ensure effective operation of the system.

1.1. Introduction

Electronic filing (e-filing) can be referred as a process of submitting court documents through an electronic form.³ The concept does not include *e-mailing* or sending a document by *facsimile*.⁴ E-filing entails the process where both filling of courts documents and services of documents is done electronically. Further, e-filing of cases should also be taken to include a system where filling and service of documents is done through the internet.⁵

E-filing of cases is not limited to the filling of cases only but it also includes the service, delivery or otherwise conveyance of a single copy using the electronic filing system that can be done through electronic transmission and/or a service bureau. E-filing system is designed to apply in all courts proceedings in Tanzania save for proceedings in the primary court.⁶

The objective behind e-filing is to do away with the handling of physical documents to the courts of law as well as services of physical documents. E-filing in Tanzania is the recent development adopted by the Tanzania court system. The system is essentially adopted and put into place so as to ensure smooth administration of justice. This is also provoked by science and

³Rule 3 of GN No. 148 of 2018.

⁴ Rule 3 of GN No. 148 of 2018.

⁵ See meaning of electronic filing system under GN No. 148 of 2018.

⁶ See Rule (1) of GN No. 148 of 2018.

technological innovations that the contemporary world experiences. So it is worthy saying that, the court system in Tanzania has now been modernised by switching from paper-based filing system to digital format; this is expected to clear large backlog of cases as well as easing the burden of time consuming legal process and procedures.⁷

Currently, the law requires that all documents including pleadings, petitions, applications, appeals and such other documents that are to be filed to the court of law to be filled electronically.⁸ In practice, that is being done through the Judicial Statistical Dashboard System (JSDS).⁹ Judicature and Application of Laws (Electronic Filing) Rules, 2018 also establishes the court official record known as electronic case file (ECF).¹⁰ Electronic case file is thus, the electronic file where all the proceedings in relation to the court cases together with any other documents and exhibits that are filed in the conventional method can be found.¹¹ Generally, the documents are prepared electronically using the formatting style prescribed under the Rules.¹² Simply, you must prepare documents by using the MS word and then convert it to PDF Format using any compatible PDF Converter. Further, the rules stipulate for the maximum permissible size of file to be uploaded to be one hundred (100) megabyte (MB).

⁷ Report by Kizito Makoye dated 17th November, 2021 retrieved on 20th October, 2022 from <https://www.aa.com.tr>

⁸ Rule 8 of GN No. 148 of 2018.

⁹ A system were registered users can opportunity to file cases online.

¹⁰ Rule 9 of GN No. 148 of 2018.

¹¹ Rule 9 of GN No. 148 of 2018.

¹² See rule 11 & 12 of the Judicature and Application of Laws (Electronic Filing) Rules GN No. 148 of 2018.

1.2. The Historical Development of E-Filing System in Tanzania

The electronic filing of cases system was established in Tanzania in the year 2018. The Chief Justice is given the power to make rules for regulating the practices and procedures of the High Court and any other court established in Tanzania.¹³ The Chief Justice by virtue of section 4 of JALA enacted the Judicature and Application of Laws (Electronic Filing) Rules.¹⁴ The electronic filing system reflects the digital developments that are taking place in science and technology. So, in order to grasp well the endeavour of electronic filing system one needs to understand the rules and case laws in which rules have been interpreted.¹⁵

Before establishment of electronic filing of cases parties, advocates and state attorneys could file cases by conventional means, that is, preparing documents physically then take trouble to go to the registry office of the court so that the court or tribunal clerk, as the case may be, could receive the document physically. It was then for the registry officer to take the documents for the magistrate or judge in charge for admission purposes. A person could then wait for four to five days in order to go to the registry again to see if his or her application has been admitted so that payment could be effected. Sometimes visitation of the registry office for the purpose of checking whether the application has been admitted or not and effecting payment does not end there.

¹³ Section 4 of the JALA Cap 358.

¹⁴ GN No. 148 of 2018.

¹⁵ G. N No. 148 published on 13/4/2018 see also GGN Construction Limited versus George Johansen t/a Mageta Timber Supply, HCT Shinyanga Registry, Misc. Civil Application No. 33 of 2020 (Unreported).

The electronic filing Rules establish the Electronic filing system. The Rules also provides the procedures for electronic filing system. It is clearly stipulated that the Rules shall apply to all proceeding in the Courts in Tanzania except the Primary Court. This means that the Rules are not applicable only in the Primary Courts in Tanzania. The process of filing cases in all other Courts is regulated by the Rules.¹⁶ The cases and all other relevant court documents are supposed to be filed electronically. For a person to access e-filing of cases system must register as users of the court's electronic system. The Rules of 2018 requires the Advocates, State Attorneys or any other person entitled to appear before the court to register as e-filing system users.¹⁷ The registration as a user makes a person eligible to access the system of filling cases electronically. Once registered the user shall be given a username and the user password. The enacted Rules require the confidentiality of the username and password of the user. It is stipulated that the user ID and password are confidential and shall be used only by the user or any other authorised person.¹⁸

The Judicature and Application of Laws (Electronic Filing) Rules, 2018 were followed by the amendment of the Civil Procedure Code (the CPC) as well as the Court of Appeal Rules.¹⁹ The amendment of the CPC took effect on 10th May, 2019 were the Civil Procedure Code (Amendment of the First Schedule) Rules, GN 381 of 2019 were promulgated. Section 22 and Order IV of the CPC that used to provide for manner of instituting cases were amended to allow presentation of a plaint

¹⁶ Rule 2(1) of the GN No. 148 of 2018.

¹⁷ Rule 29 of GN No. 148 of 2018.

¹⁸ Rule 31 of the GN No. 148 of 2018.

¹⁹ See the Civil Procedure Code (Amendment of the First Schedule Rules), GN 381 of 2019 and Tanzania Court of Appeal (Amendment) Rules, 2019 (GN No. 344 of 2019).

electronically.²⁰ Once the said plaint is presented then assignment of cases to judges and/or magistrates could also be done electronically. The amendments embraced the technological development within the judiciary by allowing electronic filing of documents to the court.²¹

1.3. The Rationale behind the establishment of E- Filing System in Tanzania

The main aim of establishing e-filing system is to ensure effective and timely disposal of both criminal and civil proceedings at affordable cost; to ensure just determination of proceedings; to ensure efficient use of the available judicial and administrative resources including the use of the suitable technology. Despite good motive behind the establishment of e-filing system the same is still faced by some challenges. Such challenges affect administration of justice. The said challenges range from the expertise on the electronic use, acceptance among the stakeholder and the ineffectiveness of the system itself as caused by technical issues, technological underdevelopment in Tanzania, and the availability and reliability of electricity. Generally, the e-filing of cases system is not efficient due to the said challenges.

It should be noted that, the Constitution of the United Republic of Tanzania of 1977 mandated the Judiciary as the organ having the final say in the dispensation of justice in Tanzania.²² the Judiciary is vowed to consider the principles of impartiality without due regard to social and economic status of a person, to avoid unnecessary delays when dispensing justice without providing any reasonable ground, to award reasonable compensation in accordance with the laws of Tanzania, to

²⁰ See section 22 and Order IV.

²¹ Retrieved from <https://www.hg.org>.

²² Article 107A (1) of the Constitution of 1977.

promote and enhance dispute resolution among parties and to dispense justice without being tied up with technicality provisions.²³ The E-filing system was established to achieve the said principles as enshrined under the Constitution of Tanzania of 1977. However, the challenges facing the system leads delay of cases and filling of case to the court being tied up with technicalities.

E-filing system of cases was also established to diminish the delay of cases. The system was designed to ensure that the documents are filled electronically without taking physical documents to the court premises. The system ensured the individuals to access and communicate to the court even on Saturdays and Sunday especially when there is urgency to be attended by the court on the following Monday. As we hinted earlier, we reiterate and insist that, despite all the good intention by the Rules maker still the system seems to be ineffective because of some challenges.

Before we venture into the said challenges, it is also important to take note that, the Civil Procedure Code,²⁴ and the Appellate Jurisdiction Act²⁵ requires the court to take into account the overriding objective which is aimed to facilitate the just, expeditious, proportionate and affordable resolution of disputes.²⁶

So to say, the courts are obligated to handle all matters before it to attain just determination of the proceedings, efficient use of the available resource including the use of suitable technology and to ensure timely disposal of cases at the cost affordable by

²³ Article 107A (2) of the Constitution of 1977.

²⁴ The main procedural law which is applicable in the High Court, the Court of Resident Magistrate and District Court.

²⁵ The law establishing the Court of Appeal of Tanzania.

²⁶ See section 3A of Cap 33 R. E 2019 and section 3A of Cap. 141 R.E 2019.

the respective parties.²⁷It is our humble view that, even the electronic filing system is established to achieve the overriding objectives.

1.4. The Importance of Electronic Filing of cases

Firstly, electronic rules increase flexibility. This means the implications of development of science and technology now impacts the parties and lawyers too. A person can now conveniently file case while in chambers, homes or even in the public transport. This is very useful as it do away with the habits of rushing to the court with deadlines pressure.

Secondly, the electronic rules save time. Lawyers and/or parties can file cases electronically within a short period of time. Moving from one's chamber or home to court, waiting for court officer to receive the document, waiting for control number, going to the bank to pay, bringing pay in slip back to the court so that the document can be signed, awaiting for courts' exchequer receipts used to consume time. The electronic rules have shortened the exercise and then parties can spend other time on other economic and professional activities.

Moreover, the establishment of the e-filing Rules saved the energy of the court and parties. This is where we have said it reduce backlog of cases in courts. In doing so, courts officials including judges and magistrates can use the energy into other important issues rather than waiting to attend the citizens who are in need of court services.

Fourthly, the electronic rules increase accuracy. Under this parties will try to avoid transmission errors as they can. This will in turn ensure data record accuracy. In doing so, even chances for manipulation of court records are likely to become zero.

²⁷ Section 3B (1) (a) to (c) of Cap 33 R. E 2019.

Generally, one can confidently say, the E-filing was introduced in line with overriding objective to ensure just, expeditious, proportionate and affordable resolutions of the disputes. The rules are useful due to number of advantages discussed herein. However, it should not be forgotten that the systems seems to be inoperative and cause some chaos to the users. This necessitated writing of this article so as to see the balance between the strength and weakness on the system. Being a scholarly work, this paper also suggests the ways forward to ensure the efficiency and effectiveness of the system.

1.5. Legal Challenges likely to be encountered on Electronic Filing of Cases in Tanzania

Number of legal challenges can be ascertained when it comes to electronic filing of cases in Tanzania. Despite number of years since the establishment of the Judicature and Application of Laws (Electronic Filing) Rules of 2018, still this is a new phenomenon to many lawyers in Tanzania. Some of the challenges are due to lack of proficiency among the users of the system. Other challenges are also attributed by the fact that in some matters the established Rules are neither less elaborative to clear the doubts casted by electronic filing of case or in conflict with existing practices.

1.5.1. A document is considered filed when Court Fees are paid and an ERV Receipt issued.

This has been a part of Tanzanian jurisprudence for years and years. A vivid example is in early 1990's in case of John Chuwa vs Anthony Sizya.²⁸ In this case, the Court of Appeal of Tanzania agreed with the High Court reasoning and declined an application for stay of execution since the document is

²⁸ [1992] TLR 233.

considered filed when legal fees are paid. Such stance has been reiterated in number of cases including 2016 case of Mrs. Surendra Surendra vs Mr. Surendra Dharamshi Jutha @ Mohamed Dharamshi Jutha.²⁹ One can say, the aforementioned decisions were rendered before the electronic filing Rules come into force. However considering the coordination between court's registry office and court's accounts office was then questioned as to competency of an application on basis of payment of legal fees are bound to occur. It should not be forgotten that, under a system with adversarial element like our preliminary objection that an application or an appeal is timed barred would be of benefit to the opponent. In Surendra (Supra) the court clearly held that "*the date of filing a document in court is a date of paying court fees and not receiving of the document*". In recent court decisions there has been such dictum which stated that "*a document is deemed to be filed in court when payment of court fees is done and the proof is payment of fees exhibited by the exchequer receipt*".³⁰ Such last decision has been issued after commencement of electronic filing Rules. So to say, the verdict seems to contradict the Rules under which rule 21 which categorically states that "*a document is considered to have been filed if it is submitted through the electronic filing system before mid-night EAT on the date it is submitted unless a specific time is set by the court*".³¹ To appreciate the gist of the challenge in some cases a different approach has been taken by the courts such as in Mohamed Hashil vs National Microfinance Bank Ltd (NMB) in which the court after going through record opted to go for the date in

²⁹ Matrimonial appeal No. 1 of 2014, HCT Tabora Registry (Unreported).

³⁰ See Misungwi Shilumba vs Kanda Njile, PC Civil Appeal No. 13 of 2019, HCT Shinyanga Registry (unreported).

³¹ See Rule 21 (1) .

which it was filed electronically rather than when the hard copy was presented for filing in court registry.³²

1.5.2. Electronic Filing Rules do not apply in Primary Courts.

Without much ado, it is undisputed that the Judicature and Application of Laws (Electronic Filing) Rules, 2018 which was published on 13th April, 2018 do not apply in Primary Courts. This is derived from its interpretation provision where it categorically states that the “*rules shall apply in all proceedings in all courts save for proceedings in primary court*”.³³ One may say, this is attributed by number of factors such as lack of personnel with ICT knowledge in many places where primary courts are established, avoiding overburdening the community members who are still fighting against illiteracy, the scattered and distant nature of most Primary courts in different parts of Tanzania as well as network challenges in most places in Tanzania. However, considering the fact that one among the aims of establishing e-filing is to ensure timely disposal of proceedings at affordable costs, the Chief Justice should reconsider to make the Rules applicable in Primary Courts. Despite the fact that in different parts of Tanzania courts infrastructure is still a problem but the impacts of science and technology cannot be ruled out in those parts too. The application can even be placed in phases with initial phase involving its test in *pilot areas*.³⁴ The use of alternative dispute resolution methods that started in such way can save a useful guide to this. It should also be noted that, as of now the recent amendments allow appearance of advocates and state attorneys

³² Revision No. 6 of 2020, HCT Bukoba Registry (unreported)

³³ Rule 2 (1) of Judicature and Application of Laws (Electronic Filing) Rules, 2018.

³⁴ The Government Can Select few areas to test applicability of the Electronic Filing Rules.

in Primary Courts.³⁵ The current villages are not the same as *Ujamaa* villages. There are also primary courts almost in all districts in Tanzania including urban areas.

1.5.3. The Chief Justice may restrict application of the Rules³⁶

This is another challenge. Yes, there may be good reasons that warrant giving such restrictive power to the head of the judiciary but then considering daily technological development and objectives behind introduction of electronic filing Rules, the power to restrict the applicability of the rules seems to defeat the overriding objective of ensuring just, expeditious, proportionate and affordable resolutions of the disputes. At least the Chief Justice should have been given power to extend application of the rules not to restrict. Such power also seems to pre-empt if not to contradict *power* to exempt electronic filing Rules that is given to the registrars and magistrates in charge in areas where electronic filing is not feasible; areas when there are concerns about confidentiality and protection of privacy; areas where the document cannot be scanned or filed online because of its size, shape or condition or where the electronic filing system is either inaccessible or in areas where the electronic filing system is not available.³⁷ Frankly speaking, such restrictive powers are likely to put at risk the application of e-filing rules. A common principle of statutory construction that expression of one thing excludes the others should not be forgotten (*expresio unius, exclusio alterius*).

1.5.4. Challenges associated with conventional presentation of documents filed online

³⁵ See the Written Law (Miscellaneous Amendments) (No. 3) Act, 2021

³⁶ Rule 2 (2) of GN No. 148 of 2018

³⁷ Rule 20 of Judicature and Application of Laws (Electronic Filing) Rules, 2018.

This is another real challenge. It has been the practice in most courts that after a case has been filed online then a party or his advocate has to present the prepared documents physically at the court registry. A quick glance might not show a challenge but if you consider possibilities of corrections made at party's own instance after a case has been admitted online or those directed by the registry office when the physical documents are presented then the questions as to accuracy, authenticity and reliability of the electronic filing system of cases arises. One can say, a good thing is that there is a rule on storage and retrieve of electronically filed pleadings and documents but the fact that Parties are being allowed to print hardcopies of documents filed online seems to raise possibilities of lowering public confidence and trust on the judiciary.³⁸ Considering the nature of adversarial system, lawyers may be tempted to act scrupulous and use the opportunity to turn matter on their benefit.³⁹ Under this aspect, there is also an issue that a document is filed on fifth, control number is issued on seventh, payment is made on eighth and then receipt is issued on ninth and same ninth the court clerk signs the document as presented for filing before the registry. As we hinted area an objection as to time limit of an appeal or application is likely to arise with courts being left with option whether or not to follow John Chuwa (*supra*) legal position.

1.5.5. Legal challenge when there is Discrepancy of Information between Documents filed online and Physical Documents Itself.

There seem to be a loophole. As per the rules the when there is discrepancy between information filed online and the document

³⁸ Rule 25 of Judicature and Application of Laws (Electronic Filing) Rules, 2018.

³⁹ See Camel Oil (T) limited vs Bahati Moshi Masabile and Another, HC Civil Appeal No. 46 of 2020, HCT Mwanza Registry (Unreported).

itself then the contents of the document itself prevails.⁴⁰ This means what has been filed online cannot prevail over the physical document. To us, this is a challenge as it seems to defeat the usefulness of having electronic Rules in place. There are number of questions to ask ourselves. What is the essence of having the electronic case file? How is the system accurate if it can be altered vide physical document? To appreciate this challenge we also noted that neither the electronic filing Rules, GN No. 148 of 2018 nor the Court Fee Rules, GN No. 247 of 2018 provide nexus of electronic filing of documents and date of payment of court fees as well as presentation of the conventional or manual documents for filing in court.⁴¹ It is our humble view that, the Rules should have stated categorically that in case of discrepancy between information filed online and the document itself then information on documents filed online should prevail and not *vice versa*. This will keep and boost public confidence and trust on the electronic filing system (e-filing system).

1.5.6. Challenge of delays in response

This challenge in filing of a case electronically is not a common challenge. In most courts if you do not make follow ups after filing it takes three to four days to get feedback on a document or cases filed online. A similar situation can be seen for a case filed incorrectly online. This would require a person to go to cross check with the registry as to whether the case/document was admitted or not. In practice the implication for the said delays in response is twofold. Firstly, it may lead to incorrect information by the party who is accessing the judicial statistical dashboard system and secondly, the party or his advocate ends

⁴⁰ Rule 18 of Judicature and Application of Laws (Electronic Filing) Rules, 2018.

⁴¹This has also been the reason of High Court Judge in Emmanuel Bakundukize (kendurumo) & 9 Others vs Aloysius Benedictor Rutaiwa, Land case Appeal No. 26 of 2020 HCT Bukoba Registry (Unreported) .

up being directed to re-file again his application or appeal. This problem is even amplified by increasingly since the coming into force of the Interpretation of Laws (use of English language in Courts), Circumstances and Conditions, Rule GN No. 66 of 2022.⁴² On several occasions the documents are returned for rectification for reasons that they are not accompanied with corresponding translation in Kiswahili language. Our humble opinion is that those in management of the system should respond promptly so that parties too can timely work on their defects (*if any*).

1.5.7. Challenges as to all pleadings to be filed online

Rule 9 of the GN No. 148 of 2018 dictates that all pleadings should be filed online.⁴³ The practice however, seems to be different as only the plaintiff's and applicant's pleadings namely Plaintiff or Chamber Application respectively are filed Online but not the defendant's or respondent's pleadings. The discrepancy is attributed by the fact that there is no rule which directs that during service of the document filed online reference number in which the suit or application was filed should be given to the opposite party so as to allow the latter to file his defence or counter affidavit online too. It should be noted that, as per Order VI of the Civil Procedure Code, 1966 the term pleadings is not limited to Plaints only but also the written statement of defence (including written statement of defence filed by third party) and subsequent pleadings filed under Rule 13 of Order VIII.⁴⁴ However, the electronic filing being among the recent adopted developments in the judiciary we can hope that the situation will change in future. Such a challenge can also be seen on the rule

⁴² This warrants filing of Documents in English language accompanying them with Swahili Translation.

⁴³ Rule 9 of Judicature and Application of Laws (Electronic Filing) Rules, 2018.

⁴⁴ Cap. 33 R.E 2019.

that warrants maintenance of electronic case file. The judiciary and stakeholders should strive to do away with physical presentation of defence or counter affidavit in all places in which electronic filing system (e-filing) is in place.

1.5.8. Post network challenges

The Rules requires anyone who faces internet complication to quickly meet the Registrar or magistrate in charge requesting an exemption from filling electronically of the whole or a part of the pleadings or documents.⁴⁵ But then the same Rules are silent on what to do in case the request of not filling electronically of the pleadings or documents is not granted. Further the same Rules do not guide the registrars or magistrate in charge in dealing with an advocate or a party has who has failed to lodge his application or appeal online due to network challenges. In connection with the above said and generally on matters of management of electronic case file the law is silent on what will happen once a server encounters technical problems resulting into failures in filling of pleadings by the litigants.

1.5.9. Abandonment of cases admitted online

The E-filing Rules are silent on the effect of an abandoned applications or appeals filed electronically. One would quickly think that the ordinary practice would be followed in such a way that nothing will be considered as filed, but then how about collection of judicial fees? This is due to the fact that some applications are abandoned while the court has already issued control number for the payment of the relevant bills. Similar situation can be seen on pleadings or applications that are overtaken by events where lawyers end up abandoning them with their bills pending.

⁴⁵ See rule 20 of the GN No. 148 of 2018.

1.5.10. Registrar and Magistrate in charge can permit non electronic filing

This is clearly provided under the rules.⁴⁶ It is our humble view that such undertaking stands as a challenge as it defeats the whole purpose of electronic filing. It is provided that some documents that cannot be converted to the limit of 100 MB non electronic filling are permitted. The Rules require that such permission should be in writing.⁴⁷ However, there is no guideline on how such permission can be arrived at. The same laws are also silent on what can a party do in case his request for conventional filing is not granted by the registrar or magistrate in charge. In simple words, it just remains discretion that should be exercised judiciously! What rule 24 (4) provides is simply that where electronic filing is done the rules relating to time for the purposes of limitation shall be the same as those applicable to a conventional filing and where party misses a filing deadline due to technical problems referred to in sub-rule (1) the party shall move informally and *ex parte* the Registrar or the magistrate in-charge not later than 15:00 hrs of the following working day for appropriate relief. Same rules don't define what amount to appropriate relief.

1.5.11. Doubts Created by Rule 24 of GN No. 148 of 2018

This is all about computation of time. Under the rules it is stated that the period during which electronic filing system is not in operation, for any reason, shall be excluded from the

⁴⁶ See Rule 10 (3) of Judicature and Application of Laws (Electronic Filing) Rules, 2018.

⁴⁷ See Rule 20 of Judicature and Application of Laws (Electronic Filing) Rules, 2018.

computation of time for filing but the same rules are to the effect that Problems on the user's end, such as problems with the user's Service Provider (SP), hardware, or software problems, shall not constitute a sufficient reason for an untimely filing.⁴⁸ One can contend that the rules are clear to the effect of clarifying that the excluded time shall not extend the limitation period for such filing under the Law of Limitation Act, or any other written law but then doesn't it create confusion with the rule that allows a magistrate in charge or registrar to permit conventional filing of an application or appeal.

1.6. Recommendations

- Amendment of the Rules

The Rules should be clear that in case of discrepancy between information filed online and the physical document itself then information on the documents filed online should prevail. The Rules should also clarify circumstances in which the dictum that “*the date of filing a document in court is a date of paying court fees and not receiving of the document*” will apply. The Rules should mandate giving of reference number to the adverse party in course of service so that it must be compulsory for all pleadings to be filed online. The Rules should also remove restrictive powers of the Chief Justice among others on the application of Rule on e-filing.

- Harmonisation of the Rules with other rules

On this, a good example is that the electronic filing Rules, GN No. 148 of 2018 should be in line with the Court Fee Rules, GN No. 247 of 2018. By harmonising the two laws, there will be

⁴⁸ Rule 24 (1) and (2) of Judicature and Application of Laws (Electronic Filing) Rules, 2018.

nexus not only of electronic filing of documents and date of payment of court fees but also presentation of the conventional or manual documents for filing in court. Such harmonisation should also focus on matching powers of the registrar and magistrate in charge when electronic filing is not feasible, when there are concerns about confidentiality and protection of privacy; when the documents cannot be scanned or filed online because of its size, shape or condition, when the electronic filing system is either inaccessible or when the electronic filing system is not available.

- The rules should be made applicable in primary court

It is our humble view in this that, since the primary courts are at the core of judiciary then they should not be isolated from such tremendous developments of using e-filing of cases system. That seeks to promote the overriding objective of ensuring just, expeditious, proportionate and affordable resolutions of the disputes.

1.7. **Conclusion**

Despite all the remaining challenges on Electronic filing, e-filing being a recent development in the judicial system should be vigorously supported to ensure that justice prevails considering the fact that the society is not static but dynamic. When such challenges arise, the court can embark on the overriding objective to rescue the situation or to harmonise interpretation thereof. But then it should not be forgotten that even oxygen principle (overriding objective) is not a panacea for all ills.⁴⁹ It cannot therefore, be used in all and every situation to shield weakness.

⁴⁹ Mondorosi Village Council & Others versus TBL & Others, Civil Appeal No. 66 of 2017, CAT Arusha Sub Registry, (Unreported).

Eliminating Forms of Discrimination Against Persons with Disabilities in Tanzania With Special Reference to Protection of the Right to Life and Free Medical Care to Persons with Albinism

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Abstract

This paper addresses, in one part, the eradication of all kinds of prejudices associated with people with disabilities and on the other part fortification of the right to life and plea for free medical care for the person with a disability, particularly those with albinism. It takes a broad understanding of various types of biases against people with disabilities and narrows the discussion down to a specific analysis of safeguarding the right to live and plea for the provision of free medical care to persons with albinism in Tanzania—because people with disabilities and in particular those with albinism are susceptible to medical conditions associated with lack of pigmentation. The paper analyses the definition of disability from the policy and legal standpoint to test whether this definition is specific enough to include almost all sorts of disabilities in Tanzania. This shows there is no sufficient and specific interpretation of the meaning

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of disability—especially when construed in terms of a person with albinism. People with albinism cannot be included in this definition of disability if it is interpreted plainly. From the forms of discrimination, the paper presents the encounters involving people with disabilities. The challenges analysed are lack of transportation accessibility and communication; stereotypes while at work, home, and or school; unfriendly government buildings, and lack of being involved in leadership positions. The authors adopted a secondary and internet-based study methodology. The authors have designed a research paper divided into sections viz., introduction, disability as construed by policy and legal framework, conceptual and background information, main kinds of biases for the disability community, major challenges faced by people with disabilities, fortification of the right to live, a plea for free medical care for people with albinism and conclusion.

Keywords:

Discrimination – Disabilities –Free Medical Care – Tanzanian Albinism.

1.0 Introduction

Albinism is a genetic, inborn disorder causing reduced pigmentation. The condition causes constant bodily problems. Complications in Africa are notable because of the exposure to severe sunshine and curtailed access to adequate medical care and treatment for persons with albinism, mainly in rural areas

persons.¹ For instance, vulnerability results from medical conditions such as skin cancer and visual impairment, Chediak-Higashi Syndrome and Hermansky-Pudlak Syndrome. No treatment arrangements, however, are available to persons with albinism who are susceptible to these medical conditions.

Besides health related problems that face persons with albinism, such persons also face a number of other problems. Discrimination and segregation are some of them. Just like other persons with disabilities, families and communities neglect them. Myths and stereotypes surround their distinctive appearance and unique conditions with a potential negative impact on their lives. For more than a decade, now, Tanzania has observed the mistreatment of persons with albinism. This includes killing and removing some parts of the body for ritual sacrifice or superstitions reasons.²

Moreover, murders of people with albinism emerged in recent years as a human rights issue in Africa and Tanzania in particular. Some of the traditional healers market parts of the body in medicines that assure their clients gain ill wealth.³ Some bad attitudes lead to homicide and assault on persons with albinism. However, prejudices against people with albinism have existed for decades now. Some of the traditional healers instruct their clients to obtain parts of a person with albinism to

¹[https://repository.up.ac.za/bitstream/handle/2263/18645/Salewi_Killing\(2011\).pdf?sequence=1](https://repository.up.ac.za/bitstream/handle/2263/18645/Salewi_Killing(2011).pdf?sequence=1). (Accessed on 6th December 2022).

²<http://publicationslist.org/data/ajase/ref-56/AJASE%209.2.pdf>. (Accessed on 6th December 2019).

³<https://www.thetcj.org/in-residence-articles/tanzania-persecution-people-albinism-thadei-kamesi>. (Accessed on 10th December 2019).

be used in a locally made medicine as part of witchcraft practices.⁴ Laws and institutions have been devised to curb the identified problems that face persons with albinism. Despite the measures taken including Tanzania enacting the Persons with Disabilities Act,⁵ however, the problems that face people with disabilities are still notorious.

2.0 Disability as Construed by Policy Framework and Legal System in Tanzania

In 2004, Tanzania adopted a policy on disability rights. The objectives were to place several requirements for safeguarding Persons with Disabilities; communication integration in various forms friendly to the disability community; and working on healthcare for the group.⁶ Following the policy-making, the Parliament enacted an Act,⁷ whose objectives and provisions reflected the policy. Both policy and Act reinforces the institutional capacity of the disability community in Tanzania.

2.1. Policy Definition of Disability

Disability⁸ in Tanzania is defined as a damage or restriction of occasions to participate in the usual life activities in public on the same basis as other people who do not have disabilities. The Act has adopted definition of disability as provided in the policy —*mutatis mutandis*.

⁴*Ibid.*

⁵ Act No. 9 of 2010.

⁶<http://shivyawata.or.tz/wp-content/uploads/2015/04/Disability-Movement-In-Tanzania-and-Status.pdf>. (Accessed on 30th October 2019).

⁷ Act No. 9 of 2010.

⁸ The National Policy on Disability of Tanzania of 2004.

Though the Government of the United Republic of Tanzania took many years and considered cultural aspects in making the policy, still the definition adopted in the policy is not comprehensive as discussed in the subsequent section of the legal definition.

2.2 Legal [Act] Definition of Disability

The meaning of ‘disability’ under section 3 of, the Act is the same as that provided in the policy. This definition is a replica of section 12101 (a) (1) of the Americans with Disabilities Act of 1990. The meaning of the Act⁹ as it stands suggests that individuals with disabilities are limited in taking part in various activities in society because of their physical, mental, or social factors. This definition should be broader and needs to be specified in order to include specific types of disability conditions such as albinism. An effective definition is required to ensure that the person with a disability community is involved in all activities conducted in society without discrimination. As the definition stands may escalate constructive discrimination against persons with disabilities by excluding them from participating and being involved in social, economic, and political activities due to their disabilities.¹⁰ Persons having physical, mental, and social factors, need to participate in public life and join in the stream of society.

⁹ Act No. 9 of 2010.

¹⁰ Section 12101 (a) (2) of the Americans with Disabilities Act of 1990.

Disability under the Americans with Disabilities Act¹¹ means a bodily or intellectual deficiency that significantly affects a body to function well.¹² The meaning of disability under the Americans with Disabilities Act is broader to types of disabilities including persons with albinism and the same broader definition in Tanzania serves purposes for specified construction of the term disability under the law of Tanzania.

2.3 Synthesised Definition of Disability

This research paper adopts a synthesised definition of the word ‘disability’. It is a permanent or temporal bodily impairment that affects a person from the full realisation of activities performed by the body.¹³ The disability condition should not be applied to exclude the person with a disability from participating in public life in full. Examples of impairments include physical and mental—disabilities.¹⁴ And the examples of major life activities according to the adopted definition of disability by this paper comprises of activities related to actions performed by sensory organs.¹⁵

Having discussed the definition of disability and coming up with a synthesised definition of what this research paper considers to be the meaning of disability, the next section provides the

¹¹ Section 12102 (1) (A) (B) & (C) of the Americans with Disabilities Act of 1990.

¹² Section 12102 (2) (A) & (B) of the Americans with Disabilities Act of 1990.

¹³<https://www.merriam-webster.com/dictionary/disability> (Accessed on 12th November 2021).

¹⁴*Ibid.*

¹⁵*Ibid.*

conceptual and background information status of the disability community in Tanzania. The analysis focuses on medical conditions and the magnitude of the problem associated with albinism in Tanzania.

3.0 Conceptual and Background Information

Persons with albinism in Tanzania face various problems: detrimental myths, discrimination, health conditions, and poverty. A myth that parts of a person's body can create wealth for other people or success—has led to misery in society. For example, bones of legs are used to find gold as metal detectors, to attract fish, hair is used when feasting in water and other bones as well can be put into charms for luck and fortune.¹⁶

People with albinism, thus, need both safeties in their personal life and free medical care. People with albinism and their medical settings are associated with their albinism because they are not rich and marginalised minorities. The society brands them and people from their households. There is deficiency of viable policies and legal framework that acknowledge their need for free medical upkeep. This has led many people with albinism not to be reached with lifesaving and developmental interventions. The government tends to distance itself from this responsibility.

Starting in 2007, Tanzania and the world observed persons with Albinism being brutalised. Wicked witchdoctors 'traditional

¹⁶https://www.heraldextra.com/news/community/doctors-orders-albinism-in-tanzania-what-it-is-and-how/article_d6e9e638-6e65-5b9d-8886-c6f8dfadb9ea.html. (Accessed on 5th November 2019).

healers' being the source—alleged in using leftovers of bodies in “magical” mixtures. It is approximated that in every 3,000 Tanzanians—one has a genetic condition for albinism—considered more susceptible in the globe.¹⁷ However, other commentators provide different statistics that, in Tanzania, one in 1400 individuals has the condition.¹⁸ This difference in statistics manifests the problem in another way—that Tanzania has no account of persons with albinism. In 2017, the Tanzania Albino Society registered an estimated 12,000 Tanzanians with albinism, however, the population of persons with albinism is likely to be higher since many parents with children or persons with albinism hide from involving in the registration process.¹⁹

In the United States, for instance, out of 20,000 people one is affected with albinism.²⁰ There are protective means to use in order to prevent more effects for persons with albinism—such as wearing protective gears like glasses and covers. This ensures the skin is covered and safe. Likewise, in Uganda, findings about the health status of the eyes of persons with Albinism indicate that 75.7% of them have an eye problem. However,

¹⁷*Ibid.*

¹⁸Healthprep, Strategies for Living with Albinism, (Accessed on 2nd November 2021), https://healthprep.com/conditions/strategies-living-albinism/?utm_source=bing&utm_medium=search&utm_campaign=328752039&utm_content=1142393173587877&utm_term=what%20is%20albinism&msclkid=c426a12167f81be55633fc9cf6d361e7. . (Accessed on 13th December 2020).

¹⁹Monaliza Seepersaud, (2017). *The Plight of Tanzanian Persons with Albinism: A Case for International Refugee and Asylum Procedure Reform*. Emory International Law Review, Vol. 32. pp. 115-144.

²⁰https://healthprep.com/conditions/strategies-living-albinism/?utm_source=bing&utm_medium=search&utm_campaign=. (Accessed pm 2nd November 2021).

only 20.5% have ever had an eye check-up. The costs of eye check-ups ranged between 30,000/= to 900,000/= with the average being 173,021/-. It was also found that 72.2% of Persons with Albinism could not read clearly because they did not have any reading glasses. One-half of the respondents 47.5% in this study admitted to not using anything to mitigate this challenge.²¹ Persons with albinism, in particular, have the following health related problems.

3.1 Skin Cancer and Visual Impairment

Albinism leads to a lack of melanin and makes a person susceptible to medical conditions as result of sun rays.²² Sunrays give a unique form to the eye and skin to be more vulnerable.

There are other two forms of medical conditions associated with albinism relating as discussed below.

3.2. Chediak-Higashi Syndrome

Chediak-Higashi Syndrome is a health situation results in people with albinism's malfunction of the white blood cells which

²¹ Pat Robert Larubi, Pats Journal—Ultimate Albinism Voice, Albinism Umbrella releases Spatial Mapping on the status of Persons with Albinism in Uganda, <https://www.pats-journal.com/albinism-umbrella-releases-spatial-mapping-on-the-status-of-persons-with-albinism-in-uganda/>.(Accessed on 2nd November 2021).

²²Report of the Office of the United Nations High Commissioner for Human Rights of 2013. p.5.

result in affecting the immune system and dispose persons with albinism to infections.²³

3.3. Hermansky-Pudlak Syndrome

This syndrome affects people with albinism by developing a defect in platelets. Platelets are blood components helping to clot blood and halt bleeding. Having this medical condition disposes people with albinism to bleeding and accumulates ceroid.²⁴ The discussion is further expanded in section four below.

4.0. Discrimination Against Persons with Disabilities

Besides health related problems persons persons with disability and persons with albinism in particular also face many forms of discrimination including the following:

4.1. Unfavourable Treatment

There is always a situation where persons with disabilities are treated less favourably than those with no disabilities. Shantha Rau Barriga contends that in many countries that she has visited while doing research on situations of persons with infirmities she discovered that people with disabilities are treated less

²³Genetics Home Reference, Your Guide to Understanding Genetic Conditions (November 2, 2019), Chediak-Higashi syndrome, <https://ghr.nlm.nih.gov/condition/chediak-higashi-syndrome>.

²⁴<https://medical-dictionary.thefreedictionary.com/ceroid>. (Accessed on 2nd November 2021).

favourably than those without disabilities.”²⁵ In this regard, disability discrimination happens when one is treated less well or put at a difficulty for a reason that relates to his or her disability. The handling could be a one-off action, request of a rule or policy or the presence of physical or message barriers which make retrieving something hard or intolerable for persons with infirmities. For discrimination to exist in this case, the treatment does not necessarily have to be an illegal act.²⁶

4.2 Treating all people with Disabilities Similarly- Disability Vary from Person to Person

Disability varies from person to person with incapacities based on the differences of the part of a person. Disability refers to the interaction between individuals with a health condition (e.g., cerebral palsy, Down syndrome, and depression) and personal and environmental factors (e.g., negative attitudes, inaccessible transportation and public buildings, and limited social support). Disability is also categorised as mental disability, physical disability, and functional disability. On the basis of the above said, thus, it goes that treating all the persons with disabilities as having common challenges is not fair; it is a discrimination.

4.3 Exposing both Persons with Disability and those without Disabilities to Common Compliance Requirements

²⁵<https://www.theguardian.com/global-development-professionals-network/2016/jun/20/we-need-to-stop-treating-people-with-disabilities-as-less-than-human>. (Accessed on 10th December 2020).

²⁶<https://www.equalityhumanrights.com/en/advice-and-guidance/disability-discrimination>. (Accessed on 10th December 2021).

It is common both in law and practice that Persons with infirmities as well as those without infirmities to be exposed to common compliance requirements. For instance, section 54(1) of the Persons with Disabilities Act²⁷ requires that a person with incapacity should be entitled to social protection without judgment on the basis of his or her incapacity.

Requiring persons with disabilities to fulfil certain settings that persons without incapacities have the benefit of is to victimise persons with infirmities; this is a form of discrimination.

4.4. Failure to Effect Positive Action

Section 15 (1) and (2) of the Act²⁸ requires that every the person with disability to be supported by a local government to conduct his or her life individually. The provision further requires them to be integrated in the community and they should not be enforced to breathing in an organisation or in a specific existing plan including clearing for persons in need of special shield. The government of Tanzania has not contented the condition of this provision as many needs for persons with incapacities are not met. Society still views persons with disabilities in different social constructs and ways that frame how persons with disabilities are treated.²⁹ For instance, prior to the 20th century, social attitudes against persons with disabilities reflected persons with disabilities as defective, unhealthy, and divergent. Society treated persons with infirmities as objects of fear and

²⁷ Act No. 9 of 2010.

²⁸ *Ibid.*

²⁹ <https://welldoing.org/article/disability-society-how-have-things-changed>. (Accessed on 11th December 2021).

pity. The dominant defiance was that such individuals were incapable of contributing in or conducive to society and that they must rely on wellbeing or charitable establishments.³⁰ However, much has not altered despite of Tanzania having a law in place that controls the rights of persons with incapacities.

5.0. Challenges Persons with Disabilities Face [Especially People with Albinism]

The Swedish International Development Cooperation Agency (SIDA) in 2014 conducted a survey that demonstrates that there are major challenges that persons with disabilities face; they include: lack of transport and communication accessibility; harmful approaches; unreachability to community facilities and buildings; and insufficient representation.³¹ These challenges massively exists in Tanzania too.

5.1. Transportation and Communication Inaccessibility

Persons with disabilities are to have access to public conveyance.³² In Tanzania, however, persons with disabilities do not have such public conveyance as required. The denial of people with disabilities to access friendly conveyance it is

³⁰<https://paul-burtner.dental.ufl.edu/oral-health-care-for-persons-with-disabilities/societys-attitude-toward-people-with-disabilities/>. (Accessed on 11th December 2019).

³¹<https://www.sida.se/globalassets/sida/eng/partners/human-rights-based-approach/disability/rights-of-persons-with-disabilities-tanzania.pdf>. (Accessed on 1st November 2019).

³²<https://ctb.ku.edu/en/table-of-contents/implement/physical-social-environment/housing-accessibility-disabilities/main>. (Accessed on 11th December 2020).

nothing but a violation of their rights.³³ In matters of communication, section 38 of the Persons with Disabilities Act³⁴ requires the public bodies to ensure proper communication in the language that persons with disabilities understand—in accordance with their individual disability. This however, exists only in the Act as there is no such service as electronic gadgets provided for the person with disabilities including those with albinism. The Act, thus, completely fails to address the two challenges related to Public transportation as well as communication related ones.

5.2. Adverse Attitudes of People at School, Work, and at Home

Persons with disability and those with albinism in particular face discriminatory treatment at almost all areas of life; at school, at workplace and even at homes. At schools fellow students fear to sit beside persons with disabilities as they think and are worried of being infected. In work places persons with various kind of disabilities such as albinism face the same problem too.

Futhermore, even at home people with albinism are not free from adverse attitudes of family members. Relatives and some family members shun persons with disabilities especially those with albinism. They have such illusion that associating persons

³³Equity in Transportation for People with Disabilities, <http://www.civilrightsdocs.info/pdf/transportation/final-transportation-equity-disability.pdf>. (Accessed on 12th December 2021).

³⁴Section 38 of the Persons with Disabilities Act No. 9 of 2010. (Accessed on 11th December 2021).

with disability would transfer to them the deformity such as such ascolor of persons with albinism.

5.3. Inaccessibility to Public Premises and the Services

People with disabilities need to access public services and premises without difficulty. Sections 35 and 36 of the Persons with Disabilities Act require that all public buildings and other structures should be available to persons with infirmities. The Act further orders the public agencies to provide access of service to both people with and or without incapacities. There should easy path to person with disabilities like ramp instead of stair case and ventilation and aeration paths. Regardless of the legal requirements as said herein above, people with disability including those with albinism in Tanzania still face some challenges in so far as accessing public premises and services are concerned.

5.4. Insufficient Representation in Public and political and Affairs

The right to participate and involve in dogmatic processes is a foundation of democracy and growth of any nation regardless of the status of its peoples. Political contribution is clearly entrenched in the Universal Declaration of Human Rights, 1948 and the International Covenant on Civil and Political Rights, 1966 which safeguard the right of every person to equal role in public matters, the right to ballot and to be chosen, and the right

to entry to public service.³⁵ Further, the Convention on the Rights of Persons with Disabilities (UNCRPD) under Article 29 calls upon state parties to assure and protect persons with incapacities' rights of contribution in political and public lifecycle without discernment and on an identical root with others.

Regardless of the above said, persons with disability especially persons with albinism do not fully participate in political processes. This is because of various reasons including challenging environment to which they are exposed. The United Nations Office for the High Commissioner on Human Rights conducted a study in 2011 exposed that persons with psychosocial and knowledgeable disabilities are deprived of their right to poll and to be elected because the constitutional or legal provisions in their individual republics question their lawful capacity to relish their radical human rights.³⁶

6.0. Shield of the Right to Life for Persons with Albinism

People with infirmities need effective guard for their survival in Tanzania. Shield of the right to life should be conferred to every person in Tanzania and, in particular, care has to be focused to people with albinism who face slaughters and cutting off their body portions because of sorcery motives.

6.1. Constitutional Protection

³⁵<https://www.undp.org/content/undp/en/home/news-centre/speeches/2019/participation-of-persons-with-intellectual-or-psychosocial-disab.html>. (Accessed on 11th December 2021).

³⁶*Ibid.*

The Constitution of the United Republic of Tanzania, 1977 offers in general terms for protection of the right to life. Article 15 (1) promises the right to life by necessitating that every individual has the right to freedom and to live as a free person.³⁷ Further, Article 12 (1) and (2) identifies that all human beings are born free, identical and entitled to appreciation and respect for his self-respect; and Article 13 (1) and (2) entails equal behaviour of all people before the law without any discernment and commands that no law shall be ratified by any authority in the United Republic that make any facility that is unfair either of itself or in its effect.³⁸

Though the right to life is generally guaranteed by the Constitution, however, that has not been successful in guarding life of people with incapacities especially persons with albinism in Tanzania. These need distinct shield and some privileges. In some societies, misguided beliefs and traditions,³⁹ seriously inclined by fantasy, put the sanctuary and lives of people with albinism at endless risk.⁴⁰ Local healers spread such belief by demanding their clients to attain physique parts of people with albinism so as to make them outmoded drug believed to have ability of carrying enchanted influences to their clients.⁴¹ The Government of the United Republic of Tanzania, on numerous

³⁷ Article 15 of URT of Constitution, 1977 as amended from time to time.

³⁸ Articles 12 (1&2) and 13 (1& 2) of URT of Constitution, 1977 as amended from time to time.

³⁹www.unicef.org/wcaro/wcaro_children-accused-of-witchcraft-in-Africa.pdf. (Accessed on 2nd November 2019).

⁴⁰ United Nations High Commissioner for Human Rights Office Report of 2013. p.5.

⁴¹United Nations High Commissioner for Human Rights Office Report, 2013. p.6.

times, removed practicing certificates of old-style healers ‘witchdoctors’ in an effort to halt the assassination of persons with albinism.⁴²

6.2. The Persons with Disability Act No. 9 of 2010

In 2010 Persons with Disability Act was launched in Tanzania Mainland providing for health care, social support, accessibility, rehabilitation, education and vocational training, communication, employment, work protection and promotion of the basic rights of persons with disabilities. The presentation of this law was headed by the approval of the CRPD in 2009 which needs state parties to defend and admiration the rights of people with incapacities. The following sections discuss in details the law and the convention in protecting persons with albinism.

The Persons with Disability Act, however, has been unsuccessful to talk the serious difficulties of shielding persons with albinism in Tanzania. While section 5 of the Act executes duty on the state to understand the right of persons with infirmities under the supervision of Ministry of Health and Social Welfare, the Act does not form the actions to be taken against persons who do not shoulder their tasks as compulsory by the Act.⁴³ As noted in the previous conversation regarding the description of the incapacity, this Act does not provide a straight description related to people with albinism hence absence actual guard to persons with albinism. The meaning contained in this

⁴² <https://www.nytimes.com/2009/01/27/health/27glob.html>. (Accessed on 1st November 2019),

⁴³ [https://repository.up.ac.za/bitstream/handle/2263/18645/Salewi_Killing\(2011\).pdf?sequence=1](https://repository.up.ac.za/bitstream/handle/2263/18645/Salewi_Killing(2011).pdf?sequence=1). (Accessed on 6th December 2019).

Act does not shield persons with albinism in its wide-ranging logic. If the report of infirmity remains as provided under section 3 of this Act, the people with albinism are uninhibited from the guard of their life by this Act. In order to offer actual protector of persons with albinism under this Act, the explanation and clarification of what is infirmity should be conical down to include persons with albinism and the therapeutic conditions allied with albinism.

The Persons with Disability Act offers for elementary principles and duties for the state to defend the rights of the persons with incapacities in Tanzania. For example, section 4 (a) wants those persons with disabilities have the right to be appreciated for their social self-respect, liberty to make their own picks and their liberation. The propensities of ruthless killing and eliminating of physique parts of people with albinism in Tanzania do validate respect, liberty and freedom of persons with albinism to relish their self-respect and make free selections. Likewise, section 4 (b) of the Act requires that no one should be favoured just because such an individual lives with a certain kind of incapacity. The obligation of this section tries to show people with disabilities as usual people and should not be judged as distinct, excluded or limited to partake in social life on the basis of their incapacity. Though, Salewi again contends that the fact that persons with albinism in Tanzania are slain implies that they are victimised against because of their skin colour, hence not being permitted to enjoy social rights which they are integrally permitted to like.⁴⁴

⁴⁴*Ibid.*

Furthermore, section 5 of the Act authorises the Minister accountable for Health and Social Welfare to pledge various agendas in safeguarding the rights of people with incapacities⁴⁵ are obeyed to. Strictly, this duty wants the presence of people with albinism. Additionally, section 6 of the Act requires the Government to ensure fairness and non-discrimination of persons with disabilities. For instance, paragraph (a) of section 6 of the Act further needs the government to guarantee the equality of the rights of persons with disabilities before the law without any discernment to their equal protection and assistances.⁴⁶ At the same time, paragraph (b) of section necessitates the Government to, “prohibit all forms of discrimination on the basis of disability and guarantee the persons with disabilities with equal and effective legal protection against discrimination on all grounds”.⁴⁷

Though the Persons with Disabilities Act was passed after Tanzania had ratified the Convention on the Rights of Persons with Disabilities, the Act has not involved many of the relevant provisions required by the Convention

6.3. The Penal Code Cap. 16 of the laws of Tanzania

The Penal Code Cap. 16 of the laws of Tanzania, apart from being a general law on all matters of criminal nature, but also protects persons with disability and the persons with albinism in particular. This law criminalises certain acts and omissions which in one way or the other affects persons with albinisms.

⁴⁵ Section 5 of the Persons with Disabilities Act No. 9 of 2010.

⁴⁶ Section 6(a) of the Persons with Disabilities Act No. 9 of 2010.

⁴⁷ Section 6(b) of the Persons with Disabilities Act No. 9 of 2010.

Murder in whatever way and cutting of bodies of persons with albinism are some of the acts which are criminalised by the said law. Discrimination is also prohibited. Further, the Penal Code provides for penalty for those convicted of the mentioned offences. For example: sections 196 and 197 states that a person who with malice aforethought kills another person is guilty of murder and upon conviction such person shall be sentenced to death.

6.4. The International Convention on the Rights of Persons with Disabilities (CRPD)

The CRPD under Articles 1, 5(1), 10 and 15(1) needs state parties to protect persons with infirmities, including persons with albinism, in numerous forms. For instance, Article 1 requires the parties to the CRPD to encourage, protect and guarantee full and equal pleasure of all human rights, important freedoms and respect for intrinsic self-respect by all persons with disabilities. Article 1 further describes people with disabilities to be included among those who have long-term bodily, mental, academic or sensory losses which act as barricades to their full and actual participation in culture on an equal foundation with others.⁴⁸ Regardless of all the aforesaid, however, people with albinism are not free to relish their right to guard and self-respect. They are always alarmed and their life at

⁴⁸Diana Henry Salewi, The killing of persons with albinism in Tanzania: A social-legal inquiry, LLM (Human Rights and Democratisation in Africa) Dissertation, Faculty of Law, Centre for Human Rights, University of Pretoria, 2011.

([https://repository.up.ac.za/bitstream/handle/2263/18645/Salewi_Killing\(2011\).pdf?sequence=1](https://repository.up.ac.za/bitstream/handle/2263/18645/Salewi_Killing(2011).pdf?sequence=1)). (Accessed on 6th December 2019).

peril. The Persons with Disabilities Act which was enacted by the government of Tanzania immediately after endorsement of the CRPD does not provide a specific definition which include persons with albinism. In addition to that there is no effective implementation of both the Act and the CRPD in shielding people with albinism in Tanzania.

Futhermore, Article 5 (1) of the CRPD requires state parties under the CRPD to ensure equality before the law for all persons—without discrimination. Tanzania has not met the requirement of this Article too as many persons with albinism are killed and others go missing. This demonstrates a failure on the part of the government to discharge its obligation under the CRPD that assurances the right to protection to persons with disabilities including persons with albinism. The government needs to use this provision under the CRPD to work with other stakeholders to eliminate these deadly legends that threaten the life and wellbeing of persons with infirmities.

In respect to guaranteing the right to life among persons with disabilities, Article 10 of the CRPD provides that, “every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.” Similar to Article 1 deliberated before, this Article requires the state parties to the CRPD to ensure that everybody’s right to life should be dwindling and no one should be underprivileged of the right to live just because such persons has a disability. Furthermore, Article 15 (1) states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Indeed, persons with disabilities especially persons with

albinism should find shelter under these Articles for the protection of their lives at this moment when they face brutality within their own society. Though the government of Tanzania has strained to protect people with albinism, yet persons with albinism are still not harmless. The law application organs have brought few wrongdoers to justice—still the government should examine and accuse those persons tangled in slaughter or brutalising people with albinism.

7.0. Prosecution of Perpetrators of the Killings of Persons With Albinism in Tanzania

The police force in Tanzania is responsible for investigating and apprehending those suspected to kill persons with albinism. The National Prosecution Services (NPS) then prosecutes the suspects before courts of law. The court of law on its part works to administer justice—by conducting a trials. Despite of the existence of the state machinery for investigation, apprehension and trial of the suspects of perpetrators of killings of persons with albinism in Tanzania, still such killings continues.⁴⁹ The presence of laws including the penal code which provides for death penalty has not helped much. The problem of continued killing of the persons with albinism, however, seems to be due

⁴⁹For example in 2019, Under the Same Sun reports 189 spells against people with albinism in Tanzania. The report discloses that there were 76 slaughters; 85 survivors all extremely disturbed and some severely injured; 1 missing; 24 grave violations and 3 asylums. The spells record in Tanzania is higher than the occurrences reported in Uganda revealing 8 survivors and Kenya showing 13 attacks with 5 killings and 8 survivors. See Reported Attacks of Persons with Albinism – Most Recent Attacks Included by Under the Same Sun (UTSS) Canada & Tanzania, (Accessed on 10th December 2019).

to the problems in the laws, practice or associated with the machinery named herein above. In respect to the police force, Salewi argues that police force in Tanzania is destined for long-suffering inducements in order to interfere with the investigations or the arrest of accused related to slaughter of people with albinism.⁵⁰ Further, the the death penalty as provided in the penal code in Tanzania has not been carried out on the detainees for long time. Since 1994 to date there are 17 people on death row waiting for their execution by hanging after being convicted of killing persons with albinism.⁵¹

The case of *Chacha Jeremiah Murimi & Others v. The Republic*,⁵² also shows another problem though the Court of Appeal of Tanzania confirmed the conviction and sentence of four appellants who were prosecuted of killing contrary to section 196 of the Penal Code, Cap.16 RE 2002 before the High Court of Tanzania.⁵³ The appellants were jointly alleged to kill one Aron Nongo, a person with albinism. The police investigations revealed that the appellants possessed and wanted to sell body parts of the victim. The police put a trap and posed as dealers and buyer of human body parts. In the trap, the police later met with the first and second appellants who agreed to sell the human body parts at rate of 200 million Tanzania shillings. However, in their defence, the appellants denied to have committed the offence of murder. Furthermore, the first and

⁵⁰*Ibid.*

⁵¹<https://news.yahoo.com/albino-killers-sentenced-death-tanzania-151913213.html>. (Accessed on 10th December 2019).

⁵² *Chacha Jeremiah Murimi & Others v. The Republic*, The Court of Appeal of Tanzania, Mwanza District Registry, Criminal Appeal No. 551 of 2015 (Unreported).

⁵³ Sitting at Mwanza in Criminal Sessions Case No. 231 of 2014.

second appellants denied participation in the commission of the offence since on the material date they were not at the crime scene. Having analysed the evidence adduced both in support and against the charge, the trial judge was satisfied that the case against the appellants was proved beyond reasonable doubt. The appellants were each sentenced to suffer death by hanging. On appeal to the Court of Appeal of Tanzania the judgement of trial court was also upheld.

Though the prosecution in this case proved the offence of murder, but much was left to be desired of—in terms of the motive and other accessories involved in the commission of the offence. For example, the prosecution did not produce any evidence of motive by the defendants beyond the need of selling the body parts in order to gain money. The evidence does not also go further to inquire on other persons associated in the tale in order to get to the bottom of the problem. Instead of killing persons with albinism as a cure or curse to the society and there would be need and free therapeutic care to should be provided to them.

8.0. Plea for Free Medical Care to People with Albinism

8.1. Low-vision Aids

There is a need of provision of visual aids to people with albinism in order to prevent themselves from sunrays that cause their eyes not to see properly.

8.2. Surgery

Persons with disabilities who are susceptible to and those affected by various conditions resulting to skin cancer and for instance require a surgery in order to mitigate the effect of such disease, should be helped in this.

8.3. Genetic Therapy

Therapy which is related to hereditary matters like taking thought who you wed by classifying genetic factor that lead to albinism should be provided in order to decrease the number of albinisms.

To sum up, though there is no permanent cure, but hospital management focuses on protecting the skin and eyes from the sun and watching for any changes in the skin would help to get rid of the problems that face **persons with albinism in Tanzania**.

9.0. Conclusion and Recommendation

In this paper, the main challenges facing people with albinism in Tanzania has been discussed. In particular, the challenges as revealed emanate from diverse sources: some are related to healthcare, some are related to human rights, some are cultural and some arise from the general legal matters. In all their varied forms, however, the challenges facing people with albinism can be addressed and tackled through legal measures.

On the healthcare problems it is our view that since the people with albinism need free medical care and because they are isolated and live-in poverty then laws should specifically provide for their free medical care. They should be given priority

in health services. In addition, they should be empowered economically.

On the issue of the definition of the of disability under the Persons with Disabilities Act of Tanzania which does not include conditions associated with albinism, this paper proposes a more specific definition on disability, rather than as it stands now; it should be stretched to include conditions like cancer and low vision that persons with albinism face as result of sunrays and their status of albinism.

This research paper highlights there should not be any discrimination in treatment with persons with disabilities including Albinos. In other words, person with disabilities including Albinos are less respect given or reverence are extended and more respect or reverence is extended or provided to those who does not have such disabilities.

Further, on the legal challenges such as violation of human rights of people with albinism and killings despite a clear guarantee of the right to life in the Constitution, authors believe that such killings can be completely eradicated if the state employs penal measures. For instance, perpetrators can be charged with murder under the Penal Code Cap. 16 of the laws of Tanzania. The relevant provision states that a person who with malice aforethought kills another person is guilty of murder and upon conviction of such murder shall be sentenced to death.⁵⁴

⁵⁴ Sections 196 and 197

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