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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 readers 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

An Assessment of Uganda's Compliance with International Instruments on Freedom of Expression: The Case of the Press in the Media

Daniel Lubowa*

Abstract

Uganda has taken considerable steps in the attainment of Press freedom and freedom of expression especially in the previous three decades. The resolution to defend the right to freedom of expression in Uganda's current constitutional order was a vital acknowledgment of the importance of free media within the country's democratic culture. Without a doubt, the Ugandan media has thrived in the last twenty-five or so years, notably scrutinizing community affairs, encouraging vigorous civic discussions exposing graft in addition to addressing other evils in the country.

For that matter, until recently, Uganda was repeatedly mentioned amongst the top examples of a vibrant media arena. Ugandan society has always expressed itself in any way it wished. Unfortunately, reports from both global and regional human rights networks such as Freedom House, Human Rights Watch, Committee to Protect Journalists as well as Uganda Journalists Association amongst others, now show that there's a perturbing decline in regard to freedom of expression and press freedom in Uganda especially in the

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previous seventeen years preceded especially by an increase of gagging of the Press as well as violence meted out on media personnel. This Paper sets out to make an appraisal on whether Uganda as a country complies to the freedom of expression in light of the regional as well global instruments, using the Ugandan Press in the media as a case study. The Paper recommends that Uganda's media fraternity should robustly work towards pushing back state oppression in a bid to advance both the legal and institutional framework for Press freedoms to thrive especially through rapid support as well as organising sustained public advocacy in this regard.

Keywords: Freedom of expression, compliance, international, regional, instruments, Uganda, Press, Media.

1.0. Introduction: An Overview of Freedom of Expression and the Press

Freedom of expression happens to be a key corner stone of democratic civil liberties globally,[1] so crucial in enabling democratic systems operate as well as fronting community participation in their resolution-making processes.[2]This right is indeed a vital part of our growth and advancement as human beings and political entities and is seen to improve and radicalize global democracies generally. Freedom of expression simply means an individual's capability in voicing out

[1]'*Freedom of Expression is a Cornerstone of Democratic Rights and Freedoms; Illustrate and Explain,*' The Lawyers and Jurists: available at: https://www.lawyersjurists.com/article/freedom-expression-cornerstone-democratic-rights-freedoms-illustrate-explain/, accessed 1st July 2022.

[2]Freedom of Expression is essential to individual liberty and constitutes to what the United States[US] Court has called the market place of ideas. Also see'*What is Freedom of Expression?*'Freedom Forum Institute, available at: https://www.freedomforuminstitute.org/about/Fact/what-is-freedom-of-expression, accessed 5th November 2022

his/her viewpoint, opinion, ideas, about diverse aspects without being gagged by the Government.

The United States [US] Constitution safeguards the constitutional freedoms of American citizens to freedom of religion, speech, press, petition as well as assembly.[3]Some scholars cluster a number of those freedoms under a much broader phrase 'freedom of expression. 'Many of the globe's State Constitutions as well have provisions that talk about freedom of expression, some offering an even greater defense of this right than the US Constitution.

In the same length, both the Universal Declaration of Human Rights[UDHR]1948 and International Convention on Civil and Political Rights[ICCPR]1966[4],welcomes the adoption of a recent resolution inclined towards 'freedom of opinion and expression' at the United Nations Human Rights Council [UNHRC].[5]This resolution emphasizes that freedom of expression comprises one of the vital fundamentals of autonomous communities and progress as well as recognize that this right is a vital pointer of the level of defense of other

[3]See the First Amendment of the United States Constitution. This Amendment assumes that the speaker, not the Government should decide the value of the speech.

[4]See *Universal Declaration of Human Rights [UDHR] 1948* and *International Convention on Civil and Political Rights [ICCPR] 1966*,Art 19.

[5]The Resolution led by Brazil, Canada, Fiji, Namibia, Netherlands and Sweden, and co-sponsored by other fifty countries from all regions was adopted by a consensus at the Council on 16th June 2020. The Resolution moreover reaffirms that the same right to freedom of expression that people have off-line must also be protected on-line. The Resolution contains positive language on specific issues related to the right to freedom of expression including the right to information, internet shutdowns, responses to information, counter-terrorism, violent extremism, encryption, anonymity tools and the safety of Journalists. The adoption of this resolution is a particularly welcome development given the long hiatus since the previous iteration of this resolution, with the last substantive text on this topic adopted over a decade ago in 2009.See *HRC44: UN Resolution on Freedom of Opinion and Expression,'* available at: https://www.article 19.org/resources/hrc-44-un-resolution-on-freedom-of-expression, accessed on 5th November 2022.

human rights and freedoms. Individual citizens cannot use this right to choose their leaders efficiently or participate in any communal choice - making processes if they can't air out their views freely.

The innovation of the Press consequently makes the turning point for all the emerging deliberations regarding freedom of expression.[6] The Pres is defined as the news industry of the mass media that focuses on churning out information to the broader public via print media[newspapers, newsmagazines],broadcast news[radio and television] as well as the Internet [online newspapers].[7]Guaranteeing everyone's right to freely search for, obtain or pass on information while interacting with other persons has ceased to be sufficient. It has now turn out to be crucial especially in the current era to go beyond, upholding this right linked by a go-between that thoroughly magnifies the outreach of views, information as well as thoughts like the mass media. Under this point of view, countless foundational pillars of the current debate on human rights[8] have devoted substantial importance to freedom of expression as well as its associations to the mass media. The contemplation of an open, autonomous, plural as well as diversified media has become the model to be achieved so as to entirely make certain the right to search for, obtain as well as convey information.

[6]The specific sense 'machine for printing 'is from the 1530s; this was extended to publishing houses and agencies of producing printed matter collectively by the 1570s and to publishing generally[in phrases such as freedom of the press] from 1680.This gradually shifted, 1800-1820 to 'the sum total of periodical publishing, newspapers, journalism.' The Press**,** meaning 'journalists collectively' is attested from 1921[though superseded by media since the rise of television, etc],See '*The Press'*, available at https://www.etymonline.com/word/press, accessed on 7th November 2022.

[7]'*What is the Meaning of Press in Media?,* 'available at: https://www.lawinsider.com/dictionary/press-media, accessed on 6th November 2022.

[8]The Glorious, American as well as French Revolutions; the writings of John Milton, Alex of Tocqueville and John Stuart Mill, amongst others dedicated substantial attention to freedom of expression and it's links to the mass media.

1.1. Global and Regional Outlook on Press Freedoms

Press Freedom is one of the essential liberties that have been around for such a long time. Take for example: the European States whereby the Press plays such a key part in the public as well as broader development,[9] attained through especially through penning down inspirational pieces, crafting radio and television programs that encourage communal participation as well as community advancement.

In the United States [US], the Press [media] is the real fourth arm of the Government, which is perceived to be a nationwide watch dog whereby a larger law that safeguards this media, so as to effect its duties liberally and diligently devoid of any intrusion and limit,[10]a fact, insinuating that the Press has the same composition with other arms of Government as provided in the US Constitution. The Press or 'Fourth Estate' most fundamental part is acting custodian to the U.S democratic system. This aspect is especially provided for by the first Amendment to the US Constitution adopted in 1789, stating that the US Congress should not pass any legislation that desecrate the freedom of the Press.[11]

The Press in Germany has a larger historical significance that other global States have always referred to as far as emphasizing the part as well as the power of the media is concerned. First and foremost, it is imperative to note that if it were not for Germany or one German citizen

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[9]'*Europe's Media in the Digital Decade: An Action Plan to Support Recovery and Transformation in the News Media Sector,* 'Policy Department for Structural and Cohesion Policies, Directorate-General for Internal Policies, PE 690.873, 2021.

[10]*Media in the United States',* Global Issues, available at: https://www.globalissues.org/article/163/media-in-the-united-states, accessed 5th July 2022.

[11]The First Amendment permits information, ideas and opinions without interference, constraint or prosecution by the Government. The amendment was adopted on 15th December 1791, as one of the ten amendments that constitute the Bill of Rights. Also see*the Media in the United States Introduction:* 'available at:https://usaembassy.de/media.htm, accessed on 5th October 2022.

in particular by the names of Johannes Gutenberg, the print media could be considerably different today.[12]The Print media [newspapers] was popular in Germany for such a long time including the World War Two period, the country's darkest phase. It was during this period that Germany became renowned for not only its involvement in the extermination of Jews around the globe, but also for its very thriving propaganda techniques. During this war, Adolf Hitler made sure that the German Government controlled all the Print media, allowing his Minister of propaganda, Joseph Goebbels to proliferate filtered information. Goebbels fondly used the radio medium in talking to the Populace until the allied forces entered Germany and silenced all German mediums of communication.[13]

The media on the Asian continent attained even bigger importance in the political as well as fiscal reinstatement stage, placed at the centre of huge socio-political-cultural advancements that are frequently characterized by the ever-skyrocketing rates of consumption, population explosion, Joblessness, city growth and expansion, disparity as well as disagreements within the region. In this area, the media constantly takes centre stage in instigating mass alertness through swaying communal opinion day every day. The cultural importance as well as worth inclined towards the Asian media whether print or audio, visual media to the social and political citizens' existence of this area

[12]In 1440, Johannes Gutenberg of Mainz, Germany invented the printing press, allowing news to be readily available in the hands of consumers across the globe. It was with the one of these presses that Gutenberg printed the famous Gutenberg Bible. Also see '*Germany Media History:A Brief Overview'*,availableat:https://sites.psu.edu.edu/bohemians/2014/05/06/german-media-history-a-brief-overview,accessed on 1st September 2022.

[13]Oldradio.com goes as far as to say that Goebbels introduced the mass production of relative cheap radio sets, the so called 'volksempfaenger'so that all Germans had access to radio reception in their homes as well as their working spaces. 'Also see Trey C. Goodwin, Maj '*Nazi Germany's Mass Media Influence Approach: An Introspective Application to* Twenty *–First Century U.S Psychological Operations Doctrine'*, a Master's Thesis Presented to the Faculty of the U.S Army Command and General Staff College, Webster University's. Louis, MO, 2007.

offers itself for the bigger comprehension of the record of the Asian media in addition to media norms, novel technological advancements as well as emerging consequences in the area politics as well as finances.[14] Most of the Asian Governments have employed the media to effectively call upon the Populace in taking part in the communal as well as individual State development programs.[15] Such efforts comprise of agriculture, politics and education amongst others.

Media usage on the African continent is not something new.[16] The continent's current print as well as electronic media came up as an upshot of direct or indirect involvement with European imperialism. A small number of African communities, if any, possessed a written language. For those that did, printing was either a myth or unutilized. European imperialism south of the Sahara meant that most literacy and for that matter, most printing was in the European language. Conventional verbal modes of disseminating information played a significant role in preserving societal values as well as political order ensuring continuity as well as reinforcing values and traditions of moral attitudes. Verbal communication was progressively confronted by a relatively diverse mode of disseminating information premised on print also generally in a foreign language. If an African language was used, it was a language not essentially used in conventional verbal communication, thus the launching of the novel print media initiated the

[14]See, Sukanya Natarajan'*Understanding the Role of Media in South Asia',* Jawaharlal Nehru University, India.

[15]Shelton A. Gunaratne,*'The Media in Asia: An Overview'* available at: https://doi.org/10.1177/0016549299061003002, accessed on 10th July 2022.

[16]In a broad sense, the media per se is something that has always existed alongside human life. Pre-colonial media in Africa was in form of storytelling around the fire places by the elders as they would pass on information to their off spring in a bid to prepare them for future undertakings when they attained adulthood. See Van der Puye Franz,*' Media and the Preservation of Culture in Africa'*, Cultural Survival Quarterly Magazine, available at: https://www.culturalsurvival.org/publications/culturalsurvival-quarterly/media-and-preservation-culture-africa, accessed on 11th August 2022.

start of the present with the past.[17]In spite of its poor flow statistics, the African print media was exceptionally significant. The most media contribution that helped safeguard African culture, language, with its continuity, conversely, came from radio and television mediums. Sarcastically, this is the medium whose liberalization came later on in the day.

Following the varying trends whereby the world has now turned into a global village, the media has unrelentingly continued to play an immense part.[18]These developments can't be swept under the carpet but there is a need for creating strategies for shielding the media from the current transgressions it continuously experiences for it to liberally carry out its roles devoid of any limits is very important.

1.2. The Press and Press Freedom in Uganda

1.2.1. The Development of the Press in Uganda

The starting point of Uganda's Press goes back to the late Nineteenth Century when the missionaries started publishing newspapers whose sole intention was to largely promote evangelism in the protectorate. The Press in Uganda has had a very interesting historical record right from its inception in 1897 when the British imperialist masters set up the *Royal Gazette*, a precursor of the State-owned media which was

[17]In 1859, the missionaries published Nigeria's first paper, which was also the first African paper in an African language. It was called *Iwe Irobin fun awon ara Egba Yorubas* or `The Newspaper for Egba and Yoruba People' and it was priced at thirty cowries, roughly the cost of a whole sheep! It is significant to note that the Press played an important part in the colonial history of Africa. Whereas the major newspapers of Nigeria and the Gold Coast [now Ghana] were organs of protest and political agitation, those of East Africa were vehicles for the culture and concepts of the rulers with the considerable resources of white capital at their command.

[18]'*The Role of the Media in the Globalization Process'* available at : https://www.123helpme.com/essay/The-Role-of -Media-in-Globalization-Process-380963, accessed on 12th August 2022.

later followed by the *Mengo Notes* of the church missionary society in 1900.[19]

It's important to note, that the development of the Press in Uganda was by no means an easy task. The seeds of Press advancement were sown in the turbulent years of imperialist rule and this was during the fight for independence. The Politicians at the time employed the Press and media mainly to disseminate information to the populace about the fight for essential individual civil liberties hence bringing about a lot of awareness in the Populace and this in part demonstrates the big successes of such self-rule in Uganda and in a number of Africa's States.

Some of the early newspapers published in Uganda during that time included *Uganda Eyogera,* published by the Uganda National Congress [UNC], *Muwereza* by the Democratic Party [DP].[20] The Imperialist administration never liked any meaningful clamoring for freedom from the citizens, often using all sorts of methods to foil freedom of expression at any cost once given the opportunity to do so. In this regard, the use of law was found to be the most efficient way of restricting Press freedoms in Uganda at the time.[21]

1.2.2. Uganda's Record on Freedom of Expression, the General Media Environment

Uganda's Press [media] dynamics got transformed with the ever shifting political as well as fiscal arena of the country, and ever since the opening up of the media spaces in the early 1990's by the Ugandan Government the amount of print as well as broadcast media outlets hastily augmented. Yet, before media liberalization came to the fore,

[19]'A *Look Back at the 119-Year Journey of Uganda's Newspapers*, 'The Daily Monitor,18th May 2019.
[20]Ibid, at note 20.
[21]Ibid.

Uganda had controlled admission to self-directed, privately-owned media outlets. At the moment, whereas freedom of expression is provided for in Uganda's 1995 Constitution, this right is still statutory and subject to regulatory limitation as well as routine Government certified attacks and intrusion.

Presently, the country's state of affairs on freedom of expression, as well as the broader media ambiance is extremely deficient.[22]Once hailed amongst Sub-Saharan Africa's liberal countries for the Press, Uganda has since taken a deep plunge in position over the previous years following the enactment of such unpopular pieces of legislation such as the anti-terrorism legislation by the Ugandan Parliament and gagging the media especially prior to the 2021 general Presidential and Parliamentary elections.

2.0. Key Definitions: Press; Media; Freedom of Expression

2.1. Press [Media]

The Press is defined by the Merriam-Webster.com Dictionary, as those personnel [such as reporters and photographers] who work for newspapers, magazines etc.[23]The Press describes any channel of communication to include anything from printed to digital material and consisting of art, news, educational content as well as lots of other forms of information. Everything that reaches or sways the masses comprising of Phones, Television and the internet; is regarded a form of

[22]In the Global Press Freedom Index by Reporters without Borders, Uganda dropped from 117th in 2018 and remained static at 125th in the preceding three years [2019-2021].

[23]*The Press'*,Merriam-Webster.com Dictionary, Merriam-Webster, available at: https://www.merriam-webster.com/dictionary/the%20press.acessed 15th August 2022.

media.[24]The Characteristics of the Press[25] amongst others include: appealing to a wide target audience; communicating public messages; there's a space amid a source of information as well as persons who attain it; has a varied audience.

2.2. Freedom of Expression

Freedom of Expression is the concept of the intrinsic individual liberty to air out one's view publicly without fright of restriction or penalty. This right is provided for in the Universal Declaration of Human Rights [UDHR].[26] In addition to this, the right to freedom of expression is also acknowledged the same as a human right in the International Covenant on Civil and Political Rights [ICCPR].[27] The ICCPR also articulates provides that the undertaking of these rights carries 'special duties' and may 'consequently be subject to certain limitations' when necessary 'or respect of the rights or reputation of others' or the protection of national security or of public order, or of public health or morals.'

Freedom of expression as stipulated in the above-mentioned instruments is as well granted official acknowledgment by the laws of most global States.

1. The International and Regional Legal Framework on Freedom of Expression in Uganda

[24] *'What Does Media Mean?'* available at: https://techopedia.com/definition/1098/media, accessed on 20th August 2022.
[25] '*What is Mass Media?', Types, Functions, Examples*,' Send Pulse, available at: https://sendpulse.com/support/
glossary/mass-media, accessed on 1st October 2022.
[26] *Universal Declaration of Human Rights, 1948*, Art 19.
[27] *International Covenant on Civil and Political Rights, 1966,* Art 19.

At the global platform, right to freedom of expression is provided for in the Universal Declaration of Human Rights [UDHR][28] as well as the International Covenant on Civil and Political Rights [ICCPR].[29]At the regional level, this right is provided for in the African Charter,[30]European and American Conventions.[31] It should be noted that the human rights notion had long been in existence before the formation the above listed global individual civil rights instruments. The phrase 'human rights' only came into daily jargon during World War One, with the creation of the United Nations [UN]and the UDHR. Freedom of Expression was integrated in these instruments majorly because of the Press [media] huge role in aiding the warfare in the distribution of propaganda especially during the Second World War.

The United Nations Treaty [UNT] Collections shows that Uganda became a party to the ICCPR on 21st June 1995. The obligations of States under International Law comprise of amongst others respecting, defending as well as satisfying individual liberties. States must not meddle in the aspect of attainment of civil liberties of their citizens; they must take the essential positive steps in ensuring the attainment of a broader array of personal liberties of their citizens. The right to freedom of expression is provided in Article 19 of both the ICCPR and the UDHR.[32]The provision on freedom of speech in the UDHR is like the

[28]*Universal Declaration of Human Rights1948*, Art 19.
[29]Supra, *International Covenant of Civil and Political Rights, 1966*, Art [1],[2].
[30]*African Charter on Human Peoples' Rights*, Art 9.
[31] See *European Convention, American Convention*, Art 13.
[32]According to Art 19 of the ICCPR and UDHR: 1].Everyone shall have the right to hold opinions without interference. 2].Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in form of art, or through any media of his choice. According to Art 19 of the ICCPR,
3].The exercise of the rights provided for in Paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

one in the ICCPR in so far as the first two paragraphs are concerned, though; the ICCPR provision is more comprehensive in scope as opposed to the one in the UDHR. This provision demonstrates the specific duties outlining that this right has limits under the law.

The African Charter on Human Peoples' Rights [ACPHR] clearly provides that every person shall have the liberty to express his views in accordance to the law.[33] Uganda ratified the African Charter in 1986. The Declaration of the Principles of Freedom of Expression in Africa was adopted by the African Commission on Human Rights in its thirty second session, 2002 in Banjul, Gambia.[34]This Declaration largely highlights the requirements needed in the process of attaining the freedom of expression in detail within the private as well as communal platforms. This aspect must be adopted by State parties to the ACPHR.

In the execution of the Declaration of the Principles of Freedom of Expression on the African continent, State parties to the ACPHR have to initiate all efforts possible in furnishing a handy effect to all these values. This specific legal instrument is not lawfully binding but its implementation very much dependent on a 'States' good faith'.
It is very important to make an observation that all these safeguards are not just for disseminating information that is very pleasant and up to standard for the broader public or the Government but is more significant for those atrocious or nasty views made towards the main stream majority of Government. On this aspect, the European Court of Human Rights made some remarks in <u>*Lingens v. Austria*</u> noting that:

> *Freedom of expression comprises one of the fundamental roots of any democratic community; one of the crucial conditions for its progress, as well as advancement of every*

a. For respect of the rights or reputation of others; b.For protection of national security or of public order, or of public health or mortals.
[33]*African Charter on Human Peoples Rights*, Art 9[2].
[34]The *Declaration of the Principles of Freedom of Expression in Africa,* Chapter I-VI of the Preamble.

man….it applies not only to information that is favorably received…..but also to that which offends the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there can never be a democratic society.[35]

3.1. Uganda's Legal Framework on Freedom of Expression

The Ugandan Parliament has enacted legislation having effect of preventing or affecting the attainment of freedom of expression in the country. Several pieces of legislation that relate to the administration of official media channels [such as radio and newspapers] is already in place. Some other legislation deals with the wider communal array, premised on ethical standards of the broader community. These pieces of legislation present the administrative processes for managing of freedom of expression, while others offer criminal as well as civil penalties for the desecration of this right. Some of this enacted legislation includes the Press and Journalists Act,[36]the Uganda Communications Act,2013,[37]the Computer Misuse Act,2022[38]Anti-Pornography Act, 2014[39] amongst others.

[35]Judgement of 8th July 1986, Application No.9815/82.

[36]This is an Act of Parliament in place to ensure the freedom of the Press, providing for a Council responsible for the regulation of mass media, establishing an institute of journalists of Uganda.

[37]An Act that was established to implement the provisions of the *Uganda Communications Act 2013*, regulating the Communications sector, which includes telecommunications, broadcasting, radio communication, postal communications, data communications, data communication and infrastructure.

[38]An Act to make provision for the safety and security of electronic transactions and information systems including computers and making provision for securing the conduct of electronic transactions in a trustworthy electronic environment and providing for other related matters.

[39]An Act that defines and creates the offence of pornography; providing for the prohibition of pornography; establishing the Pornography Control Committee and prescribing its functions; and for other related matters in Uganda.

3.1.1. Uganda's Constitutional Art 29 Provision on Freedom of Expression

Article 29 of the 1995 Constitution of the republic of Uganda is the one that is specifically premised on the freedom of speech, expression in Uganda, comprising of freedom of the Press and other media.[40]In a landmark ruling, in this respect, Uganda's Supreme Court in Charles Onyango Obbo & Andrew Mujuni Mwenda v. Attorney General[41] held that:

> *It is clear that the right to freedom of expression extends to holding, receiving and imparting all forms of views, ideas and information. It is not restricted to types, such as correct views, well thought out ideas or truthful information. Subject to limitation under Article 43, an individual's expression is not precluded from the constitutional safeguard simply because it is perceived by another or others to be untrue, erroneous, controversial or unpleasant. Every individual is free to express his or her views. Indeed, the safeguard is most important and required when an individual's opinions are opposed or objected to by the community or any part thereof, as 'untrue' or 'incorrect'.*

[40]According to this provision,
Every Person shall have the tight to:
[a]Freedom of speech and expression which includes freedom of the Press and other media;[b] freedom of thought, conscience and belief which shall include academic freedom in institutions of learning;[c] freedom to practice any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organization in a manner consistent with the Constitution.[d]freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition; and [e]freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organizations.

[41]Supreme Court of Uganda, Constitutional Appeal No.2 of 2002, p.10.

In that regard, in light of the above decision by the Court, it is imperative to defend these basic liberties enshrined in Article 29 of the Constitution, for they communicate the enjoyment of all other liberties. A Populace devoid of contact to as well as swap over of information is deeply hopeless to innovation as well to developmental responsibility.[42]

3.1.2. Domestic and International Limitations on Freedom of Expression

It's noted that freedom of expression is not an absolute right -in its enjoyment, it is subject to definite limitations. Global as well as domestic legal frameworks cautiously weave and put restrictions on this right taking into consideration the ideals of individual self-respect and democratic values. From a domestic point of view, Article 43 of the1995 Ugandan Constitution provides the set limits to the enjoyment of this right whereby according to this provision while individuals enjoy their rights as given to them by the Constitution, they should not infringe on the rights of others.[43]

Similarly, the International Covenant on Civil and Political Rights [ICCPR] as well permits Governments to put into effect certain restrictions on freedom of expression, if such limitation is provided by law and is essential; [a] for respect of the rights or reputations of others;

[42]Denis Kwizera & Hilary Asasira,'*Article 29 Threatened; A Critical Dissection of Various Laws Passed That Undermine Fundamental Freedoms of Speech, Expression and Assembly,*p.4.

[43]This provision states that: 'In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.[2]Public interest under this article shall not permit-[a]political persecution; [b]detention without trial; [c]any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution

[b] for the protection of national security or of public order, or of public health or morals.44

4.0. The Gaps in Uganda's Legislation on Freedom of Expression in Contravention of Regional and International Standards

Much as Uganda's 1995 Constitution provides for the rights to freedom of expression, the country still has a lot of other restraining legislation that desecrates the values enshrined in this very Constitution and Uganda's duties under International and regional standards.[45]Currently, the instances of breach of the said rights in Uganda are frequent and has reached fever pitch. This part of the paper provides an analysis of how domestic laws/practices in Uganda fail to comply with global standards on the aspect of freedom of expression.

4.1. Uganda's Penal Code Act [Cap 120], 1950[46]

4.1.1. The Aspect of Vague Provisions on Freedom of Expression in Uganda's Penal Code

The Penal Code has many offences that unreasonably limit the freedom of expression. The Code defines offences linked to sectarianism, criminal defamation, as well as terrorism. Charges of criminal defamation can be bought against any assumed offender even if the individual who supposedly affronted the supposed provisions is living or deceased.[47]The Code as well gives the Minister unbounded authority to stop the importation of a publication when he/she 'perceives it to be

[44]*International Covenant of* Civil *and Political Rights, 1966*,Art 19.
[45]Some of this restrictive legislation especially contravenes some of the values on freedom of expression that are enshrined in the *International Covenant on Civil and Political Rights[ICCPR]* and the *African Charter on Human and Peoples' Rights[ACHPR].*
[46]*Uganda's Penal Code Act* was passed to establish a Code of Criminal law in Uganda. This law commenced operations on 15th June 1980.
[47]*Penal Code Act [Cap 150],*Art. 175[2].

in the public interest,'[48]and provides for a penalty of two years or a fine of two thousand shillings or both on a first offence and a number of other penalties on successive offences. The Code also puts a stop at the publication of false news[49]The offence of sectarianism forbids acts in the form of printing, publishing, making verbal statements or any other form that 'exposé to contempt, create alienate, raise disaffection or promote ill feeling amongst or against any group of persons on account of ethnicity.' It is evidently seen that all these punitive provisions in the Code are very unclear and are consequently prone to irrationally, wide interpretation by both establishments as well as those subject to the law. This state of affairs regarding the law is criticized for not in being in line with the spirit of Article 19 of the Universal Declaration for Human Rights [UDHR] and International Covenant for Civil and Political Rights [ICCPR] that out rightly advocates for freedom of speech. These specific provisions in the Code are viewed as a danger to freedom of expression in Uganda.

4.2. 1995 Press and Journalists Act [Cap 105][50]

4.2.1. Several Provisions in Uganda's Press and Journalists law that Breach the Right to Freedom of Expression

The Press and Journalists legislation has a number of provisions which contravenes the right to freedom of expression. The oversight bodies of this piece of legislation law puts in place, in particular the Council[51] and Disciplinary Committee,[52]lack autonomy from the Ugandan Government. The law also provides for the licensing of journalists, as

[48]Ibid, Art 37.
[49]Ibid, Art 50.
[50]This is an Act in place to ensure the freedom of the Press; to provide for a Council responsible for the regulation of mass media and to establish an institute of Journalists of Uganda. This law commenced operations on 26th July 1995.
[51]See the *1995 Press and Journalists Act [Cap 105*], Part III of the Act especially Sec 8 establishes the Media Council.
[52]Ibid, Sec30, provides for the Disciplinary Committee.

well as conditions on who may work as a journalist; the registration of editors; a complaints system for journalists; a code of conduct as well as a range of penalties for un professional conduct. The licencing of journalists and putting restrictions on who may practice journalism is indeed not a welcome move especially when the global community is passionate about freedom of expression. The Complaints system put in place by this legislation, is feeble, un fair, and does not provide appropriate set of laws concerning what is forbidden. This on the whole thus leaves a gap, affecting the aspect of freedom of expression in the country.

4.3. The Anti-Terrorism Act [No.14 of 2002][53]

4.3.1. Possible Misuse of Uganda's Anti-terrorism Law against Political Opponents and Infringing on Freedom of the Press

The Anti-Terrorism law practically outlaws any form of coverage of any person or organization, gazette engaged in terrorist activities in addition to putting into place the death penalty for acts of terrorism or fiscal support for terrorist organizations. This piece of legislation defines any act of violence or threat of violence for political, religious, economic or cultural ends as a terrorist act also imposing harsh penalties on alleged terrorists and continuously raises fears amongst members of the Ugandan Public that this legislation could be unreasonably used

[53]This is an Act in place to suppress acts of terrorism to provide for the punishment of persons who plan, instigate, support, finance or execute acts of terrorism; to prescribe terrorist organizations and to provide for the punishment of persons who are members of , or who profess in public to be members of, or who convene or attend members of, or who support or finance or facilitate the activities of terrorist organizations; to provide for investigation of acts of terrorism and obtaining information in respect of such acts including the authorizing or the interception of the correspondence of and the surveillance of persons suspected to be planning or to be involved in acts of terrorism; to provide for other connected matters. This law was assented to by President Yoweri Museveni on 21st May 2002, and it commenced operations on 7th June 2002.

against the Government's political opponents violating the freedom of the press in the process. Publishing news that is 'likely to promote terrorism' carries a punishment of up to ten years' imprisonment upon conviction.[54] This piece of legislation in its entirety is a threat to democracy and freedom of expression in the country, leaving a bad taste in the mouths of those specific individuals affected by it.

4.4. The Regulation of Interception of Communications Act, 2010[55]

4.4.1. Lack of Safeguards by the Regulation of Interception of Communications Law in Respecting Freedom of Expression

The Regulation of Interception of Communications law does not have sufficient protection in ensuring respect of various liberties, plus the freedom of expression. The Government is given to much by this legislation in scrutinizing, interception of electronic, telecommunications as well as postal communications amongst the different entities [individuals, groups and organizations].[56]The large and indeterminate basis for interception of communication also allows for likely invasion into private conversations of persons and professionals; such as journalists, human rights defenders and political dissidents engaging in lawful activities as well as undertaking their individual liberties. The provisions of this law are seen not to champion freedom of expression ideals, which makes this piece of legislation to be in conflict with global and regional ideals on freedom of expression.

[54]Ibid, *The Anti-Terrorism Act [No.14 of 2002],*Sec 6.

[55]This is a law in place to provide for the lawful interception and monitoring of certain communications in the course of their transmission through a telecommunication, postal or any other related system in Uganda; to provide for the establishment of a monitoring center and to provide for any other related matters. This law was assented to by President Yoweri Museveni on 5th August 2010. It commenced operations on 3rd September 2010.

[56]Ibid, the *Regulation of Interception of Communications Act, 2010*,Sec 3,establishes the monitoring centre.

4.5. The 1996 Electronic Media Act [Cap 104][57]

4.5.1. Challenges Engulfing Uganda's Broadcasting Council

The Electronic Media law provides for the Broadcasting Council[58]with very wide powers to award or hold back licences on the foundation of an obscure set of circumstances as well authority to take hold of and take away broadcast gear devoid of court processes. For example, the Council has the power to award licenses for as long as 'such specific requirements are fulfilled. A one-year licence is a grave load to the owners who have invested vital monetary capital to function and is noticeably shorter than the licence period allowed in many African countries. Numerous reported scenarios demonstrate that the Council can easily be influenced and manipulated by the executive arm of Government. On the contrary, the Council's abstract methods of work and the influence peddling of Government in regard to the Council's operations, is seen to suppress Press freedoms in the country.

5.0. Transgressions on Freedom of Expression/Press Contrary to the Global, Regional and Domestic Legal Framework

The Republic of Uganda is a signatory as well as a subscriber to numerous instruments that guarantee the freedom of expression such as the Universal Declaration of Human Rights [UDHR][59]as well as the International Covenant on Civil and Political Rights [ICCPR].[60] These

[57]This is a law in place to provide for the setting up of a broadcasting council to licence and regulate radio and Television stations; to provide for the licencing of Television sets; to amend and consolidate the law relating to electronic media and to provide for other related matters.

[58]Ibid, Part III of the1996 Electronic Media Act, establishes the Broadcasting Council; Sec 9 provides for the establishment of the Broadcasting Council;Sec 10 provides for the Functions of the Council. This law commenced its operations on 21st June 1996.

[59]*Universal Declaration of Human Rights,1948,* Art 19.

[60]Supra, *International Covenant of* Civil *and Political Rights,* 1966, Art [1],[2].

international instruments have jointly made the devotion to freedom of speech as one of the sole objectives of their existence and further make it obligatory for their affiliate States to observe all the universally acceptable rules on expression. In the same vein, at the domestic front, as already demonstrated above, Uganda has an extensive legal framework on freedom of expression whose sole purpose is to champion social justice in the country. For this effort, Uganda can be applauded and congratulated upon for this huge achievement.

In spite of this positive development, Uganda is at present experiencing significant challenges with matters pertaining to freedom of speech/media freedoms in the country. For example, Journalists are harassed by Government; critical media is closed down etc. All these actions by the Government of Uganda are seen to breach Press freedoms in the country as well as contravene the global and regional instruments to which Uganda is a signatory. The specific violations of Press freedoms/ right to free speech in Uganda are discussed below: -

5.1. Harassment of Messengers in Upcountry Stations and Closure of Critical Media Outlets

Reports by global as well as local human rights organizations demonstrate a perturbing fall in Press freedom/right to expression in Uganda over the last two decades preceded by constant gagging of the media and attacks on media personnel by the Government.[61] Especially those specific journalists operating in the countryside undertaking their journalistic duties in an atmosphere of extensive impunity and constant pressure from the system, particularly Resident District Commissioners [RDCs] and District Internal Security Officers [DISOs] who make the

[61] *Uganda: Stop Harassing the Media,' See Police Shut 2 Newspapers, 2 Radio Stations Over Political Controversy'* Human Rights Watch, available at:https://www.hrw.org/news/2013/05/20/uganda-stop-harassing-media, accessed on 26th August 2022.

Journalists work extremely difficult?[62]In many reported incidents for example, opposition members have been turned away from radio stations on orders from RDCs and DISOs blocking them from airing out their views to the listening public. Those specific members of the Public who call into the radio and Television Political talk show programs callers also report of being trailed and threatened by security personnel and strangers for their critical and divergent views against Government excesses. But the main affront to freedom of expression and Press freedom in recent years was the closing down of four radio stations after the Buganda riots preceding a disagreement between the Buganda Kingdom and the Ugandan Government in September 2009.[63] The shutting down of radio stations and the arrest of media personnel critical of the Government as well as conditions that were silently deliberated upon for the re-opening of these media houses sent a scary effect down the spines of both media personnel as well as general public. Currently, there are extra reports of media gagging within media houses currently than at one time in the last twenty years.

5.2. Damning Report by a Global Press Freedom Index Report on Uganda's Press Freedoms

The 2022 Global Press Freedom Index put out by reporters without borders shows that Uganda's Press freedom index has continuously

[62]Ibid, at note 62.

[63]The stations were Central Broadcasting Service [CBS],Suubi FM,Radio *Sapientia* and *Akaboozi Ku Bbiri* which were accused of inciting violence, promoting sectarianism, campaigning against the Government and abusing the President Museveni.Three of the radio stations were allowed back on air within a few weeks and months under strict conditions that were not discussed transparently through the established regulatory process. CBS, whose license was revocked, remained off air until October 2010. Cabinet came up with some strict conditions for the re-opening of the radio station, which were rejected by both the Mengo government and CBS management.

plummeted with the country falling to 132 out of 180.[64]The report articulates that Uganda's media personnel are constantly intimidated and subjected to violence by security operatives. The country has more than two hundred radio stations and some television networks, most of these owned by top Government officials of the National Resistance Movement [NRM], the party currently in power. The report further notes that the country's incumbent President, Yoweri Museveni can't entertain any criticism and very often indulges in hateful commentary against the press.[65] The NRM establishment frequently obstructs the airing of some Television reports, ordering that they be cut from Program line-up, the report further reiterates. While the 1995 Constitution provides for freedom of the Press, Uganda's media space is governed by a sequence of legislation, including those on fraudulent digital activity, anti-terrorism and public order. In 2021, the Constitutional Court vehemently disallowed appeals by Journalistic bodies against draconian legal provisions against the media. According to this report, media personnel are also amongst the country's worst paid professionals, taking note that work contracts are odd in addition to only a few reporters earning more than $ 200, a month, a meager pay for a professional Journalist. This monetary insecurity and injustice make the media fraternity susceptible to graft, the report further says.[66]

[64]See '*Uganda Drops Places in Press Freedom Ranking*, 'The Daily Monitor, 4th May 2022.This drop is seven steps down compared to the 2021 Index where the country was ranked one hundred twenty-five out of one hundred eighty countries. Uganda's overall score declined to 46.5 down from 88. in 2021, showing that the situation deteriorates every year.

[65]President Yoweri Museveni in 2021 threatened to force the Daily Monitor, the leading independent newspaper, into bankruptcy. In 2018, the same President called Journalists 'Parasites.'

[66]See Details of report published in , The Daily Monitor, 4th May 2022; *'Uganda Drops Places in Press Freedom Ranking*.'

5.3. Raiding of Newspaper Outlets by the Ugandan Government

In 2011, some newspaper Premises mostly in Uganda's capital, Kampala were raided and busted by Police looking for assumed 'subversive' materials. As a consequence, landlords, suppliers' newspaper outlets perceived to be anti-Government felt troubled, threatening to ditch the targeted media houses. This demeanor led to the momentary closing down and stopping of Press of some newspaper publications,[67]a situation that was seen as a violation on the rights of the media fraternity to express themselves freely.

5.4. Cases Brought Against Journalists and Government's Introduction of Laws that Limit Freedom of Speech

The natural justice code stresses that justice must be quick and seen to be done. This aspect continues to be an illusion especially to Uganda's media fraternity. The Human Rights Network for Journalists-Uganda [HRNJ-Uganda] as well condemns the Government's current plans to put in place novel laws which it says will further restrict the media freedoms in the country. 'Initiates from Government to bring into conformity the existing media legislation with the current 1995 Constitution of Uganda as well as worldwide values is still absent. Regrettably, efforts to stifle Press freedom in the country most of the time take centre stage. HRNJ said that: '*Sadly, there is glaring silence from the statutory bodies that should be on the fore front of safeguarding and defending media freedoms.'*

[67] '*Raiding of Newspaper Outlets By the Ugandan Government,*' The Guardian: available at: https://www.the guardian.com/media/greenslade/2013/may/21/press-freedom-uganda, accessed on 26th August, 2022.

6.0. Conclusion

Uganda's Press freedom arena I is one of such matchless contradictions. On the one hand, the country is said to have one of the most liberal and vibrant media arena in central and Eastern Africa whereby courts of law regularly rule in favour of media personnel's rights, and yet on the other hand, a collection of legal and extra-legal technicalities continues to restrict freedom of expression in the country. This Paper has evidently shown that harassment of media personnel raiding and shutting down of print and broadcast media as well as the Government's initiation of legislation that limits media freedoms/freedom of speech thwart the right of a free Press, freedom as enshrined in both the global and regional instruments to which Uganda totally subscribes. In this regard it is recommended that Uganda's so called media fraternity ought to work towards pushing back state suppression, robustly advancing legal as well as institutional framework for media freedoms through the rapid support as well as organizing continued communal advocacy on the matter.

The Law and Practice on Family Issues in Tanzania: The Controversy of Same-Sex Marriages

Sr. Sylvia E. Massawe.*

Abstract

amily law in our society is perceived as a complex and Fdynamic field that encompasses social, cultural, political, and legal discourse. Tanzania has also grappled with the challenge in recent years, contemplating whether the globally debated issue of same-sex relations and marriage would be acknowledged and accepted. Merely labeling something as marriage does not inherently reach such a desired goal. Marriage has been historically realised as a contractual agreement between a male and a female, inherently oriented towards the conception and upbringing of offspring, accompanied by the unity and welfare of the marital partners.

Marriage has traditionally been understood as a covenant between a man and a woman, inherently directed towards the procreation and education of children, as well as the unity and well-being of the spouses. In many other African countries, homosexual relationships have been criminalised through legislation, including provisions in Tanzania's penal law. Traditionally, people understood marriage to be a commitment between one man and one woman. In the contemporary century, the concept of love has been redefined by many individuals. Same-sex or homosexual relations, exhibit variations from jurisdiction to jurisdiction, prompting legislative changes in marriage laws to align with constitutional demands and

international human rights instruments for equality. Conversely, some opposing nations regard same-sex marriages as taboo.

In this context, the paper explores various aspects related to homosexuals and marriage, including legal discourse, social-cultural, religious, and political perspectives, as well as the controversies surrounding its recognition in Tanzania. Consequently, Tanzania's legal regime does not endorse Same-Sex Marriage, citing reasons such as conflicting with public interest, morals, religious beliefs, and customs. The paper suggests that legalising same-sex relationships and marriage is not only premature in Tanzanian social-cultural aspects but also constitutes a potential disruptor that could compromise the sanctity of marriage and the foundational principles of family.

Keywords: Family Law; Same-Sex Marriage; Marriage, Homosexual Orientation.

1.0 Introduction and Historical Background of Marriage

In the intricate tapestry of legal, cultural, political, and societal dynamics, the realm of family law stands as a mirror reflecting the values and norms of a given society. Within this typology framework, speaking of 'family' in Tanzania, one must know that it is a country with a rich tapestry of cultural diversity, religious diversity, and political and historical influences. In this situation, Tanzania grapples with contemporary challenges that underscore the evolving nature of family issues. One legal challenge that has ignited considerable debate and controversy is the issue of recognising marriages between individuals of the same sex. As Tanzania navigates the complexities of tradition, law, and global perspectives, this paper delves into the

multifaceted dimensions surrounding the law and practice on family issues, with a particular focus on the contentious debate surrounding same-sex marriage. Exploring the legal landscape, societal attitudes, and the intricacies of the controversy, this paper seeks to illuminate the nuanced discourse that shapes the understanding and regulation of family matters in Tanzania.

In addressing issues of family matters in Tanzania one has to focus on different perspectives such as laws, rules, religions, customs, and norms that govern marriage relations specifically before the enactment of the Law of Marriage Act.[1] Before the coming of the colonial powers in Africa during the 19th Century, familial structures in Africa were regulated by customary law and traditions, essentially operating at the familial or clan level. Then, after the invasion by colonialists, some Africans were converted to Western culture. They changed even their local religions into Christianity and Islam. The majority of people adhere to their customary norms and traditions which govern and regulate their daily lives and marital practices.[2] There were multiplicities of norms, religions, and cultures that applied together within our societies. The legal framework on marriage is greatly rooted in local customary laws, religious beliefs, and post-colonial statutes. In the context of marriage in Tanzania, the legal provisions essentially

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[1] Cap. 29 R.E 2002

[2] MASHAMBA, Clement (2010), *Introduction to Family Law in Tanzania*, Institute of Public Policy and Law in collaboration with the National Organization for Legal Assistance, pp. 4-6.

derived from the constitution[3] and Tanzanian Marriage Act, the latter of which is considered outdated and antiquated.[4] Later, even after the introduction of colonial laws in Africa specifically in Tanzania culture and norms were reflected in ways of handling marriage issues. Regardless of all these developments, Tanzanians continued to handle family matters through customs and tradition.[5] Today parties are compelled by law to regulate their matters through a court of law according to their denominations. Marriage is used as a means of creating family members who will be used for surplus production. The states clearly that we have two types/forms of marriages in Tanzania, these are monogamous marriage and polygamous marriage.[6] All these two forms of marriage involve two kinds of sex, a man and a woman. The question of whether same-sex marriage should be legally recognised in Tanzania has faced a lot of challenges since the legal regime does not guarantee such a type of union. Tanzania like many other African countries has a history of inheriting many laws imposed under British colonial rule including the penal laws which criminalise homosexuality.[7]

[3] Article 16 of the Constitution of the United Republic of Tanzania, 1977, (as amended from time to time) regarding the protection of family and matrimonial life.

[4] The Law of Marriage Act, Cap 29, 1971 R.E 2002.

[5] Even those who converted to Christianity still refer to their marriage issues as customs and traditions and not through Christian laws.

[6] Refer to Sections 9(2) and 15 of the Law of Marriage Act (Supra).

[7] See, ARIMORO, Augustine (2021), *Interrogating Criminalisation of Same-sex Sexual Activity: A Study of Commonwealth Africa*, Liverpool Law Review 42, 379-399, available at https://doi.org/10.1007/s10991-021-09280-5, accessed 4th Jan.2024, p.388-391.

In 1860, the British colonial empire endeavored to disseminate a standardized set of common law and legal codes across its colonies. These penal statutes, aligned with the colonial mission, were influenced by religious and moral perspectives. Their primary objective was to instill submission to British rule among Africans while ostensibly preserving native customs. An illustrative example of this imposition was the introduction of penal codes, such as the Penal Code of India and Queensland. These codes harshly condemned and criminalized same-sex

Accordingly, the public policy of a given country can determine same-sex relations and unions to be void.[8] An unrecognised or void marriage lacks acknowledgment universally. The acceptance of same-sex marriages in states with no definitive stance on such unions remains an unresolved issue. Throughout history, nearly every culture has had an institution resembling marriage. However, if humans reproduced asexually and offspring were self-sufficient, the concept of marriage would likely not exist. Devoid of the fundamental elements of intrinsic physical connection, the inclusive interpersonal connection, and the particular association regarding procreation and nurturing offspring, marriage would hold no substance. Pair bonds would lack purpose without reproductive-type unions. Marriage, distinguished by its comprehensive nature that is realised through the processes of procreation and parental care, serves to meet fundamental human needs in a manner distinct from other interpersonal relationships. Due to its structured fulfillment of essential needs, marriage warrants regulation for the common good, transcending religious arguments. Those who cannot or wisely choose not to marry can have their needs addressed through alternative means, recognising the distinct nature of their relationships.

relations among males, prescribing penalties ranging from imprisonment for a number of years to life imprisonment. A pertinent illustration can be found in certain sections of the Tanzanian Penal Code [CAP.16 R.E.2022**].** For instance, Section 154 stipulates that "*Any individual who engages in sexual intercourse with another person against the natural order …is subject to imprisonment for life or a maximum of 30 years."* Additionally, Section 157 asserts that *"...any male who…engages in any act of gross indecency with another male person…commits an offense…punishable by up to five years imprisonment."*

[8] STARK, Barbar (2005), *The International Family Law,* Ashgate Publishing Company, USA.p.32.

1.2 The Concept of Marriage

1.2.1 Marriage

Marriage has been defined as 'a voluntary union for life of one man and one woman to the exclusion of all others.'[9] Sometimes marriage is characterised by attributes akin to those of contractual agreement, that establishing a legally accepted relationship entailing reciprocal rights and obligations. In this regard, marriage is more of a covenant rather than a contract as it creates a voluntary union that normally does not intend to be regulated by legal consequences.[10] In some religious views, it is an insoluble covenant between the two couples who wish to live together as husband and wife, whereby these parties lay and swear before God.[11] Other commercial transactions are required to be developed on the notion of binding promises.[12] This entails two fundamental notions "freedom of contract and sanctity of contract.[13]

According to Tanzania's Law of Marriage Act,[14] marriage is delineated as a voluntary union between a male and a female, intentionally to endure for the duration of their lifetimes. It further provides that

[9]Stated by Lord Penzance in *Hyde v Hyde* (1866) LR 1 P & D 130, at p. 133). Refer also to the case of Corbet v Corbet (*Otherwise Ashley*) [1971] P.83, [1970] 2 All E.R. 33, it was concluded that, *marriage is a relationship between a man and a woman by considering their biological sex and not artificial construction or psychological assumption.*

[10] LOBO, George V (1983), *The New Marriage Law*, St. Paul Publications, Bombay p.20.Recent developments in the theology of marriage as a covenant implies more than a contract because it concerns more fully the personal element of the relationship. It calls for active participation and is a commitment in the true sense. It implies a sharing of the personalities.

[11] Canon Law No.1057.

[12] MASHAMBA, Clement (2010), *Introduction to Family Law in Tanzania*, Institute of Public Policy and Law in collaboration with the National Organization for Legal Assistance, p. 5

[13] Ibid.

[14] Section 9(1) of the Law of Marriage Act, Cap 29 (RE 2002).

monogamous marriage refers to a marital arrangement formed by a union between one man and one woman to the exclusion of all others. Conversely, polygamous marriage denotes a marital union wherein the husband may during the subsistence of the marriage enter into additional marriages with one or more women.[15]

1.2.2 The Concept of Same-Sex Marriage

The international concern regarding gender issues is sensitive considering gender-based violations and social constructs have raised global debate for the recognition, advocacy, and protection of homosexual persons. The recognition has led to the outbreak of antagonistic views and ruptures. Practically, these people of diverse orientations and gender identities have faced several challenges in certain jurisdictions, such as criminalisation of same-sex conduct, restriction in medication, education, employment, and other mistreatment.[16] It is indisputable while other states legalise same-sex marriage, certain states have conspicuously ignored the recognition of sexual orientation and gender identity among the litany of prohibited grounds of discrimination.[17] Whereas, by 2022 the statistics indicate that Europe is the leading continent to legalise same-sex marriage (almost 18 EU member states out of 28), America indicates 10 states, Asia 3 countries, and Africa 1 country.[18] There is no proper explicit

[15] Ibid, Section 9(2) and (3).
[16] BANTEKAS, Ilias and OETTE, Lutz (2020), *International Human Rights Law and Practice*, 3rd Edition, Cambridge University Press, pp.586-588.
[17] See for instance, by 2020 the number of African countries that criminalized homosexuals were 32 countries, while by 2023 the number increased to 39 out of 55 AU member states. ,Available at, https://www.statista.com/statistics/1229293/number-of-countries-that-permit-same-sex-marriage-by-continent/, accessed 4th Jan.2024. See further, HRC resolution 27/32: Human Rights, Sexual Orientation and Gender Identity, UN doc., on states voting against. A/HRC/RES/27/32, 2 October 2014. Accessed at https://digitallibrary.un.org/record/781283?ln=en.
[18] Ibid.

reference regarding the outlined discriminatory grounds established in these Conventions, instead of squeezing homosexuals into the broader category of '*other grounds or conditions'* based on gender identity and sexual orientation. This circumstance has compelled states to violate their commitments to particular human rights agreements. It is a reasonable interpretation to perceive same-sex orientation as a moral transgression related to gender identity, deemed unlawful cohabitation in Tanzania. In the African context, this is regarded as an unfamiliar value that infringes upon and obstructs cultural norms about human nature and the traditional understanding of marriage.

Marriage between two individuals of the same biological sex and/or gender identity is referred to as same-sex marriage. While others refer to *gender-neutral marriage, gay marriage, equal marriage, lesbian marriage, homosexual marriage, and same-gender marriage*.[19]

Dr. Annamarie Jagose, a renown feminist, lesbian/gay studies scholar her viewpoint on this matter:

> "By acknowledging certain same-sex unions as marriages, the concept of same-sex marriage underscores the ongoing lack of legitimacy for alternative sexual partnerships and the persistent exclusion of certain societal participants. The legalisation of same-sex marriage carries potential risks that go beyond the positive intentions advocated by many supporters."[20]

[19] CRUZON, L Basil (2001), *Briefcase on Family Law*, 2nd Ed., London, Cavendish Publishing Limited, p.9-12

[20] Available at http://www.mercatomet.com/articles/view/same_sex_mariage_has_an_unexpected_foe, accessed on 8th January 2022. Also see, https://theconversation.com/the-trouble-with-gay-marriage-19196, accessed 17th Jan.2024. Dr. *Jagose* argues that the legalisation of homosexual marriage would have adverse effects on the LGBTQ+ community. She inquiries about the continued reliance on marriage as a

Although the concept of family is not well defined by marriage or heterosexual cohabitation, it remains crucial to ascertain the presence of a formalised union or partnership. In some jurisdictions, homosexual cohabitation seems to clash with the existing family laws and regulations.[21]

2.1 Essential Formalities of Marriage

Prior to 1753, marriage was formally regulated by the Canon law of the Roman Catholic Church and the common law recognised such marriages as steamed from the free will of the spouses and their declaration that they are subjected to one another as husband and wife.[22] Marriage like any other contract has its formalities which differentiate it from other commercial agreements.[23] The essentials are important, and these include demonstrable agreement, the capacity to marry, and voluntary, consent between the two opposite sex.[24] Moreover, almost under common law jurisdiction marriage is a contract between the two persons who consent to live together as spouses. Marriage creates legal rights and duties between the parties just like any other form of contract.[25] Marriage is not a contract that can be created and terminated

primary means of obtaining social recognition and privilege in the contemporary era. She contends that the current legal definition of marriage fosters dishonesty, denial, and sexual hypocrisy. Rather she commends admitting the complex realities of sexual behaviour in the 21st century and abandoning idealistic notions concerning lives characterized by virtue and fidelity. about lives of virtue and fidelity.

[21] BURTON, Frances (2003), *Family Law*, Cavendish Publishing Limited, Australia, p.13

[22] Canon Law No.1057 and Section 16 of the Law of Marriage Act Cap 29 R.E 2002

[23] Refer to the case of *Ramadhan Said V. Mohamed Killu (1983) TLR 309*. In this case, *Lugakingira* J. (as he then was) held that: According to Section 9 of the LMA *…a marriage is a voluntary union of a man and a woman intended to last for their joint lives.*

[24] BURTON, Frances 2003, *Family Law*, p.13.

[25] MASHAMBA, Clement, Op.cit, pp.12 -13.

easily by the will of the parties.[26] It is a covenant that engages God by making vows and also the state has an interest in it. In this regard, there are legal rules governing the formation of marriage such as the presence of witnesses, formal pronouncements of vows in public, formal announcement, registration of the marriage, etc.[27]

2.2 Purpose of Marriage

The purpose of marriage varies widely from different perspectives including traditions and cultures that are involved over time. Commonly, marriage creates family which is among the social institutions we have in the community.[28] Traditionally especially in the African context, the concept that "the larger the family the higher surplus production" was of more value. Therefore, it was through marriage that one could introduce surplus production since family members were to offer their labour power. During the Middle Ages, the focal point revolved around the marriage contract, establishing it as the basis for the stipulation that marriages had to be visibly consensual.[29] Prior to the Council of Trent in 1563, the prevailing custom associated the agreement on marriage contract followed by the blessing of the union in the church. Nevertheless, no formal religious ceremony was mandated before this council. Rather, a simple declaration called *per verba de praesentior de future* (*I take you or I shall take you as my*

[26] Section 12 of the Law of Marriage Act Cap 29 R.E 2002. In the case of *Jonathan Mhagama v. Joyce Mangweru (PC) Matrimonial* Appeal *No.2 of 2013 HCT Songea Registry, (Unreported)* Justice *Kwariko* observed among other things that *Matogoro Parish* was not legally registered to be a Marriage Conciliation Board in which under Roman Catholic is known as *Kamati ya Malezina Familia*, hence the proceedings from lower courts were nullified and parties were advised to comply with the law.

[27] Canon Law No. 1060, also refers to Part II of the Law of Marriage Act Cap 29 R.E 2002.

[28]Op.cit, MASHAMBA p.2. Family is the basic unit of society and the most popular institution in our modern society.

[29]Burton Frances, op.cit.22.

wife/husband) sufficed, and the marriage became lawfully binding upon consummation.[30] Consequently, marriage was primarily regarded as essential for the procreation/reproduction of new offspring.[31] It is a common practice that the religious ceremony should take place only when the bride demonstrates her ability to conceive as marriages often aim to secure an heir for property succession.[32]

2.3 Controversy of Same-Sex Marriage Concerning Cultural Norms

Homosexual acts and marriage in Tanzania attract more controversy amongst members of the society because they deeply try to entwine the cultural structure of the country. The controversy penetrates and create a complex traditional intersection, and societal norms and yield the global stance. One must understand the real characteristics of Tanzanian culture that are formed by historical traditions, diverse ethnic groups, and religious and political influences. All these aspects have a great role in shaping societal attitudes and responses towards issues of family and relationships.

The concept of marriage in Tanzania is traditionally comprised of values that often adhere to a conventional understanding of a union between a man and a woman. This perspective is massively influenced by cultural norms and religious teachings that historically dictated acceptable relationships, and clashes with other discourses across

[30] Ibid
[31] Canon Law No. 1055(1)
[32] Ibid, In due course, however, a custom developed of exchanging the vows before a Priest or (after the Reformation) a clerk in holy orders, and eventually there were three ways of contracting a marriage, either as above or 'clandestinely' (ie, speaking the words in private without the presence of the priest or clerk and subsequently consummating the marriage by sexual intercourse) or in church after the publication of banns or with a license (and after obtaining any necessary consents for minors).

human rights, individual freedoms, liberties, and universal inclusivity. As in the case of many African states, Tanzanian communities, are rooted in a solid social conservatism, that emphasises safeguarding traditional family structures. The rise of dichotomy regarding homosexual marriages is fueled by some triggered views revolving around the significance of societal disruptions, moral implications, and the perceived threat to cultural norms. The essence of resisting this controversy stemmed from the critical desire to uphold the integral Tanzanian identity by maintaining and preserving culture and religious values.

In an actual sense, the Tanzanian culture has been influenced much by religious beliefs, that contribute to the controversy as numerous denominations believe that marriage is a sacred covenant between a man and a woman. This global clash and dichotomous views that advocate for homosexuals' rights generate unexpected dialogue and tensions among Tanzanian societies.

It is indisputable, public opinion of many societies as in Tanzania is strongly influenced by two components: on one hand, traditional and cultural values, while on the other hand religious beliefs. These societal attitudes are well recognised and acknowledged, particularly among the younger generation. Among the impacts of globalisation an extreme access to information and widening exposure to diverse views emanating from social media where the world population including Tanzanians is more ambitious to embrace other broader staffs related to marriage and family including diverse attitudes. The complexity of diluting the Tanzanian social tradition and conservatism regarding marriage is based on the significance of procreation, and family as a unity of productivity and generational development.

2.4 Historical Background of Same-Sex Marriages in Africa

In pre-colonial African societies, informal rites of passage facilitated the informal homosexuality relations. However, the era of colonialism in Africa saw the introduction of anti-homosexual legislation by external forces, altering the social perception of such relationship…[33] With the emergence of the amalgam system in South African gold mines, men began departing from their wives for prolonged periods which led to the emergence of the so called 'mine marriages, where older men sought sexual release with young men.[34] Colonial officials viewing colonial subjects as racially inferior and primitive, framed this behaviour as western or foreign and an African, attributing it to influences from the Portuguese or Arabs trading communities. Accordingly, same sex relationships were stigmatised as deviating from African culture and traditions. The dislocation of men from their traditional societies where such relationships had fluid social meanings to the colonial system solidified the perception of homosexual relations as definitely an African. This discourse, reinforced by the missionary work and Islamic influences, ingrained the notion of homosexual relationships as foreign and negative among Africans. All in all, the practices became stigmatised as incompatible with African culture. Embedding within Africans the foreign and thus negative element of such behaviour. Same -sex relationships became stigmatised as un-African.[35]

[33]DIVAN, Aarti (2014), "*Is Homosexuality Un-African"?* available at: http://thinkafricapress.com/gender/homosexuality-un-african-colonialism, accessed on 9th January 2022. The late deceased Border Gezi, a close ally of Mugabe, pronounced homosexuality to be completely alien to Zimbabwean culture, claimin that' they have no right to practice homosexuality in our country, and if they don't like it can leave'.

[34] ibid

[35] Ibid. Nevertheless, colonialism did not introduce same-sex relationships to Africa. Pre-colonial Africa contained a range of approaches to sexual behaviour,

Throughout history, unions resembling same-sex marriages have been documented, including the arrangement such as "female husbands." Within some African cultures.[36] These women assumed the cultural roles of men, including having the same rights as men which included seeking damages if her wife should have relations outside of their union without her consent. Several traditional societies in Africa have traditionally allowed non-sexual marriage between two women. These arrangements usually involve one woman taking the role of a man and marrying another woman to secure her inheritance and are not seen as homosexual.[37]

In Kenya female similar 'same-sex marriages' are observed among the Gikuyu, Nandi, Kamba, Kipsigis, and neighboring tribes with approximately 5–10% of women partaking in the said unions.[38] Nevertheless, this is not perceived as a homosexual practice; rather, it serves as a method for families lacking male heirs to preserve their inheritance within the familial lineage. While laws criminalising homosexuality in Kenya primarily target men, former Prime Minister Raila Odinga called for the arrest of females engaging in such acts in 2010.

including many which permitted same-sex relationships to exist without violating social norms. What colonialism introduced was a binary model of sexuality, and systems of jurisprudence that identified and regulated sexual behavior to conform to the norms of the coloniser.

[36] In Tanzania among the *Kurya* society there is a practice known as *nyumbantobhu* whereby, a woman is allowed to marry another woman who will bear kids with a man chosen by the one who marries to get issues in her name.

Ibid. Nevertheless, colonialism did not introduce same-sex relationships to Africa. Pre-colonial Africa contained a range of approaches to sexual behaviour, including many which permitted same-sex relationships to exist without violating social norms. What colonialism introduced was a binary model of sexuality, and systems of jurisprudence that identified and regulated sexual behavior to conform to the norms of the coloniser.

[37] Gender and Language in Sub-Saharan Africa, 2013:35.

[38] FLESHMAN, Michael. "African gays and lesbians combat bias: An 'invisible' minority seeks legal safeguards, acceptance". United Nations. Retrieved 28 November 2022.

Throughout history, Same-sex marriage spans back to ancient times, when ceremonies were conducted without formal sanctioning by governing authorities.[39] However, in Ancient Rome, *Constantius II* and *Constants* implemented laws condemning same-sex marriages punishable by death.[40] Similarly, medieval France saw the existence of civil unions between male spouses known as *brotherment*, where couples shared property and resources akin to their marital agreements, albeit with less formal legal recognition.[41]

Roman society, including its highest emperors, witnessed same-sex unions with Roman statesman Cicero documenting the legal entitlements involved with such marriages.[42] While Female same-sex unions were less prevalent due to societal restraints on women's freedoms, the initiation of Christianity in the Roman Empire generated a negative perception of same-sex unions and non-procreative sexuality.[43] Consequently, by the fourth century, concerns about openly prevalent same-sex unions peaked, leading to the enactment of a law by the state that threatened consequences for those entering into such marriages. This was due to the fact the Bible strictly condemned same-sex marriage.

[39] Thomas K. Hubbard, Historical Views of Homosexuality: Roman Empire, 2020, available at http://doi.org/10.1093/acrefore/9780190228637.013.1243, accessed 4th January 2024.
[40]Ibid.
[41] Ibid, See further Jean Bryner, *Gay Marriage goes way Back*, NBC News, Aug.27, 2007, at https://www.nbcnews.com/id/wbna20464004, accessed 17th Jan.2024.
[42]https://www.123helpme.com/essay/Essay-About-Homosexuality-654847, accessed on 17th Jan.2024.
[43] Ibid

3.1. Various viewpoints on same sex marriage

3.1.1. natural law vis-à-vis same sex marriage

In accordance with natural law, marriage transcends mere human relationships, representing a link deeply ingrained in human nature and governed by natural law. The fundamental precept of natural law asserts that individuals are obliged to pursue what is morally good and to avoid what is evil.[44] Through natural reason, people can discern the moral implications of their actions understand the deliberate purpose of each action, and recognise the moral impropriety of manipulating means to achieve ends.

Any situation that distorts the purpose of sexual acts is considered a violation of natural law and an objective moral norm.[45] Natural law, rooted in human nature, is universal and immutable, applying uniformly to all humanity commanding and forbidding consistently, everywhere, and always. Saint Paul, in the Epistle to the Romans, emphasised the intrinsic presence of natural law within every individual, (Rom. 2:14-15). Plato similarly discussed in his writings how opposite-sex acts are naturally pleasurable, while same-sex sexuality is deemed "unnatural."[46]

These scholars dedicated to upholding traditional sexual ethics argue that homosexual acts are inherently immoral, advocating for marriage to be reserved exclusively for heterosexual unions.[47] The sterility

[44] Stanford Encyclopedia of Philosophy, Reasons why homosexuality is harmful, http://www.tfpstudentaction.org/politically-incorrect/homosexuality/10-reasons-why-homosexual-marriage-is-harmful-and-must-be-opposed.html. Accessed on 5th November 2023.

[45] Ibid.

[46] Ibid. The "New Natural Lawyers" (NNLs) are a prolific group of philosophers, theologians, and political theorists that includes John Finnis, Robert George, Patrick Lee, Gerard Bradley, and Germain Grisez, among others.

[47] http://www. link.springer.com/article/10.1007%2Fs10677-012-9393-0, Accessed on 5th November 2023.

objection criticises the new natural lawyers for drawing distinctions between same-sex couples and sterile heterosexual couples.[48]

This perspective acknowledges the substantial difference between individuals grappling with personal struggles and striving to overcome them and those who turn their sins into a source of pride, attempting to impose their lifestyle on society. Such actions are viewed as a blatant contradiction to traditional Christian morality and natural law. Same-sex marriage is deemed contrary to nature, as two individuals of the same sex, irrespective of their characteristics, are believed to be biologically incapable of marrying due to insurmountable constraints.

3.1.2 Positivists School of Thought vis- a-vis Same-Sex Marriage

According to the positivist school of thought, the law is perceived as a product of well-established regulations, decisions and practices; authorised within the society. Positivism asserts that law is significantly a construct of social norms and conventions. Legal positivism is concerned much with the process that enacts a law and not the content of the law. For them, the only immoral law is one improperly enacted. This was philosophy created by political philosophers like Hobbes, Hume, and Jeremy Bentham who influenced John Austin a lot. Hence, positivists contend that same-sex marriage is morally right and legally binding as long as it follows the proper procedures in its enactment.[49] The movement and the perspective of the positivists led to the spreading of views of enacting laws to legalise same-sex marriages. Many states have enacted some laws to allow same-sex marriage. One of the states is the Netherlands, which legalised gay marriage on 1st April.2001;

[48] Ibid. The Athenian speaker considers how to have legislation banning homosexual acts, masturbation, and illegitimate procreative sex widely accepted. He then states that this law is according to nature.

[49] Legal positivism, Stanford Encyclopedia of Philosophy, accessible at http://plato.stanford.edu/entries/legal -positivism, accessed on 14th November 2022.

Belgium, which followed suit on 30th January.2003; Canada, which granted right to gay marriage on the 28th June 2005; Spain, which legalised same-sex marriage on the 3rd July.2005; South Africa followed the trend on 30th November.2006; Norway, on 11th May 2008; Sweden, recognised same-sex marriage on 1st May 2009; Portugal, which legalised same-sex marriage on 17th May etc. Certain libertarians and anarchists oppose same-sex marriage, as they are against any type of state-endorsed marriage, which includes unions between individuals of different sexes.[50] They do not inherently object to the concept of homosexual weddings but rather assert that government intervention in such events should be minimal or nonexistent, as is similarly upheld for opposite-sex marriages.

3.2 The Theory of Values versus Same-Sex Marriages

Value theory encompasses the examination of the processes by which individuals formulate, assert, and adhere to specified values, as well as their subsequent actions and inactions toward these values.[51] It elucidates the reason behind individuals' preferences or sections based on personal conduct and the evolution of different phases of human growth and maturation. By invoking the theory of values, marriage between people of the same sex falls under the category of social values. This is to say the theory of values tries to link law with values. In any society, there are some values or laws in which people agree to give them a normative force (status) or evaluative considerations.[52] For

[50] See for instance the commentary of June 25, 2015, by David Boaz, Libertarians have Long Led Way on Marriage, accessed at https://www.cato.org/commentary/libertarians-have-long-led-way-marriage, on 17th Jan.2024.

[51] Value theory, accessed at http://www.princeton.edu/~achaney/tmve/wiki100k/docs/Value_theory.html, accessed on 21st February 2022.

[52] Normative status means to transform values into law while evaluative consideration means to look at law in the length of values.

instance, in Tanzania, some categories of values have been given normative force.[53] There are controversies among different societies from those who consider values as a separate entity from the law and others who try to link law with values.[54] Therefore, the issues of same-sex marriages, homosexuality, prostitution, euthanasia, abortion, the death penalty, and so on have different forces according to the society on how they invoke the theory of values. In Tanzania same-sex marriages (homosexuality acts) are objective and absolute they have been given normative force.

4.1 The International and Regional Legal Position Regarding Same Marriages

Tanzania is a member of many international regional and international human rights instruments that guarantee human freedoms. Globally, the recognition of same-sex marriage is controversial according to international instruments that enshrine basic human rights. First and foremost, issues of marriage were introduced by the Universal Declaration of Human Rights (UDHR), whereby the Declaration among many rights provides for a right to marry and the validity of marriage, as it states clearly that: adult *men and women, irrespective of race, nationality, or religion, have the right to marry and to create a family*.[55]

The requirement of free and full consent is significant for the validity of a marriage between prospective spouses, as stipulated by law.[56] The legislation affirmed that the family constitutes the natural and

[53] Tanzania Penal Code Cap 16 R.E 2002.
[54] Some society considers some values as subjective and non-absolute while others consider them objective and absolute. For instance, on the issue of the death penalty and abortion, some argue that the right to life is subjective and non-absolute while others argue that the right to liberty and the right to privacy is objective and absolute.
[55] Article 16(1) of The Universal Declaration of Human Rights, 1948.
[56] Ibid, (2).

fundamental unit of society and is entitled to societal and state protection.[57] Furthermore, the International Covenant on Civil and Political Rights (ICCPR) provides that '*family is the natural and fundamental group unity of society*[58] *...right of marriage between men and women*[59] *in which the requirement of full age is considered and is to find a family.'*[60]

Similarly, the International Covenant on Economic Social and Cultural Rights (ICESCR) underscores the essential of providing extensive support and assistance to families, *'the widest possible protection and assistance particularly during their establishment and while fulfilling their responsibilities for the care of dependent children.'*[61]

The African Charter on Human and People's Rights on its part does not explicitly address the right to marriage, nevertheless, it emphasises the protection of the family as the essence of society by the state, encompassing both its *physical health and moral perspective.'*[62]

In contrast, the above legal views are inconsistent with human rights activists' perceptions regarding same-sex marriage. Their arguments are based strongly on principles of equality and non-discrimination as

[57] Ibid, (3).
[58] Article 23(1) of the International Covenant on Civil and Political Rights, 1966.
[59] Article 23(2) ICCPR.
[60] Article 23(3) ICCPR. These couples also have equal rights concerning marriage upon its subsistence and even upon dissolution.
[61] Article 10(1) of the International Covenant on Economic Social and Cultural Rights, 1966.
[62] Article 18(1) of the African Charter on Human and Peoples' Rights. The provision also contends in para (3) that *the state shall ensure the elimination of women's discrimination…protection of women's rights and children*…This paragraph entails the situation in Africa regarding the protection of vulnerable groups of women and children towards the predominant patriarchal system (male dominant). Literally, this acknowledges that marriage is between two people of the opposite sex and not of a single-sex.

established by different international and regional human rights instruments.[63] The underlying principle of equality states that;

> 'All individuals are equal before the law and are entitled to equal protection without discrimination on any grounds, including, race, colour, sex, language, religion, political or other opinion…birth, or other status.'[64] Accordingly, the legislation must prohibit discrimination and ensure all individuals receive equal and effective protection against discrimination in all forms.

The above provision has been construed broadly to accommodate societal dynamics and diverse perspectives. In the case of homosexual acts that fall under illegal cohabitation thereto are now forced to have a room under this provision based on the category of discrimination on sex. This is intended to narrow and shield the sole content of this provision as *'sex'* refers to the protection of biological difference and not sexual orientation.[65] Either trying to push or squeeze it into the last

[63] See, for instance, Articles 1, 2,6,7, and 12 of the UDHR, Articles 2, 17, and 26 of ICCPR, and Articles 2, and 3 of the African Charter.

[64] In this case refer to Articles 2 and 26 of ICCPR and Article 2 of the African Charter. For a clear understanding of Articles 2 and 26 of ICCPR, each provision is an autonomous right. The Committee on ICCPR GN. 18 in paragraph 12 has lamented this regarding the two provisions, Article two tries to limit the scope of the rights as enshrined by the Covenant to be protected against discrimination. Article 26 implies the adjudicating right or equality before the law, which means it is the responsibility of each member state to ensure that no discrimination in law or fact in any field is protected and regulated by the government authorities. Therefore, for the judiciary to dispense justice, all legislation enacted by state parties must comply with Article 26. Thus, while Article 2 avails a narrow scope of the rights, Article 26 avails a broader scope of protection of rights not necessarily within the parameters of the Covenant.

[65] The case of *Corbet v Corbet (Otherwise Ashley) [1971] P.83, [1970] 2 All E.R. 33,* established a foundational interpretation that justifies homosexual acts as illegal cohabitation, considering the nature of human sex and gender identity as either male or female. In this instance, a man married another man, believing the latter to be a woman who had undergone vaginal surgery to acquire a female status.

words of the provision of *'other status'* might contradict other values of the society. This loophole or gap of the law regarding the scope of the provision and the vague concept as enumerated must be construed to the scope of the parameter of the Covenants and Conventions by considering the intention of the adoption of such treaty by that time and not to the present situation. Same-sex acts and marriage are gaining momentum and present a new phenomenon that intervenes with global dynamic societal values, does not fit the available legal framework and contradicts many states' laws, cultures, and religions.[66]

Regarding the principle of equality and non-discrimination as delineated in various human rights Conventions, the Committee acknowledges that the ICCPR never avails the suitable definition for 'discrimination' and what constitutes it. Nonetheless, the International Convention on the Elimination of All Forms of Racial Discrimination provides that the term racial discrimination shall mean '*any distinction, exclusion, restriction or preference…based on race, colour, descent or…that has the purpose of impairing the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis in the political, economic, social, cultural or any other public domain.*'[67] The provision tries to align with Article 1 of the Convention

However, the marriage was later deemed void due to the failure of consummation. The judge, in his decision, extended his opinion to biological factors, concluding that despite the artificial cavity-constructed surgery, the respondent retained male genitalia but was identified as transsexual on a psychological level. Consequently, the constitution of biological sex in humans is considered fixed at birth/conception and remains unalterable through natural development or medical procedures attempting to change sex organs. The respondent's sex operation does not impact the nature of her true sex. With this case, the court realized that marriage is essentially formed in a relationship between a man and a woman.

[66] Especially the African countries most of them believe that the connection between culture and religion forms part of public opinion.

[67] Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, read together with para 6 of the UN Human Rights Committee (HRC), ICCPR General Comment No.18: Non-Discrimination, of 10th

on the Elimination of All Forms of Discrimination against Women (CEDAW) regarding '*prejudice to women.'*

4.1.2 The Yogyakarta Principles of 2006

The fear of same-sex marriage to suit the available legal framework and to fit in the litany of the principle of equality and non-discrimination, there is an emergency group of people on the international plane to influence states all over the world to accept the additional principles in human rights laws and gender identity.[68] These individuals convened their inaugural assembly in Yogyakarta, Indonesia, that came up with the formulation of the Yogyakarta Principles on the Application of International Human Rights Law concerning Sexual Orientation and Gender Identity, aim to apply established standards of international human rights law to combat violations of the rights of lesbian, gay, bisexual, and transgender LGBTQ+ individuals, as well as issues pertaining to intersexuality.[69] The formulation of these Principles took place during a gathering organised by the International Commission of Jurists, the International Service for Human Rights, and human rights experts from various countries, held at Gadjah Mada University in Java from 6th to 9th November 2006. The final version of the Principles comprises 29 principles unanimously endorsed by the experts of the assembly, later accompanied by recommendations addressed to regional bodies, governments, civil society organisations, and the

November 1989, available at https://www.refworld.org/docid/453883fa8.html, accessed on 4th January 2024.

[68] The Yogyakarta Principles adopted in 2006 on the application of International Human Rights Law about Sexual Orientation and Gender Identity and its Additional Principles adopted in November 2017 in Geneva. See also the Advisory Opinion OC-No.24/17, Gender Identity, Equality, and non-discrimination concerning same-sex couples, specifically the interpretation and the scope of Articles 1(3), 3,7,11(2), 13,17,18, and 24 in connection with Article 1 of the American Convention on Human Rights, 2017. At, https://www.corteidh.or.cr/docs/opiniones/seriea_24.

[69] The Yogyakarta Principles, Ibid.

United Nations.[70] These principles are named after the city of Yogyakarta, where conference took place.[71] The finalised Yogyakarta Principles as a universal charter for the rights of individuals with diverse sexual orientations occurred on March 26th, 2007 during the session of the United Nations Human Rights Council in Geneva.[72] Michael O'Flaherty, reiterated during his address at the International Lesbian and Gay Association (ILGA) Conference in Lithuania on October 27th, 2007; he explained that:

> 'all human rights belong to all of us. We have human rights because we exist not because of our sexual orientation or gender identity but despite this, in many instances, these human rights are disregarded or unrealised, and the Yogyakarta Principles aim to rectify this situation.'[73]

The Yogyakarta Principles were unveiled during a United Nations event in New York on 7th November 2007, with the endorsement of Argentina, Brazil, and Uruguay. *Human Rights Watch* outlined that the initial measure in achieving the intended goal would involve decriminalisation of homosexuality in 77 jurisdictions where legal sanctions persist for individuals engaged in same-sex relationships,[74] as

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[70] The Yogyakarta Principles, Ibid, https://www.refworld.org/pdfid/48244e602.pdf, accessed 17th Jan.2024.

[71] Yogyakarta Principles, 2006. See also, BANTEKAS Ilias and OETTE Lutz (2020), *International Human Rights Law and Practice*, 3rd Edition, Cambridge University Press, pp.585-588.

[72] The global struggle is to realize the protection of homosexuals all over the world without considering other social perceptions regarding culture, religions, human nature, the role of family, and the controversy thereto. In 2016, the UN Human Rights Council created an independent organ of experts on sexual orientation and gender identity. Refer, UN Human Rights Council, Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity, UN, doc. A/HRC/RES/32/2, 15th July 2016, accessed on 5th January 2024, at https://www.refworld.org/docid/57e3d9934.html.

[73] Ibid, the preamble to the Yogyakarta Principles, 2006

[74] Human Rights Watch, Uneven Progress, June 20, 2023, at https://www.hrw.org/news/2023/06/20/uneven-progress. It reveals that since 1969

well as the abolition of the death penalty in the seven states where such punitive measures remain in place for such homosexual conduct.[75] Furthermore, in November 2017 the Principles were reviewed and additional changes were made which led to Yogyakarta Principles plus 10. The meeting led to some other ten additional principles to the former Principles of 2006. States have not formally incorporated these principles into a treaty, thus rendering them not inherently legally binding within the framework of international human rights norms. have not been adopted by States in a treaty, and are thus not by themselves legally binding part of international human rights law. However, the Principles are intended to serve as an interpretive aid to the human rights treaties. The critical question is the willingness of states to accept these principles as part of international human rights laws. The principles instead of filling the legal gap, are likely to impose more controversies and contradictions regarding family law, human rights law, and other societal values.

4.3 Legal Position on Same-Sex Marriage in Tanzania

Tanzania acknowledges that homosexuality is a 'taboo' socially stigmatised, and engaging in same-sex sexual activities is considered a criminal offense sanctioned by the state.[76] Across the country, sexual acts between men are prohibited and can lead to a maximum sentence of life imprisonment.[77] While mainland Tanzanian law does not explicitly address sexual acts between women, the broader context suggests a general disapproval of same-sex relationships. In the semi-autonomous region of Zanzibar homosexual acts between women are prohibited by the law and punishable by a maximum sentence of

several 78 countries have decriminalized same sex relations. In contrast, they acknowledge that in Africa same sex acts remain greatly contested.

[75] Ibid.

[76] See for instance Part XV of the Penal Code on crimes against morality and sections 9 and 16 of the LMA.

[77] Refer e.g sections 154 and 155 of the Penal Code.

500,000 shillings.[78] It further narrates the offence of *same-sex union* and its punishment of up to 7 years imprisonment.[79] Therefore, in this regard, laws depict the position of same-sex marriage. The Constitution of the United Republic of Tanzania is the mother law and embodies the fundamental rights and freedoms: does not provide any right about marriage but it states that; *Each individual has the right to be respected and safeguarded concerning their well-being the confidentiality of their personal affairs, family and marital relationships...*[80]

Attempting to legalise homosexual marriage in Tanzania is deemed unusual, as it cannot be invoked under the right to privacy. The term "matrimonial" in Article 16 of the Constitution must be interpreted in line with the LMA, which firmly realises that marriage is between individuals of the opposite sex (a man and a woman). In the ongoing collection conducted by the Constitution Review Commission citizens have expressed their opposition regarding same-sex marriage, as follows:

> "The constitution should be explicit about homosexual marriage as an immense crime that should be stated about that without ambiguities. "We indeed desire a more democratic constitution, but we can't live in a democracy that is not suitable to our cultural values," he said, adding: "Our government must be very cautious about this. Same-sex marriage should be highlighted by the constitution as one of the worst crimes because this behaviour contradicts

[78] Section 153 of The Zanzibar Penal Code of 1934, as amended in 2004.
[79] Section 158 of Penal Code, Ibid. The provision elaborates the content of the offense including participation, arrangement of the same-sex union, celebration of the union thereto, and same-sex couple living in a reputation of husband and wife.
[80] Article 16(1) of the Constitution of the United Republic of Tanzania,1977 as amended from time to time.

> our Tanzanian moral and social values, hence, to be highlighted as a criminal right from the constitution."[81]

The Constitution of Tanzania as a mother law of the country embodies provisions that preserve public morality.[82] Considering same-sex relations and unions as human rights in Tanzania contravene public morality as inferred in the heading of Chapter XV of the Penal Code written "Offences against Morality."[83]

In a comparative analysis, the Constitution of the Republic of Uganda upholds the right of the family and contends that individuals of the age of majority (18 years) and above have the entitlement to enter into marriage and establish a family. It guarantees equal rights to couples before, during, and at the dissolution of marriage.[84] Furthermore, the Constitution explicitly prohibits marriage between individuals of the same sex[85] and insists that marriage must be steamed on voluntary consent of the parties.[86] Parents are entrusted with the primary obligation to nurture and raise their kids within the context of marriage,

[81] Pastor Jackson Sifael, at Kaselya Village in Iramba District, written by *Orton Kiishweko*, 18th October 2018, Tanzania: Views United in Transhing Same-sex marriage, Tanzania Daily News, Dar es Salaam.

[82] Articles 30 and 31 of the Constitution of the United Republic of Tanzania.

[83] Chapter XV of the Tanzania Penal Code on 'offenses against morality' contains the provisions from sections 129 to 169A.

[84] Article 31 of the Constitution of the Republic of Uganda of 2005. Recently, as a further initiative, the Uganda parliament has introduced the Anti-Homosexuality Act, of 2023. The Act must be read in line with the Constitution, Penal Code, and family law concerning marriage and family issues. Accessed at https://www.parliament.go.ug/sites/default/files/The%20Anti-Homosexuality%20Act%2C%202023.pdf.

[85] See Article 31 (2)(a) of the Constitution as amended by the Constitution (Amendment) Act, 2005.

[86] See further, Article 31 (3) of the Ugandan Constitution and refer to ARIMORO, Augustine (2021), *Interrogating Criminalisation of Same-sex Sexual Activity: A Study of Commonwealth Africa*, Liverpool Law Review, available at https://doi.org/10.1007/s10991-021-09280-5,accessed 4th Jan.2024, p.395.

which serves the essential purpose of family.[87] and children are not supposed to be detached from their families.[88] Similarly, the Constitution of the Republic of Kenya recognises the family as the fundamental unit of the society, significant for preserving social order. The state is mandated to provide protection and recognition to families.[89] Every adult is afforded the right to marry an individual of the *opposite sex*, contingent upon the voluntary consent of both parties.[90]

4.3.1 The Law of Marriage Act Cap 29 (RE 2002)

The legislation avails the precise definition of marriage as a voluntary union of a man and a woman, intended to last their entire lives.[91] It further defines monogamous marriage as a union between one man and one woman exclusively, while polygamous marriage involves a husband marrying additional women during the through which a husband during the existence of marriage.[92] The bonding of the male and female, whole in themselves, adds up to more than one they enrich each other through their complementarity. Furthermore, the law stipulates the minimum marriageable age setting it at 18 years for a male and 15 years for a female. [93]There is a clear distinction between heterosexual marriage and homosexual union as per the definition provided by the Law of Marriage Act that highlights the necessity of the union between individuals of opposite sexes. Section 38(1) (b) of

[87] Article 31 (4) of the Ugandan Constitution.
[88] See Article 31(5).
[89] Article 45(1) of the Constitution of Kenya, 2010, at https://www.constituteproject.org/constitution/Kenya_2010, accessed on 17th Jan.2024. Same-sex orientation is criminalized in Kenya through sections 162, 163, and 165 of the Penal Code, read together with section 377 of the Indian Penal Code that propounds the anti-sodomy laws as implemented by the colonialists in 1890s. See further, ARIMORO, Augustine (2021), Ibid, p.391.
[90] Article 45(2) of the Kenyan Constitution.
[91] Section 9(1) of the Law of Marriage Act, Cap 29(RE 2002).
[92] Ibid, Section 9(2) and (3).
[93]Section 15 of the Law of Marriage Act, Cap 29(RE 2002).

the said law, prohibits marriages between parties within prohibited relationships including same-sex couples and incestuous relationships. The law references the tradition*9 entrenched by medieval Christian churches to delineate prohibited degrees of kinship.[94] Marriages contracted outside Tanzania must comply with the LMA to be recognised in Tanzania.[95]

4.3.2 The Penal Code, Cap 16 (RE 2002)

The position of same-sex (homosexual orientation) is strictly prohibited and sanctioned under the Tanzania *Penal Code*. The act of homosexuality is an offence according to this law. The law provides that:

> 'any individual who engages in carnal knowledge with another person against the natural order; or allows a male person to engage in such conduct, commits an offence, and is subject to life imprisonment or at least a thirty-year imprisonment term.'[96]

The law continues to assert that when the aforementioned offence in subsection (1) of this section is committed to a minor underage below ten years the offender shall be subject to life imprisonment.[97]The law also provides for the offence of 'gross indecency'[98] as it is against our values, it provides that:

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[94] BURTON, Frances, Op.cit, p.16

[95] Section 36(d) of the Law of Marriage Act Cap 29 R.E 2002

[96] Section 154(1)(a)(c) of The Penal Code [Cap 16 R.E 2002] (as amended by the Sexual Offences Special Provision Act, No.4, 1998 (also see Gay Tanzania at http://www.gaytimes.co.uk/Hostports, retrieved on 12th January 2018.

[97] Ibid, Subsection (2)

[98] The Penal Code does not avail a definition of the term 'gross indecency' though According to Part I(3) of the Sexual Offences Special Provisions Act, Act No.4 of 1998 (the provisions of this law already form part of the Penal Code) "gross indecency" in Section 138A "*means any sexual act that is more than ordinary but*

> 'any person who, in public or private commits, or is a party to the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, is guilty of an offence and liable on conviction to imprisonment for a term not less than one year and not exceeding five years or to a fine not less than one hundred thousand and not exceeding three hundred thousand shillings; save that where the offence is committed by a person of eighteen years of age or more in respect of any person under eighteen years of age, a pupil of a primary school or a student of secondary school the offender shall be liable on conviction to imprisonment for a term not less than ten years, with corporal punishment, and shall also be ordered to pay compensation of all amount determined by the court to the person in respect of whom the offence was committed for any injuries caused to that person.'[99]

Moreover, the Penal Code states that; *'any individual who attempts to engage in any of the offences that prescribed under section 154 commits an offence which is punishable for conviction of up to 20 years of imprisonment.'*[100]

The law also addresses indecent conduct between males. It provides that, any male individual who, whether in public or private commits or engages in any act of gross indecency with another male or induces another male to engage in such conduct or attempts to induce a male to

falls short of actual intercourse and may include masturbation and indecent physical contact or indecent behaviour without any physical contact."

[99] Section 138A of The Penal Code. The offense of gross indecency was originally used to criminalize sexual acts for men that fell short of Sodom which required penetration. Normally the scope of the definition of this offence is left to the court decisions.

[100] Ibid, Section 155.

engage in indecent behavior with him, commits an offence and may be sentenced to imprisonment for up to five years.[101]

The Zanzibar Penal Code of 1934, as amended in 2004, prohibits and criminalises any sexual intercourse against nature punishable by up to 14 years of imprisonment.[102] Any individual who endeavors to engage in carnal knowledge of any boy commits an offence and upon conviction shall be subject to a minimum imprisonment term of twenty-five years.[103]

The law stipulates that *'engaging in carnal knowledge with another person against the order of nature; or allowing a male individual to engage in such conducts, constitutes a felony, punishable by imprisonment for up to fourteen years.[104] Furthermore, any attempt to commit the aforementioned offenses as indicated in section 150 is subject to a felony by imprisonment for up to seven years.[105]Additionally, unlawfully and indecently assaulting a boy is categorised as a felony, carrying a minimum imprisonment term of twenty-five years.'[106]* The law explicitly prohibits homosexual acts and same-sex marriage:

> 'any woman who commits an act of lesbianism with another woman whether taking an active or passive role shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding five hundred thousand shillings.[107]Also, any person who enter[s] or arrange[s] a union whether amounting to marriage or not of the

[101] Section 157 of The Penal Code.
[102] Sections 150 and 151, of The Zanzibar Penal Code of 1934, as amended in 2004
[103] Section 152 of The Zanzibar Penal Code of 1934, as amended in 2004.
[104] Ibid, Section 150 (a)(c).
[105] Ibid, Section 151.
[106] Ibid, Section 152.
[107] Ibid, Section 153.

> person of the same sex; celebrate[s] a union with another person of the same sex whether amounting to marriage or not; [or] lives as husband and wife [with] another person of the same sex, shall be guilty of an offense and liable on conviction to imprisonment for a term not exceeding seven years.'[108]

The law forbids any kind of sexual intercourse with individuals of homosexual. Marriage must be consummated therefore any marriage claimed to be between individuals of the same sex in Tanzania cannot be consummated as it is an offence and illegal cohabitation.

4.3.3 Customary Law Position in Relation to Marriage

According to the customs and traditions of Tanzania, same-sex marriage is regarded as a taboo that is unaccepted. Both the customs of Tanzania whether codified or not do not guarantee marriage of the same sex. The Local Customary (Declaration) Order, 1963 (GN No.279/1963) which applies to Tanzania contends marriage to be between the union of a man and a woman. The payment of dowry is done by a man to the father or representative of the woman he wants to marry.[109] Furthermore, the Order provides for the legality of marriage by the issuing of a marriage certificate to the consented parties (man and woman).[110] *Benard Membe,* the former Foreign Affairs and International Cooperation Minister in addressing the query by *Konde* legislator, Khatib Said Haji (CUF) sought clarification on the government's stance concerning Western nations' indicating that aid would be recent pronouncement that they would not provide aid would be retained from opposing same-sex marriages. He said:

[108] Section 158(a)(b)(c) of The Zanzibar Penal Code of 1934, as amended in 2004.
[109] Rule 1 of the Local Customary Law (Declaration) Order, 1963.
[110] Ibid, Rule 84(A).

> "The government is ready to lose any foreign support and aid from friendly countries that are now forcing legalisation of same-sex acts unions. He lamented that the government would not yield to external and local pressure to legalise same-sex orientations."[111]

You cannot give rights to something that cannot exist. Marriage consummates in the marital union between a man and a woman. In every culture, time and place, this is what marriage has always been. It's how human beings create families in order to continue the race. Homosexual "unions" are perversions of the marital act and are at par with any other grave sin.

4.4 Religious Law in Relation to Same-Sex Marriage

Opposers fear that legalising same-sex marriage may diminish the influence of religious institutions, curtail their free speech rights, compel them to conduct ceremonies against their beliefs, and potentially lead to financial strain through lawsuits against established churches. Same-sex unions are among various aspects of sexuality that are discouraged by numerous religious institutions, akin to illegal cohabitation, masturbation, and fornication. Excommunication represents a severe sanction within the Catholic Church that constitutes the most stringent penalty available. This resulted in the individual's disqualification from participating in the sacraments or religious rituals and permanently forbade them from conducting mass ceremonies.[112]

[111] Tanzania Daily News, Tanzania: 'No' to Same-Sex Marriages-Government, Dar es Salaam, https://web.archive.org/web/20181212123059/https://allafrica.com/stories/201206210145.html, accessed on 15thJan. 2024.

[112] http://world.time.com/2013/09/25/pope-francis-excommunicates-priest-who-supports-womens-ordination-and-gays/, accessed on 17th January 2024. In this case, Father Greg Reynolds of Melbourne, Australia was excommunicated by Pope Francis, and he was shocked. Granted, Reynolds told the National Catholic

The Church asserts that masturbation and fornication are deemed as selfish misuse of sexuality, whereas homosexuality is viewed as a less serious "incomplete" use of one's sexuality identity.[113]

4.4.1 Catholicism (RC)

Official Catholic doctrine regarding homosexuality is rooted primarily in its teachings on human sexuality and moral theology. In this regard, the Catechism of the Roman Catholic Church describes the church's position on same-sex orientation and acts.[114] Though the church tries to distinguish between homosexual orientation and acts. The church admits that homosexual orientation is a biological impairment related to sexuality where an individual can experience an uncontrollable sexual attraction towards individuals of the same sex.[115] In this situation, the Catechism emphasises that these people should be handled with compassion, sensitivity, and recognition of their inherent dignity.[116] While for homosexual acts, the church admits that it is against the law of nature and moral values. Engaging in homosexual acts is inherently disordered and are against the intended purpose of human sexuality and the underlying significance of unity of spouses in

Reporter that he also believes he was excommunicated because he supported the gay community. He has officiated mass weddings for gay couples.

[113] Ibid.

[114] See for instance No. 2357 to 2359 of the Catechism of the Catholic Church, 2nd Ed 2000, accessed on 29th December 2023 at https://www.vatican.va/archive/ENG0015/_INDEX.HTM.

[115] The church teachings emphasize that those who are in homosexual orientation as a biological disorder should all the time accept their situation and live a life of chastity by struggling to abstain from sexual activity that may lead to heterosexual marriage. Refer to the Congregation for the Doctrine of Faith: Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons, at www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html, accessed on 4th January 2024.

[116] Ibid.

marriage towards procreation and education of children.[117] The Roman Catholic views marriage as a sacramental union, meaning it is sacrosanct.[118] Under Canon law, marriage unites a husband and wife into one flesh or body by the divide act, forming a consecrated bond accepted as a sacrament.[119] According to Catholic doctrine, sexual intercourse is solely intended for procreation and such homosexual acts is incapable of fulfilling this motive. Consequently, homosexual conducts are deemed contrary to the natural order and the divine will, constituting a transgression (sinful). [120] Catholics who promote "same-sex marriages" act contrary to Canon 209 § 1 are deemed to be sinners which restricts them from receiving holy Communion per Canon 916.

Based on the circumstances of the situation, individuals may face the potential consequences of being denied holy Communion in accordance with Canon 915, receiving reprimands per Canon 1339 § 2, and/or being penalised under Canon 1369 for significantly violating ethical standards.[121] Additionally, Catholics who aid others in pursuing a "same-sex marriage" engage to collaborate cooperate in the misdeed actions of those individuals, an involvement exposes to moral evaluation comparatively with the customary principles governing collaboration with evil and, potentially, depending on the conditions that are pursuant to the colonial principles governing in crime as per Canon 1329 and/or scandal per Canon 1339 § 2.[122] Pope Benedict

[117] Ibid.
[118] Canon Law No. 1055 (1) and (2) recognize marriage as a permanent, insoluble sacrament.
[119] The concept of marriage under Christians is made in heaven and what God has joined together no person causes it apart. In this regard, once a marriage is entered with the free consent of the reunion and is consummated it becomes complete provided that no impediments to it.
[120] Pope John Paul II on "Same-Sex Marriage "Issued on October 31, 1986.
[121]Refer for instance, https://world.time.com/2013/09/25/pope-francis-excommunicates-priest-who-supports-womens-ordination-and-gays/, accessed on 17thJan.2024.
[122] Ibid.

utterly denied the analogy of homosexual unions and marriage, asserting that such unions contradict the divine intention behind marriage and family. Marriage is regarded as sacred, while homosexual acts are irreconcilable to the fundamental principles of God's will and natural moral order."[123] He further emphasised that the sacred scriptures condemn same-sex acts as a serious immorality." On Feb. 23, 2005, Pope John Paul II referred to homosexual marriages as relatively "a new ideology of evil."[124] Canon law No. 235 mandates the avoidance of any unjust discrimination averse to individuals on their sexual orientation. When people advocate for same-sex marriage, they are advocating for *civil* marriage rights, without imposing an obligation upon the church to confer *sacramental* marriage rights to homosexuals.

4.4.2 Evangelical Lutheran Church

The Evangelical Lutheran Church characterises marriage as a lifelong covenant of faithfulness between a *man* and a *woman*."[125] Nevertheless, in its 2009 synod assembly, the church approved to permit resolution allowing its believers, if they wish, to acknowledge and bestow homosexual couples. During the selfsame assembly adopted a declaration on human sexuality endorsing diverse family structures, encompassing those led by couples of the same gender.[126]

[123] Generally, see SEEWALD, Peter (2010), *Benedict XVI, Light of the World: The Pope, the Church, and the Signs of the Times*, San Francisco, Ignatius Press, and further FR. MULLADY, Brian, *et al* (2011), *Pope Benedict XVI on the Priesthood and Homosexuality*, the Linacre Quarterly Journal, Vol.78, Issue 3, Published online 1 Aug.2011, at https://doi.org/10.1179/002436311803888311, accessed on 16th Jan. 2024.

[124] Ibid.

[125] https://www.bethanysaginaw.com/page/doctrine-and-policy-regarding-marriage, accessed on 4th Jan.2024.

[126] Religious Groups Official Positions on Same-Sex Marriage, at http://www.pewferum.org/2012/12/10/religious-groups-official-positions-on-same-sex marriage, accessed on 17 Jan. 2024.

4.4.3 Hinduism

Officially, Hinduism does not take a stand on same-sex marriage. While some Hindus disapprove of homosexual orientations and acts, others reference ancient Hindu texts like the Kama Sutra, which appear to support homosexual behavior.[127]

4.4.4 Buddhism

There is no consensus within Buddhism concerning the issue of homosexual marriage. While some interpretation of the Buddha's teachings emphasises "sexual misconduct" as one of the ten unvirtuous acts leading to suffering, often linked predominantly with adultery. Nevertheless, some Buddhists construe the phrase to encompass homoerotic.[128]

4.4.5 Islamic Law Position

This is another area in which we can understand whether the Islamic religion recognises same-sex marriage. Under Islam marriage is known as *nikah* which means a contract. Furthermore, such a relationship makes the marriage to be lawful. According to the Quran, marriage is defined by the Arabic word called *hisn* which suggests a fortress for marriage. Accordingly, marriage serves as a bastion of moral purity. Homosexual marriages, diverging from the aforementioned conception, are considered immoral and sacrilegious.[129] The primary sense of the

[127] Ibid.
[128] Ibid.
[129] SYED, Ibrahim (2022), *Same-Sex Marriage and Marriage in Islam, Islamic Research Foundation International Inc*, accessed at https://www.researchgate.net/publication/337307555_SAME_SEX_MARRIAGE_and_MARRIAGE_IN_ISLAM, See further, Islam and Homosexuality, available at http://wikiislam.net/wiki/Islam_and_Homosexuality,Tuesday12 November 2020.

expression "nikah" denotes the physical intimacy between a man and a woman, with its subordinate usage referring to the contractual arrangement that legitimises such intimacy. The intended meanings of the term are discerned from the context in which it is employed. In the realm of Islamic jurisprudence (fiqh), marriage succinctly means a contractual agreement wherein the parties engage in permissible physical relations as delineated by Sharia law.[130] Modern scholars such as Muhammad Abu Zahrah and Ibn Uthaimeen availed expanded interpretations of marriage, emphasising its role in fostering a virtuous family and contributing to a stable society.[131] Islamic legal tradition contends that the prime objectives of marriage include procreation and mutual pleasure, as evidenced by the prophetic injunction to marry to increase the Muslim community. Several Sunni schools of jurisprudence unanimously judge homosexuality deserving severe punishment, with differing penalties stipulated for homosexual acts depending on marital status and school of thought.[132] Same-sex marriage is considered a morally repugnant and aberrant practice, that is contrary to the teachings of Islam, which admonishes believers to abstain from indecent behavior and refrain from promoting it. This stance is reinforced by Quranic verses warning of severe consequences for those who indulge in obscenity, (An-Nur:19).[133]

5.1 Conclusion

In conclusion, therefore, the scenery of family law in Tanzania is associated with the complex interplay of legal discourse, societal norms, and religious discourse *vis-a-vis* the surrounding controversy of same-sex marriage that knocking on the door. The Tanzanian legal

[130] SYED, Ibrahim (2022), Ibid.
[131] Ibid.
[132] Islam and Homosexuality at, https://wikiislam.net/wiki/Islam_and_Homosexuality, accessed on 17th Jan. 2024.
[133] Ibid.

framework is deeply rooted in many sources including specifically cultural, moral, and religious considerations that strictly uphold the traditional heterosexual definition of marriage. In this context, law, culture, morals, and religions contend that marriage is a union between two persons of the opposite sex (a man and a woman) and not of the same sex. That being the fact, most of the African countries including Tanzania which were under the British colonial mandate their penal codes are mostly influenced by colonial legacies that criminalise same-sex relations.[134]

Same-sex marriage as a contentious issue culminates in an obvious tension between cultural values versus human rights perspectives. Nevertheless, it is imperative for Tanzania to navigate the exquisite margin of appreciation between embracing its cultural heritage and the principle of equality and non-discrimination. Substantially, the controversy encompassing homosexual marriages in Tanzania is not only a legal issue but is associated with the broader diversity of societal discourse, religious, inclusivity, and the developing nature of family relationships.

Marriage is fundamentally the conjugal union between a husband and wife, designed to promote the welfare of children, spouses, and the broader societal interest. Conversely, Same-sex marriage, by its nature, does not encompass a reproductive function and advocates for a union primarily focused on sexual activities that contradict the prohibitions set forth by various cultural norms, legal statutes, and religious doctrines. Despite the absence of explicit provisions for same-sex marriage in the Tanzanian legal regime, it does not equate to the legalisation of such unions. In our societal framework, same-sex relationships are viewed as taboo and historically met with severe consequences. The prevailing values have traditionally upheld the

[134] See also, ARIMORO, Augustine (2021), Ibid, pp. 388, 390

heterosexual model of marriage. Legalising or even tolerating same-sex marriage is perceived as a potential redefinition of the family structure and could contribute to an increase in homosexual couples. The reluctance to recognise same-sex marriage in Tanzania reflects not only legal considerations but also deep-rooted cultural and societal norms that shape the understanding of marriage and family within the Tanzanian context.

Restriction of Human DNA's Proprietary Rights in Tanzanian Jurisprudence: Its Astray and Relevancy in Contemporary World of Inventions and Innovation

Jackson Masoud Issah*

Abstract

Human DNA forms one of the aspects of property .It stands in auspices of personal property which is one of the two major categories of property, where close to it, stands a real property, another property dimension .Proprietary rights may have private or public function much as their use and benefits are concerned. Whether private or public function however , is a matter that depends on a nature of a thing so held to be property on the first part, and state policy surrounding regulation of proprietary rights on the second instance. However, there is a controversy surrounding ownership in human DNA in both natural and legal context of it. This controversy comes from a legal assumption that, when a human DNA is in the constitutive body of an individual, becomes exclusively owned by that particular person . The same DNA owner(the sample owner) may be limited of his human DNA proprietary rights where his DNA sample has been removed from his body. It is in academic need of unfolding this Human DNA ownership controversy under the relevant laws of Tanzania that ,this study was conducted and communicated.it comes with a conclusion that, there is a need of reforming the Human DNA related laws in Tanzania in order to have a clear demarcation

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in its ownership and use for the purpose of having effective legal parameters and limitation individual's human DNA ownership and use in the country as a need of reflecting the scientific innovation and invention in the human DNA . The effective legal demarcation of Human DNA ownership serves the intended purpose use of it for both individual owners of Human DNA and public use of it .

Keywords: DNA; Huma DNA; DNA Proprietary Rights; Human DNA Law in Tanzania.

1. A Conceptual Discourse and Nature of Human DNA

Human DNA is an abbreviation for biological term of ***Deoxyribonucleic Acid*** of a person which means, human genetic material existing in the nucleus cell and mitochondria the existence which comes as a biological inheritance that a person copies from his biological parents [1]. It is a genetic device which every person has, much as prescription of his unique biological being is concerned. It is the initial biological aspect which DNA invention was mostly concerned with, than any other professional use and purpose which became developed thereafter.

Individuals 'uniqueness comes from the human DNA's composition. It is comprised of six biological components having different biological functions .These DNA components are Deoxyribose sugar,[2] Phosphate,[3] and the four nitrogenous bases which are Adenine,[4]

[1] The Human (DNA Regulation) Act No 8 of 2009

[2] This is the five comprised carbon molecules whose function is an assistance in a formation of the DNA'S phosphate backbone

[3] It is the phosphoric acid salt comprised of phosphorus and oxygen which functions a major biological process. It supplements as a biological molecule.

[4] It is the chemical compound in structure stands and functions as one of the important building blocks of DNA.

Guanine,[5] Thymine,[6] and Cytosine.[7] This NDA descriptive composition is different in each Individual's DNA composition because of different sequence of nitrogen- based molecules among individuals.[8] It is from the same components that, DNA *uniqueness* and *similarities* among individuals, stands and flows. The biological distinctiveness and similarities among individuals therefore are made possible with the presence of these DNA 's components.

In a need of making human DNA accommodative of various socio-economic changes occurring in the contemporary world, human DNA has been growing together with various scientific innovations and development. It is through this trend of development that, human DNA became associated with other social- economic use and functions including *identification of parentage*, *criminal investigation*, *establishment of kinship* and *DNA Commercialisation*, a newly growing DNA economic concern in the contemporary world of commerce. [9]

Commercialisation of DNA however, is an area which seems to be mostly beneficial to medical and research institutions than any other DNA actor. They have been reported to have had been making a lot of money in DNA inventions and related businesses. Thus it is a commercial aspect of DNA in which the *DNA sample owners* have remained less beneficiaries in such huge profit that has had been

[5] It is also a chemical compound counted as another building block of DNA.It is a nitrogenous base functioning as a component of nucleic acid.
[6] It is the compound constituting basis of nucleic acid which functions as a stabiliser of nucleic acid structure.
[7] In its combination with adenine, they are two nitrogen-conditioning bases pairing together in a formation of DNA's structure. It is therefore a chemical compound making the building blocks of DNA.
[8] See https://www.nature.com/scitable/topicalpage/gene-expression-regulates-cell-differentiation-931 accessed on MAY,11 /2023.
[9]Seehttps://economictimes.indiatimes.com/small-biz/startups/features/theres-money-you-can-make-selling-your-dna-shivom-will-help-monetise-it/articleshow/72451580.cms?from=mdr

generated by the same institutions from the use of their *DNA samples* in medical use and *research innovation*. Beneficiaries of DNA commercial deals and dealings therefore, are the *medical* and *research institutions* on the first instance and medical professionals in the second instance of it.[10] This is a concern that comes from ineffective regulation of Human DNA, the incidence which is detrimental to the DNA sample sources who are unequally beneficial to those mentioned DNA commercial actors' majority whom are medical and research institutions.[11]

Tracing individual's DNAs is done by using different samples extracted from the body of a particular DNA sample source (*a person from whom the DNA samples are extracted)* .These samples include although not limited to *saliva*, *hair*, *skin* and *blood* or *amniotic fluids*[12] .They are the samples from which individual's DNA is identified and established by relevant professionals and authorities through prescribed procedures identified for that particular process. It is through the same process that, DNA proprietary rights may be removed from the DNA sample source's body. It is at this particular point and through the same process that, DNA proprietary rights may pass from the sample source to any other person in some certain contractual and legal arrangements.

Where the DNA samples have been removed from the body of the sample source, the possibility of transforming and extending DNA private proprietary functions into public domain of its proprietary function, becomes obviously possible. This would also convey a meaning that , at a stage where DNA has not been removed from the

[10] *Moore v the Regents of the University of California* Cal (1990)
[11] *Loc.cit*
[12] Some fluid surrounding a fetus during pregnancy which is always very clear with a slight yellow colour. It is a part which has protective value on the life of a fetus. A baby in a womb is always safe from temperatures and injuries with the presence of this layer of fluids.

body of the *DNA sample source* no any other individual's right, other than that of the sample owner, can be established in the same *DNA samples*. Thus the latter has the exclusive right of ownership and use of DNA at this stage.

From the presentation given in this context therefore, *human DNA proprietary rights* cut across both private and public provinces of proprietary rights ownership. This classification is possibly made in reference as to *whether or not DNA is constitutive part* of the sample source's body. The important legal conception surrounding ownership in these two DNA's provinces of proprietary rights is found in the American famous case of *Moore v the Regents of the University of California*[13] and section 37 of the Human DNA Regulation Act[14].Where according to these two legal authorities, two different legal positions are established much as ownership and functions of DNA proprietary rights is concerned. These legal positions extracted from these legal authorities are that ,DNA proprietary rights are exclusively owned by the *sample source* when they are in his body still; and that, different DNA ownership other than that held by the *DNA sample source* can only be established when the *DNA samples* have been removed from the body of its sample source.

Above are important legal cardinal points relating to regulatory aspect of DNA and its variants as extracted from legal authorities given above. The logical inference which may be drawn from *section 37 of the Human DNA Regulation Act*[15] is that, the *DNA samples* are exclusively owned by the DNA sample owners. The general legal implication surrounding legal authorities above therefore is that, establishment of ownership in DNA is something which is not easy different from other cases relating to ownership in ordinary properties. The same legal

[13] 51 Cal (1990)
[14] *Op.cit,* FN 1
[15] *Loc.cit*

position held in these two legal authorities , forms important reference in this discussion much as DNA proprietary rights ownership and functions are concerned.

2. The Why Aspect of Human DNA

Since its formal discovery in 1950's human DNA has been used for different purposes capturing socio-economic variations occurring worldwide as time comes and goes. There may be other purposes surrounding socio-economic use of DNA but the major and renown functions surrounding its socio-economic use today are; the *archeological use of DNA* ; *the ancestral findings use of DNA*; *the prenatal use of DNA; the criminal investigation and prosecution use of DNA* and *the medical use of DNA*.

All the above enlisted DNA uses need a broad discussion not only for the purpose of appreciating socio-economic importance of this precious aspect of property but also its illuminate regulatory legal aspect. **Archeological use of human DNA** is always connected with records keeping for the purpose of having accurate historical information of people's communities. Historians always need to have a stock of reliable information on the origin, development and relations among human kinds in their relative communities the purpose which is at its perfect peak with the presence of DNA records. It is through this kind of DNA's test and relative records that, becomes easy to unfold the history of ancient groups in terms of dates and years plus the ancient communities' migration trends. It is within the same arrangement that the innate relations and difference among the people's communities may be established. DNA therefore makes the best method of achieving this historical objective for the same particular purpose.

Ancestral Findings use of DNA results from a need to trace genetic relation existing between one individual and his ancestral genetic line. It is commonly applied in order to place an individual in his proper line

of ancestors for various reasons. This tracing initiative has its different socio-economic reasons. One of those reasons is tracing a family history of a person or group of persons for individual or community identification and lineups. Immigration and citizenship eligibility has a close link with the origin of an individual and this may effectively and easily be attained by the assistance of **DNA** *tests* and *records*. To this end therefore, DNA has its significant use in tracing ancestral lineups for different reasons.

DNA Prenatal use is always conducted for diagnostic and medical treatment purposes. It may be both proactive and reactive depending on the purpose upon which it is conducted. DNA use is said to be proactive where it has been used as medical preventive mechanism. The approach involves medical attention done for the purpose of tracing possible genetic risks and diseases which a fetus is likely to be exposed to. It may also be reactive where it has been used for curative purpose the circumstance in which DNA is steered to pill genetic diseases at the very initial stage of human life. The good example to this medical initiative includes screening for metabolic and genetic conditions, for hearing and vision, and for congenital heart disease.[16]

DNA Paternity use is the most known form of DNA application among street and common men. It is therefore the true meaning of a layman's' perception on DNA. It may be conducted out of a personal curiosity or court order when identification of a child's parenthood is a matter of concern in those compelling reasons for its conduct. It is on this reason that this kind of DNA use has its connection with unravelling of matrimonial disputes and decision especially where determination of a child's fatherhood is a matter to be resolved in a given matrimonial setup. This use is very much restricted in terms of its conduct where an application to DNA's authorities needs be made before it can be

[16]See https://karger.com/dmj/article/4/2/133/104480/The-Importance-of-Early-Detection-of-Genetic.

conducted and the reason being its serious effects on matrimonial harmony and orders in the community.[17]

Criminal Investigation use of DNA is another kind of DNA's application having a purpose of aiding and simplifying criminal investigation. Through DNA tests and records , criminal investigation machineries will easily detect criminal suspects through the identities or objects found in scenes of crimes. This is always done by comparative analysis of the suspects' DNA individualities with those criminal identities found and collected from the scene of crime or a due process of crime commission .The comparison is made in order to correctly establish strong evidence on the suspect's involvement in commission of the alleged crimes. This is the simplified and effective investigative approach within criminal investigation process. To this point therefore, DNA is of evidential value in criminal investigation and prosecution .It is the same observation that was made in American case of *Andrew v State.* [18] In the case basically, the court accepted DNA evidence from which the accused was convicted of aggravated battery, sexual battery and armed burglary

Medical Use of DNA which reveals itself through research and innovation is yet another important use of DNA and its variants. Discoveries of DNA supported by scientific and technological advancement stimulated a rise of companies whose commercial medication has since ever been extended to doing wonders in human

[17] The sample source has no exclusive right to directly conduct DNA tests in his individual capacity. The law will always require the conduct of DNA tests to be applied by legally DNA authorized officers on his behalf depending on the purpose upon which the particular DNA test is conducted. District commissioners; social welfare officers; Medical Research Institutions; Medical Practitioners ;Courts of law and Police officers above the inspector rank are the legally identified and established DNA officers in Tanzania.

[18] See https://www.google.com/ Retrieved on 1st JANUARY 2023.

tissues. Discoveries include cloning of DNA for medication and medical discovery's purpose. Many companies have acquired patent rights for discoveries they have had made using DNA much as their commercial and medical practices and innovations are concerned. These companies' competitive innovations have been instigated by prodigious use of human DNA at their advantages and disadvantageous against the DNA's sample owners .This observation may be justified by unpleasant facts in the case of *Moore v. The Regents of the University of California University*[19] where the physician had taken an advantage of almost **$3 billion** from developing *human tissue* that he had removed from a patient's body in a due process of cancer medication. The latter however got nothing from this handsome business. The instance of the case therefore indicates the commercial use of DNA and its profit distribution among DNA commercial actors in the same context of it.

The discussion above elucidates the purpose surrounding the DNA use today. The same highpoints communicate a significant note that, DNA has socio-economic importance much as its use and benefits are concerned. There are those benefits which individual owners of the DNA samples (The DNA sample sources) will have exclusive ownership within them and those functions in which the general community is for public interest is entitled to have and benefit from them. The central concern of law in these two provinces of DNA use therefore, is a balance between public and individual use of DNA without redundant interloping between these two spheres of its application and use.

Effective DNA regulation therefore needs take into account the above equilibrium both between its public and private use of it as its nature would suggest . To meet this equilibrium of effective DNA use, three important precepts have been established and reflected in relevant laws

[19] 51 Cal.(1990)

accordingly. The precepts are of important contemplation on the effective allocation and limitation of DNA as reflection of individual and public use of it in that particular milieu. The three identified precepts in this context are;

I. That, DNA proprietary rights bear important functions cutting across both private and public province of its use.
II. That, DNA is owed by its individual source when within his body and such ownership however becomes limited when it has, with his consent, been removed out of his body, and that;
III. DNA should be regulated in a way that protects both individual and public use of DNA for the purpose of protecting individual's right to privacy and property ownership he so holds in his DNA samples on the first instance while accommodating the public use and benefit of it in the second instance.

It is through those precepts surrounding ownership in human DNA that states have been enacting laws regulating DNA use and benefit among the individuals, governments and their agencies , companies and other DNA stakeholders for suiting different socio-economic use and purposes of human DNA. Regulation of DNA therefore is made in order to have effective and efficient use of it .Regulatory initiatives are always done for the good purpose of protecting DNA sample sources' rights while at the same time allowing necessary use and development in DNA for public benefits. The benefits referred to in this context is a need to promote and accommodate scientific research and innovation in human DNA, the end results of which may include although not limited to, medical inventions and medication which are of significant use for various generations of a human kind both the present and comings. It is in a need to meet the above noble desire that the same position is held under the US Constitutional Fourth

Amendment[20] and the DNA Identification Act,[21] the DNA most important regulatory laws in the United States of America, the country which is the most successful state in DNA use and developments. The same legal endeavour is expected to be replicated in the DNA relevant laws of other states including Tanzania when it comes to the regulation of DNA and its related proprietary rights in the country.

3. Regulatory Aspect of Human DNA In Tanzania

Despite the identified socio-economic objectives above which DNA tends to realise and serve, DNA regulation in Tanzania was not attained as results of socio-economic pressure to achieve those identified objectives. It was necessarily born out of a community need to have establish protection of the individual's rights to privacy that has had been caused by lack of the DNA regulatory framework in the country before. This is because individuals were exposed to forceful DNA tests by state machineries especially the crime detective forces.

Avoidance of DNA forcible tests therefore was the most celebrated achievement of having the DNA regulatory legislative framework enacted in the country.[22] Individuals were reported to have had been forcibly required to give samples of their hairs, saliva, urine and alike by the government authorities in different circumstances relating to crimes detection and control. This incidence was commonly practiced by government coercive organs including police and prison institutions.[23]

[20] Of 1791.
[21] Of 1994.
[22] The Human (DNA) Regulation Act, No 8 of 2009.
[23] See https://www.loc.gov/item/global-legal-monitor/2009-04-29/tanzania-new-law-on-human-dna/ Retrieved on 3rd JANUARY 2023.

Under celebrated hopes of DNA legislation, it was thereafter expected that, state machineries especially the police would be limited if not prevented from forcible extract of the individuals' DNA samples except in some legally prescribed circumstances flowing through the appropriate legal channels and procedures. The DNA regulatory mechanism in the country therefore was mainly put in place for the purpose of avoiding coercive and arbitral extract of DNA samples as indicated above more than a legal desire to meet socio-economic demand for the use of it.

Close to avoidance of DNA samples abuse which has been as elaborated above, stood criminal investigation use of DNA, another justification of having DNA Regulatory framework in the country. This is because in the same given circumstances, the same piece of law would also be helpful in having a fair and just criminal investigation system which had has been attached to the use of unnecessary force more than professionalism itself. It has had been reported that some innocent citizens were victims of fictitious criminal charges that were severally initiated by the criminal prosecution machineries against innocent citizens for different interest other than that of public. [24] It was an audacity of hope therefore that, DNA use would be of a significant help in the matters pertaining to crimes detection and control in that realm of professional criminal investigation. Attainment of this criminal investigative objective would effectively help to avoid harassing the criminally innocent persons who were said to be subjects of coercive investigation approach in TANZANIA.[25]

Socio-economic demand which this law would generally seek to meet upon its enactment as stated before among other things includes, alleviation of matrimonial disputes relating to children parenthood.; simplification and modification of investigation of criminal offences

[24] *Op.cit,* FN 19.
[25] *Op.cit,* FN 22.

and it is through the same law that, medical research in DNA were expected to be formalized and subsequently flourish in the country. All these legal functions expected to be realized and protected under this precious piece of legislation are beneficial to the people both individually and collectively[26] something which denotes an idea that, DNA proprietary rights save both private and public functions .This is what has been the same trend of proprietary rights functioning in the country since its regulatory initiatives over ten years ago.[27]

3.1 A Legal Discourse of DNA Private Proprietary Rights in Tanzania

Primarily ownership in DNA is placed under the private sphere of ownership held by the DNA samples sources .It is through this notion that DNA samples cannot be removed from the sources' bodies unless such removal has been consented by DNA sample owner. The basis of human DNA public use therefore is the consent of the individual source of it and this might have been one of the reasons behind the legal language carried under section 37 of the Act.[28] The section holds a legal view that , DNA samples are the property of the

[26]See https://www.lrct.go.tz/uploads/documents/sw-1595875643-DNA.pdf retrieved on 3 rd. JANUARY 2023.

[27] As property DNA proprietary rights are made to be used in private area of individual use such as voluntary offering of DNA samples by the individual sources ; the right to non-divulge of the DNA's report of the human DNA sample source ; authorization of private individuals to have a right to conduct researches in human DNAs and the individual use of DNA to determine the relationship with his family members. The same proprietary rights are also guaranteed and enjoyed under the auspices of public use of human DNA including allowing conducting medical researches using human DNA; use of DNA in investigation of crimes and compulsory use of DNA to trace the possibly suspected disease infection against individuals of a certain related genetic line and a compulsory disclosure of the DNA results against the DNA samples source for the public interest.

[28] The Human DNA Regulation Act, *Op.cit.*

sample source, meaning a person from whom DNA samples were extracted.

The above legal line of reasoning however does neither contravene neither offend the fact that, individual ownership in DNA under the statute , is not construed to allow prevention of the use of DNA proprietary rights by other individuals either individually or collectively. The same public DNA use however is only possible when DNA samples have been removed from the body of the DNA sample source. There are various legal entitlements guaranteed to the individuals much as the application and use of DNA proprietary rights are concerned. These private functions and use of DNA proprietary rights as commonly applied include the DNA's use for determination of child parenthood ; DNA use for medical and non-medical research and DNA commercial use .These private use and functions of DNA proprietary rights may be elaborated in a broader context through the following trend of discussion.

The DNA use for the purpose of establishing parentage and kinship is the socio-economic use of DNA which has been identified and subsequently allowed under section 23 of the Act.[29] DNA plays important role in matters relating to identification of parentage and kinship among the family and clan members in the country. This role may be done out of the individual personal curiosity or under the court order. It remains a private DNA function where it is to be conducted out of the personal curiosity while plays public function where DNA test is to be conducted on the court order subject to the Law of the Child Act,[30] and the Law of Marriage Act [31] as established under the legal requirements of Part VI of the Act.[32]

[29] *Loc.cit.*
[30] No 21 of 2009.
[31] No 5 of 1971.
[32] *Loc.cit.*

In a due process of conducting DNA test to establish parentage or kinship, a person will not directly apply for it except through the DNA recognized requesting officers on his behalf if it is to be so conducted on his own curiosity .This will be the same case even where DNA test is to be conducted under the court order where written application will be made by the court under the legal capacity of requesting officer by a person requesting for it in that court capacity to the DNA Government Laboratory pursuant to section 25 (2) of the Act [33]. These authorities will always extract human DNA samples from persons against whom or at whose desires the human DNA tests are to be conducted. The samples so collected will be sent to the human DNA Government Laboratory or any other human DNA designated laboratory which will scrutinize the DNA samples before sending back the laboratory findings to those legally identified institutions for the intended use of it. This mode of conducting DNA requires compliance to the DNA sample source's human rights and dignity standards especially right to privacy and confidentiality as required under the statute and **Health Information System Guidelines** (HISG).[34]

Conducting medical and non-medical research in DNA samples is another area of private use of human DNA which has been guaranteed by the statute[35]. The Act allows conducting research either *medical* or *non-medical by* the research institutions or professional individuals using human *DNA samples*. This is the **DNA's** function that may be conducted by any researcher having capacity to so do subject to determination and assessment of the DNA's regulatory authorities, the

[33] *Loc.cit.* The provision establishes and recognizes court of law; Advocates; Social Welfare Officers ; Community Development Officers for Legal Matters ; Police Officer at least of the inspector rank ; Research Institutions that are mandated to engage in human DNA research; District Commissioner and Medical Practitioners for medical cases as the authorized institutions and personnel for extracting DNA samples for relevant tests.

[34] Of May 2019.

[35] *Loc.cit.*

DNA regulator in a particular. The law provides that, any interested person in conducting research either or not medical may apply to the DNA regulator for that particular purpose.[36]

The research rights in DNA is extended by section 38 (7) of the Human **(**DNA) Regulation Act [37] which confers patent right to the DNA researchers whose results are *newfangled* and *inimitable* to the preceding novelties in the *inventory world*. Patentability of DNA research stands as the spur mechanism from which **DNA** has been captured commercialization aspect of scientific invention. It is Commercialisation of DNA proprietary rights from which medical research institutions earn a lot of money .It is done by trading in DNA samples obtained from the sample sources majority whom are patients and other individuals who also are not beneficiaries from this commercial aspect of DNA .[38] It is an area therefore which jeopardizes individuals' rights to their bodies at the same time causing unjustified enrichment to the research institutions and individual researchers who have had been acquiring exclusive ownership in the patents from their scientific invention using human DNA samples they inexpensively extract from sourced individuals.
DNA commercial rights to the sample sourced individuals is another DNA private function reflected in the statute especially under the virtue

[36] Section 38 (1) and (2) of the Human DNA Regulation Act, *Op.cit*
[37] *Loc.cit.*
[38] In the case of *Moore* v *The Regents of the University of California*(*1990*) a patient whose body tissue had been removed for cancer treatment by the doctor claimed without a success for payment of money that had been raised through cloning of the same tissues from his Doctor. The statistics show that the value of the tissues that had been removed from his body for this medical development which he hadn't been informed of, had raised to almost $3 billion. So DNA would be treated of less commercial value in the days where advancement in science and technology hadn't been connected to the innovations in DNA the initiatives from which corporations are making handsome profits from the body parts which they sometime obtain at a zero cost from the sample sources who benefit nothing in a return.

of section 40 (2) of the Act which gives a contractual right to a DNA sample source to use his DNA samples for contractual arrangements and engagements . The provision states to the effect that, where a researcher has procured the samples source's consent on contractual basis, the disclosure of genetic information will be allowed subject to the sample source's next of kin's authorization. This would also mean more that; an individual is allowed to make an exchange of his DNA proprietary rights with the researcher by accepting a contractual consideration including a context of selling his DNA samples in the same contractual aspect of DNA proprietary rights. In a straightly stated language this legal provision would have conferred the sample sources with real and practical use of DNA proprietary rights in a very practical commercial context of the DNA use and benefit. The provision however is subject to some legal queries which are that;

I. How would a sale of human body tissues (DNA) be possible without a contravention to public policy?
II. Are the human DNA samples recognized to have legal values under the contract laws of the country to the extent of making them capable of forming lawful consideration under contractual relations and transaction?
III. If the human DNA samples are subjected to creation of contractual relations under the relevant statutes another quest would now be, under what legal principle(s) would the DNA sample source's next of kin have a room to authorize the transactions made by the DNA sample source of his exclusively owned DNA proprietary rights in the same contractual transaction and relationship?

From the presentation made above therefore , it may generally be concluded that, DNA proprietary rights under the DNA law(s) of Tanzania have been guaranteed and protected in a way reflecting individual ownership which is captured under the sphere of private functions of DNA proprietary rights in a very limited legal scope. This

limitation comes from the presence of legal challenges surrounding private function of DNA within relevant regulatory law(s) of the country as indicated above. The commercial aspect of DNA is regulated in way protecting and promoting medical research in the country. This is the important legal initiative which is prolific to the individual's health and national socio-economic prosperity. The problem associated with this legal protection and promotion however is lack of effective moral and economic protection of the DNA sample sources.

The law does not guarantee neither state protection of the DNA samples identity in the patent rights guaranteed to the researcher as it exclusively gives him legal and economic right under the patent rights so guaranteed. Acknowledgment of the DNA sample owner in the patentability of the research innovation made using the former's samples would have made a moral recognition and promotion of his identity. Likewise non recognition of the DNA sample owner in the patent rights when the use of his DNA samples results into the invention qualifying patentability, does on that reason prevent him to have an access to the economic gain obtained from the same invention.

3.2 The Human DNA Public Proprietary Rights Function in Tanzania

On the second part of its use, DNA offers a range of different uses falling under public domain of its function. As it was unfolded and communicated before, there is public importance attached to this proprietary item and device much as its use and benefits are concerned. The fact that individual's rights in DNA are not extended into the circumstances where its samples have been removed from his body, makes a legal possibility of its use by any other individual and public function in that particular context of human DNA use and benefit. This is because where DNA samples have been removed from the body of the sample source, become subjected to other individuals in terms of

their ownership including the public ownership in the same context of it.

The position above however is limited by the statute where under section 37 of the law [39] it has been provided to the effect that; DNA samples are the property of the DNA sample source. The same legal provision however doesn't bar a legal recognition that public use and benefit of DNA is very much obvious because of the nature and proprietary functions held in it. In a clearer language, this means that while DNA samples are exclusively owned by the sample source but that is not the same ownership in the incidental developments made from DNA's samples. In the latter DNA sample may be owned by any other person different from the DNA sample source.

The DNA's public functions as held in the relevant laws of Tanzania include Criminal investigation; the child parenthood determination; Medical Research and Pharmaceutical purpose. These are important functions that have a direct connection with the public use and benefit as the evidence that, DNA is capable of having public use and benefits held within its propriety rights. [40]These are functions which are justified by various legal principles and doctrines including the principle which is held in a Latin maxim of *Salus Populi Suprema Lex.*[41] It is through this principle that various legal limitations have been adopted and applied against some individual rights in different contexts of law. DNA has been subjected to this principle which will only allow a cherish and enjoyment of certain individual legal entitlements or rights in a way which does not offend public use and access to the particular subject from which those rights and legal entitlements emanate and flow. These public use and benefits of the

[39] The Human DNA Regulation Act, *Op.cit.*
[40] Section 23 *Loc.cit.*
[41] The health of the people is the supreme law.

DNA in the statute may be discussed in the following trend of narration and discussion.

The DNA use in criminal investigation and prosecution is one of the important public functions held under the statute. Sections 30 and 31 provide for procedure through which DNA may be extracted from the sample sources. One of the procedures demands a criminal suspect to be informed of the reasons behind taking his samples. This process must be done in presence of a parent or guardian if the DNA sample source is the legally incompetent person. In any case that the criminal suspect refuses his sample to be taken he will be punished pursuant to section 59 (4) of the Criminal Procedure Act[42] which imposes the payment of a fine not exceeding ten thousand or imprisonment for the term not exceeding twenty-four months or both of the two.

In connection with the point above said, therefore, it suffices to be comment , legal recognition and authorisation of the DNA use in investigation of crimes is the successful approach of crimes detection and control in the country. It is a legal approach which is considered to be of public use and benefit simply because crimes control is always done for the purpose of securing public safety and good. From this observation therefore, DNA , plays significant public role of ensuring public safety under the same particular regulatory wing.

To make sure that criminal justice is met within above criminal investigation and prosecution process, the Act also accommodates constitutional principles relating to criminal justice. This achievement comes from a legal requirement for a police officer to inform the criminal suspect of the intention and purpose for which his DNA samples are taken.[43] Having been extracted from the criminal suspect, DNA samples are then sent to the human DNA laboratory for

[42] [CAP 20 RE 2019].
[43] Section 30(1) (a)-(d) *Loc.cit*.

establishing the results of the suspicion upon which they were extracted. This process is done in a very convenient and prescribed procedures full of confidentiality and careful handling pursuant to the requirements of sections 31-37 of the Act [44] and the Health Information System Guidelines(HISG) [45]The purpose of all these is to not only to make sure that scrutinising DNA information is effectively done without a breach of the suspect's constitutional rights especially the right to privacy but also without offending intended investigation results. It is in the same circumstances that as the DNA sample source's property, the DNA's samples may be destroyed upon an order of the criminal suspect or his representatives pursuant to section 37(3) of the Act[46] soon after the intended investigation results have been established.

There are legal problems however related to this legal and precious function of DNA under the statute and its related practices perhaps. These problems are two which are involvement of different agencies other than the criminal investigation departments in scrutinising the DNA results on the first instance. This legal extension may have damage on the preciously intended investigation results surrounding the process. This is because such bureaucracy regarding DNA process subjects it to a so many individuals whose compliance standards and integrity may differ from one to another. It is something which may adversely affect the good end purpose of the process because of a big possibility to abuse professional standards and compliances by some of DNA process actors because of different factors including corruption.

The second problem comes from inactivation of the DNA National Data Base which has been established under the statute.[47] There would

[44] *Loc.cit*.
[45] Of May 2019.
[46] *Loc c*it.
[47] *Op.cit,* section 59 creates the DNA Data Base and Gene Bank for storing DNA information human genetic devices for medical treatment and research. It is

have been national programmes to make sure that DNA tests are conducted throughout the country. This would be for the purpose of securing every individual's DNA information and particulars within the national DNA Data base. The initiative would simplify and amplify the use of DNA for various individual identification purposes in the country including criminal detective initiatives. This function would therefore be helpful to different public agencies especially the criminal investigation officers and institutions for the purpose of criminal investigation. This would also subsequently simplify and modifying extraction of criminal evidence implicating the criminals when facing their criminal charges before the court of law.

Matching DNA particulars found in different scenes of crime with the DNA National Data Base (DNDB) would bring the appropriate and simplified effective means of detecting criminals in the country. It is the modern and most simplified tactic in detecting the criminal perpetrators that has had been done in other jurisdictions for a quite long period of time now.[48]

The human DNA use for various medical purposes is another important aspect of the DNA proprietary rights function. It is an aspect of law that falls under the public area of its use. Medical treatment is important life engineering device connecting scientific initiatives with individuals' lives. Millions of lives are saved by medical support that the victims get from diagnosis and treatment of different diseases and injuries. The statute has held this precious purpose in regulation of DNA activities and transaction in the country. While DNA sample sources own their DNA samples as provided under section 37 of the

something which justifies the presence of DNA public proprietary functions under the statute.

[48] The DNA index was established in USA via the federal state law called the DNA Identification Act,1994 and until 1998 states had collected a number of samples for the purpose of conducting forensic investigation of crimes.

statute, the patent rights in human DNA innovation and discoveries are exclusively owned by the researchers.

The position above is something which has motivation to various medical research institutions and individual researchers to have their dedication in research initiatives. Medical research initiatives assist very much coming up with medical solutions and measures relating to medical diagnosis and treatment. They are therefore useful for prevention; curing various diseases and discoveries of medicines, the medical devices which are of significant use for public health and life in general. This is another important public function held under the human DNA proprietary rights use. This human DNA precious function has been extended by section 62 of the statute by allowing compulsory research in a move to investigate any detected genetic diseases against individuals. Where DNA would be considered to assist a diagnosis of that particular diseases, researchers are entitled to compulsorily conduct research using human DNA samples as a need to come up with a scientific solution of preventing a more spread of the same disease , medical solution to cure it or a combination of the two.

It is under the need of having effective use of DNA public function above that various regulatory institutions have been established under the same statute. There has subsequently been legislative measures done in order to establish the DNA institutions for a proper and effective regulation of DNA in the country for that particular purpose. These regulatory organs are the DNA regulator office[49] Human DNA technical committee[50] human DNA inspectors[51] and human DNA Laboratory[52].The Government Chemist Laboratory Authority Act[53] was

[49] Section 4 *Op.cit.*
[50] Section 8 *Op.cit.*
[51] Section 11 *Op.cit.*
[52] Part III *Op.cit.*
[53] No 8 of 2016.

enacted to supplement the weakness that might accrue from the forensic and research use of DNA in the same regulatory context. This is another government commitment to have effective use and management of human DNA for public interest and safety in a place.

Despite the good regulatory move on human DNA use much as its proprietary rights are concerned, still there are some problems surrounding these commitments in both private and public province of DNA use as elaborated above before .To protect such precious and effective use of human DNA in the country therefore, some legal reforms are needed. It is the legislative approach which must be deployed and employed in order to have an effective realisation of both private and public function of human DNA in the laws and their related practices in the country.

4. Concluding Remarks

A discussion on the human DNA functions has indicated the reasons as to why human DNA and its related proprietary rights are important and beneficial in both spheres of private and public use. The human DNA private proprietary rights have been guaranteed by the relevant statute(s) with identified legal weakness surrounding its application in this province of its proprietary rights. It is the same case for human DNA public proprietary rights function. Unnecessary limitation and inefficient administrative approach on human DNA proprietary rights use and benefits are the foundation of this regulatory weakness in this legal aspect. These are the legal weaknesses caused by the fact that, the statute governing rights in use of human DNA in the country was not preceded by any National Policy something which might have caused crafting of this law without a policy guidance.

It does not bring national socio-economic health, crafting a law which is very sensitive to the people's lives in terms of its effects on their both physical and socio-economic aspects, without any preceding

national policy as the guiding instrument for that enactment. This is worsened by constitutional general view on human DNA rights and regulations. There should have been constitutional provision (s) on the use, benefits and control of human DNA proprietary rights.

The propositions above would have assisted avoiding a reliance on general provisions of Article 24 and 30 (1) of the Constitution of the United Republic of Tanzania[54] as the general clauses justifying and limiting benefit and use of human DNA proprietary rights. As the important but newly growing aspect of property law its sensitivity and thorough study were required before rushing to a craft of its regulatory law in that particular purpose and context. This would need a reflective constitutional framework and adoption of the National policy from which the regulatory law would have been subsequently crafted.

These measures above would have given a more serious and effective administrative and legislative initiatives on regulation and promotion of human DNA proprietary rights in the country than they stand today. It is a commitment which would have avoided the challenges surrounding human DNA's use in both private and public sphere of its proprietary rights and functions as indicated and discussed in this piece of academic work. The general work ahead of us as a national is alignment of constitutional breath to the human DNA and its related proprietary rights in a way that reflects its nature and social economic use of it. This constitutional alignment of human DNA in its true nature and socio-economic use of it will simplify and amplify other legislative and administrative reforms for the same purpose.

[54] Of 1977.

Re-Thinking the Justiciability of the Right to Housing in Tanzania

Joseph Jerome Muna*

Abstract

This Paper dwells on and develops the conceptual framework for addressing the issue of the right to housing in Tanzania. This particular right is traditionally considered non-justiciable. The rationale for this view is that, first, the realisation of the right to housing requires availability of resources and, second, the realisation of the right to housing is not instant but progressive. These features, in turn, disqualify the judiciary arm of government from dealing with its enforcement because these are policy matters that involve allocation of resources. Besides, such matters fall under the domain of the Executive arm of government alone. Furthermore, it is argued that progressive realisation poses challenges as to when exactly the right will be said to have been breached for purposes of commencing a legal action. By invoking some provisions of the Constitution of the United Republic of Tanzania, the paradigm that views all rights as interdependent and interrelated and by drawing the example from other countries, this research paper argues for the justiciability of the right to housing through law courts and the Commission for Human Rights and Good Governance. The Paper, further recommends for inclusion of the right to housing in the Bill of Rights of the Constitution of the United Republic of

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Tanzania, as an enduring solution for the problem of non-justiciability of the right to housing in Tanzania.

Keywords: *Socio-Economic Rights; Justiciability; Right to Housing; Policy Matters.*

1.0 Introduction

Housing is an accommodation for human dwelling. It is at times referred to as home or shelter. Housing in its connotation as a shelter broadly includes not only the roof over a person's head but also satisfactory secrecy, space, lightening, heating, ventilation, safety; physical accessibility, basic infrastructures, such as water supply, sanitation, and waste management facilities; accessible location with regard to work and basic facilities; security of tenure; structural stability and durability; suitable environmental quality as well as health related factors; all at an affordable cost.[1]

Housing is an important element of human survival, the need for reasonable housing to any human being is indispensable. In addition to nutritious food and clothing, housing also is a basic need of any human being. On this basis, one may rightly argue, therefore, that life itself is dependent upon housing in equal weight as it is depended upon, say, food or clothing. Housing shields a human being against harsh weather and danger, and offers privacy. Moreover, housing is a manifestation of human dignity. Human dignity of a person is seriously compromised if he or she cannot access reasonable shelter. Similarly, personality and privacy of a person is seriously infringed if he or she cannot access reasonable shelter. On the strength of the aforesaid, thus decent housing qualifies to be an entitlement (human right) of every human being.

[1] Art. 60 of the United Nations, Habitat Agenda: Goals and Principles, Commitments and Global Plan of Action, A/CONF.165/L.1, Istanbul, 1996.

Realisation of housing rights in Tanzania is guided by both domestic and international laws. Domestically, the principal guide in this aspect is the Constitution of the United Republic of Tanzania, 1977[2]. Other laws include the Basic Rights and Duties Enforcement Act, 1994 and the Commission of Human Rights and Good Governance Act, 2001. At international level, instruments to which Tanzania is a state party are the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966; the International Convention on Elimination of all Forms of Racial Discrimination (ICERD), 1965; the Convention on the Rights of the Child (CRC), 1989; the Convention on the Elimination of all Forms of Discrimination against Women of 1979 and the African Charter on the Human and People's Rights. All these instruments generally provide for the rights to housing.[3] In addition, there are also other instruments such as the Universal Declaration of Human Rights, 1948 and the Vienna Declaration and Programme of Action 1993. All these instruments, in their totality, provide that realisation of housing is dependent on the available resources and through time (that is progressively).[4] The realisation of the right to housing being dependent on the resources and time, states such as Tanzania consider it as optional hence categorising the right as non-justiciable (un enforceable) right, that is, such a right cannot be claimed by people before courts of law. A right is meaningless, however, if it cannot be claimed or enforced by a competent court or tribunal. A right to housing is thus a meaningless

[2] Art. 8 (1) (b) places the responsibility of people's welfare to the government, welfare includes housing.

[3] Art. 11 of ICESCR, 1966; art. 5 of ICERD, 1965; Art. 27 (1) and (3) CRC, 1989; art. 14 (2) (h) CEDAW, 1979. and Arts. 13, 14, 16 and 18 of the Banjul Charter; recognise right to access to public services, right to access to property, the right to health, and right to family, in this the Charter is construed as recognising the right to housing.

[4] Art. 2 (3) of ICESCR, 1966; Art. 2 (1) of ICESCR, 1966 and art. 27 (2) and (3) of CRC 1989.

notion in its un enforceable status. In this paper, thus, the enforceability of the right to housing in Tanzania is broadly examined.

2.0 The Status of the Right to Housing in Tanzania and Challenges of its Justiciability

Despite its relevancy for human dignity, survival and human life generally, the right to housing in Tanzania, just like in many other countries is not contained within the Bill of Rights; this is a part in a Constitution that expressly outlines rights that may be claimed in Courts of law. Non-embodiment of the right to housing in the bill of rights gives it a status of 'non-justiciable' right. 'Justiciable' rights on the other hand are those rights that can directly be 'claimed in Courts of law. The categorisation of the right to housing into non-justiciable rights is because of its social-economic nature. Most experts believe that the right to adequate housing is 'non justiciable' because its realisation cannot be achieved immediately but over a certain period of time; that is progressively. In that view, a clear line cannot be drawn at when exactly the right to housing has been violated. This view particularly applies where the duty-bearer is required to provide housing as opposed to, say, required to abstain from evicting settlers or destroying human dwellings. In the latter scenarios, the "progressive realisation" argument is irrational.

Non-inclusion of the right to housing in the Bill of Rights of most country's Constitutions including that of Tanzania is also grounded on the idea that the realisation of the right to housing depends on the availability of sufficient resources. According to this view, the distribution of the resources squarely falls in the domain of the executive, and not the judiciary. Thus, it would be ridiculous to subject the realisation of the right to housing to the judiciary which, in principle, is incompetent in policy matters particularly those relating to the distribution of resources. For instance, the Supreme Court of Ireland

adopted this narrow view in *O'Really and Others v. Limerick Corporation*.[5] In this case, which was about lack of appropriate residence for travelling groups, the Court found itself incompetent to make decisions affecting the allocation of state resources.[6] Like, in Tanzania, the right to housing under the Constitution of Ireland has a non-justiciable character.

As hinted above, there is no express provision on the right to housing in the Bill of Rights of the Constitution of the United Republic of Tanzania, 1977 (the "Constitution"). Normally, a right is justiciable only if it is expressly provided in Articles 12-29 of the Constitution.[7] Moreover, a right is justiciable if it is expressly provided for as a "right" in a written law.[8] An example of a right which is arguably justiciable in this manner is the right to clean and safe environment. This is because the Environment Management Act of 2004 expressly provides for it as a right.[9] Justiciability of rights which are provided in written laws, even if they are not included in the Bill of Rights is implicit in Article 30 (3) of the Constitution which confers jurisdiction upon the High Court for the violation of the Bill of Rights or a provision "*in any law concerning a right or duty*…" (emphasis added). Thus, since the right to housing is neither included in the Bill of Rights nor prescribed as a right in any written law, one may argue that the right to housing is not justiciable in Tanzania.

Apart from the challenges regarding enforceability of the right to housing due to its being not embodied in the Constitution, another challenge arises from the legal requirements recently entrenched in the

[5] [1989] ILRM 181, 3 May 1988.
[6] For similar approach see Soobramoney v. Minister for Health KwaZulu-Natal, (Constitutional Court of South Africa) [1997] ZACC 17.
[7] Art. 30 (3) of the Constitution of the United Republic of Tanzania of 1977. (Amended time to time).
[8] Ibid.
[9] S. 4 (1) of the Environment Management Act of 2004.

laws obligating persons who intend to institute a case on human rights violations to show, first, how they have themselves personally suffered from the violation and, second, that they have exhausted all the available local remedies prior to the institution of such case.[10] These requirements are such a challenge because by imposing the said restrictions, the right to housing matters are rendered nugatory.

3.0. Arguments for Non-Justiciability of the Right to Housing in Tanzania

The arguments advanced for non-justiciability of the right to housing are not convincing enough to warrant a general conclusion that the right to housing must be accorded a status of non-justiciable. Such arguments comprising of the "resources" argument and 'progressive realisation' argument, are all irrelevant in the situation of right to housing. They tend to generalise issues. The two arguments may only be relevant in some situations where the duty bearer is vested with positive duties but completely inapplicable in situations where the duty bearer is vested with negative duties.

In positive duties, linked to the right to housing such as provision of houses by the state the presentation of resources is as well purely an exaggeration. This is because the issue of "resources" in the realisation of human rights is somehow un avoidable. In reality, all rights, irrespective of the nature or status, whether civil, political or social, require resources. For instance, realisation of the right to take part in public affairs requires a huge amount of resources such as funds for holding elections. The 2020 general election in Tanzania, for instance,

[10] See s. 4 (3) of the Basic Rights and Duties Enforcement Act, Cap. Cap 3 (As Amended by s. 7 of the Written Laws (Miscellaneous Amendments) (No 3) Act 2020.

did cost 331 billion shillings (TZS 331, 000, 000, 000/=).[11] It would be absurd to argue that the right of an eligible voter under Article 21 of the Constitution be dispensed with because of lack of resources.

Furthermore, in the realisation of the right to a fair trial as warranted in the same Constitution, the need for resources is obvious. These will be needed, for example to construct court rooms, employing judges and even installation of furniture and computer systems. Besides, in relation to implementation of negative duties the issue of resources is completely inapplicable. In our case of right to housing in which negative duties would involve desisting from demolishing, evicting and destruction of homes the need for "resources" does not even have a chance. What type of resources, for example, are needed for not evicting people from their residences? Or why would one need money, for example, to abstain from demolishing or destructing peoples' homes?

Moreover, the 'progressive realisation' argument also lacks merit in the realisation of the right to housing by the duty bearers. It is not true that social economic rights such as the right to housing must in all circumstances be progressively realised. In some circumstances their realisation is immediate. For example, in the performance of negative duty by the duty bearers the realisation of rights is never progressive but instant. In the instances of evictions, demolition and destruction of homes the duty is immediate. In addition to the said arguments, also the law, in respect of some duties, sets a minimum core obligation to be met by the duty bearers. Examples of such obligations are those related to the right to dignity, privacy and right to life. Unlike many other social rights, therefore, the right to housing has a direct bearing on the dignity of a man, his privacy and above all the right to life. As hinted above life is dependent on shelter. Shelter protects a human being from dangers that may take his life. Moreover, housing is an obvious manifestation

[11] BBC News Swahili, 23rd October 2020 available at www.bbc.com/swahili/habari-54655423.amp (Accessed on 29th March 2022).

of dignity and privacy. In such a situation, therefore, measuring the progressive realisation is not difficult. It will only mean meeting a certain set minimum content.

On the basis of the hereinabove presented facts, it is argued, therefore that, justiciability of right to housing in Tanzania is possible. A number of reasons support this view. Hereunder is the revelation of the circumstances under which the right to housing can be considered justiciable.

3.1. Justiciability of the Right to Housing Through the Constitution of the United Republic of Tanzania

In Tanzania, the rights which are provided within the Universal Declaration of Human Rights (UDHR), 1948 is arguably justiciable even if it is not included in the Bill of Rights, particularly where a government agency acts below the standard anticipated by the UDHR. This is implicit in the Constitution which requires state authorities to ensure human dignity is well-preserved and safeguarded consistent with the spirit of the UDHR.[12] Thus, since the right to housing is expressly provided in the UDHR,[13] the government is required to ensure its realisation in both positive and negative dimensions. Whereas, the former entails that the government should take deliberate measures to ensure every Tanzanian gets reasonable housing, the latter entails that the government should refrain from interfering with peaceful enjoyment of the right to housing. The positive obligation may be achieved through creation of affordable housing schemes and mortgages. The negative obligation may be achieved by refraining from destroying houses or evicting lawful settlers.

[12] Art. 9 (f) of the Constitution of the United Republic of Tanzania of 1977.
[13] See art. 25 (1) of the Universal Declaration of Human Rights, 1948.

Accordingly, where a government agency or official acts below the standard anticipated by the UDHR, 1948 in regard to the housing right, such act or omission thereof will obviously be an infringement of the Constitution. Hence, although such act or omission would not be justiciable as a infringement of the Bill of Rights, it may be actionable under article 26 (2) of the Constitution. The latter provides for everybody's right to instigate legal action for purposes of safeguard the Constitution and the laws of the land, as per the relevant legally prescribed laws.

Moreover, eviction of settlers may also attract justiciability of housing rights because it also infringes the right to freedom of movement which is itself a justiciable right because it is contained within the Bill of Rights.[14]In its broad sense, the right to movement includes the right to choose residence anywhere in Tanzania. Article 17 of the Constitution is the relevant authority for the said, it clearly states that all citizens have right to freedom of movement and to live in any part of the land; Tanzania. (Emphasis supplied).

Thus, arbitrary eviction of a lawful settler is a clear violation of the right to freedom of movement. Therefore, the right to housing may be justiciable under the Constitution if its violation involves an element of the right to choose residence or to settle anywhere in Tanzania.

3.2. Judicial Approaches on the Justiciability of the Right to Housing

Though it is presented that traditionally for a right to be justiciable it has to be stipulated in the Bill of Rights, but currently there are some views opposed to this. Courts in some jurisdictions have taken approaches that ensure justiciability of rights which are not provided in

[14] The right to movement is provided under article 17 of the Constitution of the United Republic of Tanzania of 1977. It thus falls within the Bill of Rights.

the Bill of Rights. Such approaches may be adapted by Courts in Tanzania in order to uphold justiciability of right to housing. For example, in dealing with the right to housing of several persons who were evicted from houses, the Constitutional Court of South Africa held the state in violation of the right to housing for failure to ensure sensible delivery within obtainable resources for homeless people who were leaving in unbearable circumstances.[15] Under the "reasonableness" approach, justiciability of a right, regardless of its nature, is determined by the reasonableness of the action taken by the duty-bearer in dealing with the right. If the action or omission is so unreasonable and leads to undignified conditions to the right-bearer, the violation will be actionable. This is so even if admittedly the realisation of a policy objective squarely falls in the domain of the Executive.

The reasonableness approach may be taken in Tanzania because the right to housing is a policy objective of the State. This is because housing and welfare are inseparable. Under Article 8 (1) (b) of the Constitution of the United Republic of Tanzania, 1977, the welfare of the people is the primary policy objective of the Government. That being the case, any public action or omission which is unreasonable and leads to undignified and/or intolerable conditions of housing should be actionable. Although the State enjoys a wide margin of appreciation in policy matters especially those requiring resources, judicial actions may be taken if the particular action or omission is irrational.

A duty-bearer of the right to housing is always expected to be aware of the consequences of his or her decisions. Therefore, where an occupier has been allocated a place that later turns out to be unsafe, he or she should not be evicted from the unsafe location arbitrarily. Reasonableness in this case means the government should make a

[15]Grootboom and Others v. Minister for Housing (Cape Province), Constitutional Court of South Africa [2008] ZACC 19.

meaningful engagement with the evictee before taking any action.[16] Forceful eviction should be a last resort, otherwise any action would be considered unreasonable and thus actionable.

A right may further be justiciable on the basis not of its content but on its relation to dignity and equality. The "human dignity and equality" approach has been taken in matters relating to the right to housing. In *Khosa and Others v. Minister of Social Development and Others,*[17] the Constitutional Court of South Africa held unconstitutional the exclusion of permanent residents from security protection. The court decision of the court was founded on the dignity and equality principles and not on the right to housing *per se*.

Since the right to housing (shelter) is basic to every human being, its justiciability may also be established through the "minimum core" approach. Courts use the minimum core test to determine whether a particular right has a minimum legal content to which every person is entitled.[18] A right with such minimum legal content is considered self-standing and independent and can be enforceable regardless of other considerations. In the R v. *Secretary of State for Social Security, ex-parte Joint Council for the Welfare of Immigrants,*[19]the Court of Appeal of the United Kingdom (UK) applying the minimum core test found the regulations which removed housing benefits from certain categories of people uncompromisingly draconian because it compromised their welfare.

Furthermore, the right to housing though stipulated on the Constitution as directive principles of state policy (DPSP), still can be enforced. This

[16]Berea Township and Another v. City of Johannesburg and Others, Constitutional Court of South Africa (24/07) [2000] ZACC 19.
[17] Constitutional Court of South Africa (CCT 13/03, CCT 12/03) [2004] ZACC 11.
[18] Raphael Kamuli, Human Rights in the World: Standards and Protection. Gunewe Publishers, Mwanza, 2019. p. 126.
[19][1996] 4 ALL ER 385; [1997] 1 WLR 27529 HLR 129 (CA).

line of argument was preferred by the Supreme Court of Ghana in the case of *Ghana Lotto Operators et al. v. National Lottery Authority popularly known as Ghana Lotto case.*[20] In this matter the Supreme Court of Ghana overruled its previous decisions on the unenforceability of social economic rights (SER) stipulated as directive principles of state policies and continued to hold that the directive principles of state policies (DPSPs) in Chapter Six (6) of the 1992 Constitution of the Republic of Ghana is assumed to be justiciable except when the provisions lead themselves to an interpretation which renders them unenforceable.[21] Justice Date-Bah writing for the majority reasoned that 'all provisions of the Constitution are justiciable, unless there are tangible signals to the contrary in the text or content of the constitution'. In Ghana just like in Tanzania, the right to housing (a social economic right) is stipulated in the part of the Constitution which provides for directive principles of the state policy. In Tanzania too, Courts can take the view angle established by the Supreme Court of Ghana in the Ghana Lotto case.

3.3. Justiciability of the Right to Housing Through the Theory of Interconnectedness of Human Rights

It is a principle of human rights law that a right should not be viewed in isolation of other closely related rights. This view is supported by Article 5 of the Vienna Declaration and Programme of Action of 1993, a document that expresses a contemporary global view on the justiciability of rights. Basing on this idea, contemporary view suggests that justiciability of a rights should be viewed beyond mere inclusion or non-inclusion in a Bill of Rights or written law. A right should be

[20] [2007–2008] 2 SCGLR 1088.

[21] Nana Tawiah Okyir, ''Toward a Progressive Realisation of Socio-Economic Rights in Ghana: A Socio-Legal Analysis'', African Journal of International and Comparative Law, 25.1 (2017): 91, accessed on 9th November 2020. https:/ doi: 10.3366/ajicl.2017.0183.

considered justiciable based on its bearing to human life and survival. In other words, a right should be held justiciable if it is inter-dependent or interrelated to a civil right, especially the right to life. The right to life is not restricted to mere animal existence. Rather, it connotes something beyond just bodily existence. Therefore, deprivation of anything that supports life, including shelter, amounts to an infringement of the right to life.[22] Views similar to these were also taken by the Court in Tanzania in the case of *Joseph D. Kessy and Others v. the City Council of Dar es Salaam.*[23] In the said case, the High Court interpreted the right to a clean environment in the light of the right to life under Article 14 of the Constitution of the United Republic of Tanzania, 1977. Rejecting elongation of time to the respondent to continue dumping wastes at Tabata area, the Court reasoned that extending time would be deliberate exposing everyone's life to danger likely to infringe on the right to life under the Constitution. In a similar manner, the right to housing though non justiciable but because of its necessary connection to right to life, the Court can correctly enforce it just to protect life under Article 14 of the Constitution. Moreover, the African Commission for Human and People's Rights, a supervisory body of the Banjul Charter to which Tanzania is a member state, held that housing is inter-dependent and interrelated to the right to life.[24] Hence, its justiciability should not be viewed independent of the right to life especially where the duty bearer destroys houses or evict lawful settlers.

[22] Francis Colarie Mullin v. The Administrator, Union Territory of Delhi, (1978) 1 SCC 248; AIR 1978; SC 597; (1978) 2SCR 621.

[23] High Court of Tanzania at Dar Es Salaam, Civil Case No. 299 of 1988 (Unreported)

[24] The Social and Economic Rights Action Center and the Center for Economic and Social Rights (SERAC) v. Nigeria, African Commission on Human and Peoples' Rights, Communication. No. 155/96 (2001).

3.4. Justiciability of the Right to Housing Through a "Backdoor"

The right to housing may as well be justiciable before Court through a "backdoor", in the sense that a matter may be brought to Court through the Commission for Human Rights and Good Governance (the "Commission"). The Commission is established to entertain human rights matters generally. Article 130 (b) of the Constitution mandates the Commission "to admit complaints regarding human rights generally" (emphasis added). This wording suggests that the Commission can receive a complaint alleging infringement of any human right.[25] This wide mandate of the Commission is very advantageous because it allows complainants to file cases in relation to infringement of rights which are not included in the Bill of Rights like as the right to housing.

Thus, any matter relating to human rights, including the right to housing, may be brought before the Commission. It is noteworthy that the Commission is entitled to refer any case before it to the court or tribunal.[26] Thus, a matter relating the right to housing may reach the Court through the Commission. There is a vivid example of such a scenario which is connected to the right to housing. In 2001, Serengeti District authorities arbitrarily evicted residents of Nyamuma village and burned down their houses. This matter was taken to the Commission and the latter found the Serengeti District authorities in violation of the right to housing. However, the recommendations from the commission were ignored by the respondents leading to the Commission to recommend a reference of the matter to a regular Court. The case was

[25] The Commission for Human Rights and Good Governance Act, 2001 uses the term "generally" (Section 6(1) (b) of the Act).
[26] Art. 130 (1) (e) of the Constitution of the United Republic of Tanzania of 1977.

resolved by the Court of Appeal order passed for the enforcement of the Commission's recommendations.[27]

Furthermore, the institution of suits on behalf of individuals by the Commission through the 'back door' gets strength because the procedural requirements demanding the petitioners of human rights violation to show the manner, they have personally suffered from the violation alleged, and the obligation regarding exhaustion of local remedies prior to the institution of such human rights violation case as enunciated in the Basic Rights and Duties Enforcement Act,[28] do not bind the Commission. The Commission can institute a case without itself being a victim of the pertinent infringement of human rights and also without first referring the dispute to local remedies.

4.0. Searching for an Enduring Solution

There has been a loud outcry for a new Constitution in Tanzania and the incumbent President and ruling Political Party '*Chama Cha Mapinduzi' (CCM*) have given a green light signalling for the process to commence after 2025.[29] A durable solution for the enforcement of the right to housing would, thus, be effective, if included in the Bill of Rights of the upcoming Constitution. Without doing so, its enforcement would remain just a moot. In its current status, the right to housing is very imprecise and vague. It is not mentioned in the Bill of Rights nor as an express state objective. Worse still, there is no written law that expressly prescribes it as a "right". That imprecision and vagueness greatly challenges the justiciability of the right to housing, and, as

[27] See Legal and Human Rights Centre v. Attorney General and Others, Civil Appeal No. 88 of 2006.
[28] See s. 4 (3) of the Cap. 3 as amended by the Written Laws (Miscellaneous Amendments) (No 3) Act 2020.
[29] https://youtu.be/dw4xGnp7x4k, accessed on 21st August 2022.

already said above, a right that cannot be claimed remains a mere aspiration and meaningless.

Including a right to housing in the Bill of Rights is not a new phenomenon. Neighbouring Kenya has expressly included the right to housing in the Bill of Rights of its Constitution making its justiciability very practicable.[30]By being included in the Bill of Rights, the right to housing will have been given a meaningful status beyond mere matter of state policy. As such, any person whose right to housing has been denied, violated, infringed or threatened may institute a case in Courts of law for redress.[31]

The Constitution of Kenya has well balanced the progressive nature of the realisation of the right to housing and its requirement of resource on one hand and its need for enforcement to give it a meaningful status. Where the State alleges lacking the resources to implement the right to housing, the Court or tribunal shall place the burden of proving the unavailability of such resources upon the State. However, the Court or tribunal may not disturb the decision by a State organ concerning the allocation of available resources on matters of housing, solely on the ground that such Court or tribunal would have reached a different conclusion.[32] In distributing resources, however, the State is supposed to prioritise warranting of the broadest imaginable satisfaction of the right to housing considering the circumstances prevailing in Kenya and the rest of world, particularly on the vulnerability of certain groups or individuals.[33]

Despite its promotion of the justiciability of socio-economic rights, the Constitution of Kenya acknowledges that the full enjoyment of the right

[30] Art. 43 (b) of the Constitution of Kenya of 2010.
[31] Art. 22 (1) of the Constitution of Kenya of 2010.
[32] Art. 20 (5) (c) of the Constitution of Kenya of 2010.
[33] Art. 20 (5) (b) of the Constitution of Kenya.

to housing is progressively achievable. In this regard, the Constitution enjoins the State of Kenya to take legislative, policy or other relevant measure to set standards to attain the gradual realisation of this right.[34]

5.0. Conclusion

The substance of this Paper revolves around justiciability of the right to housing in Tanzania. It reveals the status of the right in the country, revisits the law regulating it and explains the rationale for treating the right to housing as non-justiciable. It is presented in this Paper that, traditionally, the right to housing, like many other socio-economic rights, is considered not justiciable. It is thus excluded in most Bills of Rights of the Constitutions of most countries of the world including the Constitution of the United Republic of Tanzania, 1977. The rationale for this narrow view is that the right is progressively realisable and its realisation requires availability of resources. Because of this, it is therefore not proper for Courts to order its realisation because that would mean usurping the executive branch of government's work. It is the latter, not the judiciary, is exclusively mandated to deal with policy matters and allocation of resources.

Regardless of all the said, it is however, presented in this Paper that the arguments advanced for non-justiciability of the right to housing are not worthwhile. Actually, the arguments would only be correct if the Executive's decision concerned is not irrational or unreasonable. Moreover, the right to housing would be justiciable if the Executive's act concerns a negative obligation say of not evicting lawful settlers. From this therefore, it is argued in this Paper that, it is possible to treat the right to housing as justiciable. This can be realised through various ways including using provisions of the Constitution that appears to restrict enforcement of the right to housing, by invoking the theory of

[34] Art. 21 (2) of the Constitution of Kenya.

interdependence and interrelation of rights, through the jurisprudence established by the law Courts and through the Tanzania's Commission for Human Rights and Good Governance.

The Right to Peaceful Protests and the Pandemic of Abusive Policing of Protests in Kenya

Dr Judith Adongo Oloo*

Abstract

This paper sets out to investigate the human rights violations in the backdrop of the right to peaceful protests in Kenya in the background of the protests between March and July 2023. Acknowledging the delicate national fabric that makes Kenya and the political climate ensuing therefrom, it sheds light on the legal framework that upholds the right to peaceful protests on the one hand and the legal framework that guides the operations of the police juxtaposing them against the contraventions of human rights of protesters as showcased in the 2023 March-July demonstrations. It identifies the points of divergence and gaps and makes a recommendation on the reduction of the human cost of police violence, thereby charting new frontiers for the protection of the freedom to peaceful protest in Kenya. Among the major findings are the existence of a solid and strong legal framework supporting the right to demonstration, the fragrant and pervasive violations of the law of the said right by the police and the high human cost emanating therefrom. It recommends remedial measures including inquiry into the Police acts and omissions in the March and July 2023 protests, reform of the laws governing policing in Kenya aimed at enhancing police accountability, capacity building of the service to enhance service delivery among others.

Keywords: Demonstration; Police; Human Rights; Abuse; Brutality; Violence; Reforms; Human Cost.

1.0. Introduction

Kenya as nation state experiences a tribal balance predicated on fragile cohesion that is more enforced by law than voluntary consent.[1] In addition, she also carries heavy historical injustices driven by skewed land rights, political representation and access to economic opportunities.[2] Indeed, the 2010 Constitution seems to have done little to address the deep lying grievances through devolution, culminating into deep seated simmering tensions. These tensions are normally best expressed through electoral contests for the presidency with past occupiers of the position largely abusing their powers to reward their communities. There is a well-founded feeling that without access to the presidency, the rest of the communities stand no chance at the national cake sharing table.[3] Demonstrations also known as peaceful protests have over the years become an important tool for expression of grievances.[4]

Demonstration is recognized both as an effective tool and tactic for airing grievances particularly in politics, consisting of like-minded citizens banding in solidarity to demand for the respect of their

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[1] Truth, Justice, and Reconciliation Commission, CIPEV Report (Waki Report) (2008). IX. Government Documents and Regulations. p 21-22.

[2] Susanne D. Mueller, 'The Political Economy of Kenya's Crisis,' Journal of Eastern African Studies,
Vol. 2, No. 2, July 2008, p 185.

[3] Truth, Justice, and Reconciliation Commission, "Commissions of Inquiry - CIPEV Report (Waki Report)"
(2008). IX. Government Documents and Regulations. p 28.

[4] The Armed Conflict Location & Event Data Project (ACLED), 'Situation Update, April 2023 Kenya: Rise in Disorder as Opposition Stages Mass Demonstrations' Kenya Situation Update: April 2023 | Rise in Disorder as Opposition Stages Mass Demonstrations (acleddata.com) accessed 14 September 2023.

right(s).5 Peaceful demonstrations have caused revolutions across the globe in the form of civil rights, pro-independence and even anti-apartheid movements in South Africa. In Kenya, the right to demonstrate is guaranteed by the Constitution and the Public Order Act.6 It therefore follows that any application of force by the police during protests must be underpinned by tenets of legality, necessity, proportionality and non-discrimination.[7] There have been many significant protests including the famous Unga revolution in 2011[8] and My dress my choice Campaign in 2014.[9] The ushering in of a new regime in 2022 has seen a rise in the number of demonstrations against increased cost of living informed by policies of the government of the day.[10] This was exacerbated by the amendment to the Finance Bill, 2023, which proposed to increase the amount of taxes to be paid despite many Kenyans already struggling financially.11

During protests, the police are charged with the responsibility of keeping the peace. Physical violence, tear gas and even firearms are not

[5] Sebastian Hellmeier, Nils B. Weidmann, Pulling the Strings? The Strategic Use of Pro-Government Mobilization in Authoritarian Regimes, Journal of Comparative Political Studies 2020, Vol. 53(1) 71–108.

[6] Article 37 of the Constitution of Kenya, 2010 and Schedule 7 of the Public Order Act, 1951.

[7]United Nations Office of the High Commissioner, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (07 September 1990), <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-use-force-and-firearms-law-enforcement> accessed 31 July 2023.

[8] Katy Migiro, Will Kenya's hungry masses heed the Unga Revolution call? Thomson Reuters Foundation News, (3 June 2011) <Will Kenya's hungry masses heed the Unga Revolution call? (trust.org)> accessed 19 November 2023.

[9] Dana Regev, Kenya's #MyDressMyChoice rally, Deutsche Welle (Berlin 17 November 2014) <https://www.dw.com/en/mydressmychoice-kenyans-hold-rally-to-support-woman-beaten-for-wearing-miniskirt/a-18069645> accessed 19 November 2023.

[10]The Guardian, Death toll rises as Kenya's cost-of-living protests continue (21 July 2023) <https://www.theguardian.com/global-development/2023/jul/21/death-toll-rises-as-kenyas-cost-of-living-protests-continue> accessed on 18 September 2023.

[11]Reuters, Kenyan police fire tear gas at protesters marching against Finance Bill,(June 6, 2023)Kenyan police fire tear gas at protesters marching against finance bill | Reuters accessed on 14 September 2023.

be used to disperse protesters.[12] However, in the past few years the country has experienced escalated police brutality towards civilians. For instance in July 2023, the UN Human Rights Office reported that up to 23 people had been killed and scores injured in the demonstrations in just a week, at the hands of the Kenya police, out of excessive use of force.[13]

2.0. Police Brutality in Kenya – A Pandemic?

The use of excessive force by the Kenya police is not anything new, going by the thousands of incidences of use of excessive and lethal force documented, particularly in unwarranted circumstances such as during peaceful protests.[14] The culture of brutality can be traced to pre-independence, when the main role of the police was to protect the interests of the colonial administration.[15] Kenya's history is dotted with police officers enjoying the freedom to demand bribe, abuse, falsely accuse and imprison, and even kill innocent civilians without fearing retribution.[16] Police have been documented to engineering forced disappearances and display general disdain towards the poor and

[12] Ibid.

[13]UN 'very concerned' over widespread violence by police during protests in Kenya, <https://edition.cnn.com/2023/07/14/africa/kenya-protests-united-nations-intl/index.html> accessed on 18 July 2023.

[14] The Armed Conflict Location and Event Data Project (ACLED), Situation Update - Kenya: Police Use Excessive Force in Response to Anti-Government Demonstrations (26 September 2023) <https://acleddata.com/2023/09/26/kenya-situation-update-september-2023-police-use-excessive-force-in-response-to-anti-government-demonstrations/#:~:text=of%20these%20incidents.-,Police%20Use%20Excessive%20Force%20in%20Response%20to%20Anti%2DGovernment%20Demonstrations,Unity)%20One%20Kenya%20Coalition%20Party.> accessed 19 November 2023.

[15]Matthew Carotenuto, Brett Shadle, Toward a History of Violence in Colonial Kenya, The International Journal of African Historical Studies Vol. 45, No. 1.

[16]International Justice mission, 'Police abuse of Power in Kenya: We won't stop until police are protectors from violence and not perpetrators of it' (International Justice Mission) <Police Abuse of Power in Kenya | IJM> Accessed 14 September 2023.

defenceless with little or no convictions for these wrongs.[17] Even after independence, they maintained the same *modus operandi*.

Under the presidency of Jomo Kenyatta (the late), the police were used to silence dissenting voices.[18] One of the most prominent examples when the police were used to advance political interest is the Kisumu Massacre 1969, in which President Kenyatta ordered the Presidential guard and police to open fire on civilians, killing up to 100 men women and children.[19] After the massacre, the police were used to put opposition leaders under house arrest.[20]

In a similar fashion, Kenya's second president Daniel *arap* Moi (the late) treated the police as a tool for suppression, extermination and torture of the opposers of his rule.[21] During his regime, Kenya experienced the height of human rights violations in history, as Moi accused pro-democracy advocates of subversion and detained them under inhuman conditions and without trial.[22] Even the church leadership was not spared.[23] Other documented instances of suppression

[17] International Commission of Jurists, Police abuse of power in Kenya: We won't stop until police are protectors from violence and not perpetrators of it. https://www.ijm.org/our-work/police-abuse-power

[18] Matthew Carotenuto, Brett Shadle, Toward a History of Violence in Colonial Kenya, The International Journal of African Historical Studies Vol. 45, No. 1.

[19] The Nation 'Dark Saturday in 1969 when Jomo's visit to Kisumu turned bloody' Daily Nation (Nairbobi,24 October 2018) <https://www.nation.co.ke/kenya/news/dark-saturday-in-1969-when-jomo-s-visit-to-kisumu-turned-bloody-101870> accessed on 25 October 2023.

[20] The Nation, 'Dark Saturday in 1969 when Jomo's visit to Kisumu turned bloody' Daily Nation (Nairobi, 24 October 2018) <https://www.nation.co.ke/kenya/news/dark-saturday-in-1969-when-jomo-s-visit-to-kisumu-turned-bloody-101870> accessed on 25 October 2023.

[21] Adar, K. G., "Human Rights and Academic Freedom in Kenya's Public Universities: The Case of The Universities Academic Staff Union" Human Rights Quarterly. 21 (1) (February 1999): 187.

[22] Korwa G. Adar, Isaac Munyae, Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978-
2001, African Studies Quarterly, Volume 5, Issue (2001).

[23] Ibid.

include the attack of opposition MPs at Kwanza in May 1998 when their meeting was suddenly declared illegal, and the police assaulted the attendees to prevent the rally from happening.[24]

The trend of violence continued even into the 2007/2008 post-election violence, the police force was implicated in innumerable criminal activities including murders, rape, extortion.[25] The Commission Investigating Post-Election Violence (CIPEV) established that of the 1,133 people killed during the violence, 405 died of gunshots from the police.[26] This made the more for police reform ever more urgent. Again, police brutality made headlines in the height of the Covid-19 pandemic lockdowns as 15 people were killed while others left with life-threatening injuries at the hands of the police.[27] Although Covid-19 was the unseen killer, the police were the visible killers[28] and as such, the real pandemic.

[24] Amnesty International, Kenya: Political Violence Spirals, (Amnesty international, 10 June 1998) <https://www.amnesty.org/en/wp-content/uploads/2021/06/afr320191998en.pdf> accessed on 25 October 2023.

[25] Truth, Justice, and Reconciliation Commission, "Commissions of Inquiry - CIPEV Report (Waki Report)" (2008). IX. Government Documents and Regulations. p 5.

[26] Republic of Kenya (2008), Report of the Commission into Post-Election Violence, (Nairobi: Government Printers), pp 384-393.

[27]The Guardian, Human Rights Focus: Nine weeks of bloodshed: how brutal policing of Kenya's Covid curfew left 15 dead, 23 October 2020, <https://www.theguardian.com/global-development/2020/oct/23/brutal-policing-kenyas-covid-curfew-left-15-dead> Accessed 31 July 2023.

[28] The Guardian, 'Human Rights Focus: Nine weeks of bloodshed: how brutal policing of Kenya's Covid curfew left 15 dead' The Guardian (London,23 October 2023) <https://www.theguardian.com/global-development/2020/oct/23/brutal-policing-kenyas-covid-curfew-left-15-dead> Accessed 31 July 2023.

3.0. Human Rights Violations within the March-July 2023 Demonstrations

In the following part, some of the key human rights violations are highlighted, they are:

3.1. Threats to the Life of the Opposition Leadership and threatening of Protesters

Reportedly, senior police officials described the protests as illegal and directed the police to use force to disperse them.[29] They warned that the government was 'ready' to combat protesters,[30] even as the president promised to mobilize every resource available to stop the demonstrations, and accordingly, ordered the use all means possible, including using state resources to hire vigilante groups, to ensure that no new demonstrations took place.[31]

3.2. Arbitrary arrest and Intimidation of prominent Opposition Leaders

It was reported that the sitting Member of Parliament (MP) for Embakasi, Babu Owino was arrested by unknown individuals on the eve of protests and driven to an unknown destination, later identified as Wang'uru Police Station.[32] His advocate was manhandled, and his

[29] The Standard, 'IG Koome bans Wednesday Azimio protests' The Standard (Nairobi, 19 July 2023) <https://www.standardmedia.co.ke/national/article/2001477045/ig-koome-bans-wednesday-azimio-protests%20)> accessed 31 July 2023.

[30] Opera News, CS Kuria Warned After His Careless Statement Predicting Raila's Death And Burial Date Next Week. https://ke.opera.news/ke/en/politics/2bdafdff0304d30979d91be1d3c01b12 accessed 31 July 2023

[31] Human Rights Watch, Kenya: Officials Threaten Protesters with Violence - Authorities Should Curb Hostile Rhetoric, Hold Police Accountable. https://www.hrw.org/news/2023/07/18/kenya-officials-threaten-protesters-violence

[32] Wang'uru is in Kirinyaga County, 184 kilometres from Nairobi.

family denied access to him[33] contrary to the rights of arrested persons.[34] During Babu's release on bail, the police caused chaos within the precincts of the court, assaulted a photographer and damaged his camera.[35] The judiciary condemned this act of harassment of journalists.[36] Immediately he was released, police threatened to re-arrest him.[37] In a statement issued to the public, the Law Society of Kenya (LSK) condemned this abuse of power by the police.[38] The LSK also called upon courts to uphold the rule of law and further castigated the denial of bonds in contravention of Article 49(2) of the Constitution.[39]

Kalonzo Musyoka, a former vice-president and one of the principals of the opposition claimed he had been under house arrest, preventing him from participating in the protests.[40] This was also said by the opposition leader, Raila Odinga whose bodyguard was arrested and detained for

[33] Nation, Police eject MP Babu Owino's family from police station; move MP to unknown destination, https://ntvkenya.co.ke/news/police-forcefully-eject-mp-babu-owinos-family-from-police-station-move-mp-to-unknown-destination/ accessed on 20 October 2023.

[34] According to Article 49 of the Constitution of Kenya, an arrested person's rights include to be informed of the reasons for his arrest, the right to remain silent; to communicate with an advocate among others.

[35] Ibid.

[36] Nation, Judiciary condemns harassment of journalists covering Babu Owino arraignment (Friday, July 21, 2023) <https://nation.africa/kenya/news/politics/journalist-assaulted-as-police-disperse-babu-supporters--4310888> accessed on 20 October 2023.

[37]Kamau Muthoni, 'High Court bars police from re-arresting Babu Owino' The Standard (Nairobi, 20 August 2023)<https://www.standardmedia.co.ke/article/2001477754/high-court-bars-police-from-re-arresting-babu-owino> accessed on 19 September 2023.

[38]Emmanuel Kipchumba,'LSK: Police should not use excessive force during protests' Nation (Nairobi,18 July 2023)<https://www.standardmedia.co.ke/health/politics/article/2001477485/lsk-police-should-not-use-excessive-force-during-protests> accessed on 19 September 2023.

[39]Ibid.

[40]Brian Oruta, 'Azimio Protests: I've been under house arrest since Tuesday - Kalonzo claims' The Star (Nairobi, 21 July 2023)<I've been under house arrest since Tuesday - Kalonzo claims (the-star.co.ke)>Accessed 19 September 2023.

three days without food and water in an unknown place, and later released without charge.[41] Not to mention opposition politician Maina Njenga's arrest**,** just two days ahead of the planned protests[42] and four days later, he was charged of preparation to commit a felony.[43] At the same time, another MP Anthony Oluoch was also arrested and charged four days later with 'mobilising the public to participate' in the demonstrations.[44] A popular blogger and critic of the Kenya Kwanza government Pauline Njoroge was also arrested and charged with 'being in possession of illegal drugs,' later changed to 'false publication' for a post she made on Twitter.[45] She was released four days later on free bond.[46] The LSK once again condemned the clandestine way civilians were arrested in a fashion similar to abduction the police and transferred to police stations, and other unknown places contrary to the Constitution.[47]

[41] Ibid

[42] The Nation, Mungiki ex-leader Maina Njenga arrested ahead of Day 2 of Azimio protests, https://nation.africa/kenya/news/politics/mungiki-leader-maina-njenga-arrested-azimio-protests-4309386

[43]Carolyne Kubwa, 'Maina Njenga, two others remanded until Tuesday' The Star (Nairobi, 24 July 2023). <https://www.the-star.co.ke/news/2023-07-24-maina-njenga-two-others-remanded-until-tuesday/>Accessed on 19 September 2023.

[44] Nation, 'Maandamano: Mathare MP Anthony Oluoch charged, defended by 20 lawyers' (Nairobi, July 24, 2023)<https://nation.africa/kenya/counties/nairobi/maandamano-mathare-mp-anthony-oluoch-charged-4313922>Accessed on 19 September 2023.

[45]She had posted; thus,'The massacre happening in Nyanza is heartbreaking. The Images are so painful to see, Men's organs are being mutilated, other forms of atrocities, crimes against humanity also happening especially in Nyalenda area. Why would the government persecute its people it's such a manner. Why would it terrorize its own citizen?

[46] Citizen Digital, Drug Charges Against Pauline Njoroge Dropped, To Be Prosecuted Over Social Media Post. Citizen (Nairobi, 24 July 2023) <https://www.citizen.digital/news/drug-charges-against-pauline-njoroge-dropped-to-be-prosecuted-over-social-media-post-n324133> accessed 25 October 2023.

[47]Emmanuel Kipchumba, 'LSK: Police should not use excessive force during protests' Nation (Nairobi,18 July 2023)

3.3. Police Brutality on civilians including women and children

Incidents of police brutality towards women and children were recorded. For instance, in Kisumu, a video of police gang assaulting a civilian went viral, and at the time of the publication of this paper, no one has been charged in relation to this offence.[48] The media reported the police to have fired tear gas into homes, neighbourhoods and schools, killing and injuring children.[49] Also, two children were shot by the police – Fidel Castro, a high school boy in Kisumu was shot 9 times and another 16-year-old in Nairobi.[50] Several children were also arrested and remanded with adults during the said protests, a matter that the LSK seriously condemned.[51]

The protests held between 19-21st July 2023 saw the death of 30 people by police,[52] and president Ruto was reported to have commended the police violence towards civilians[53] saying that 'criminals' must be dealt

<https://www.standardmedia.co.ke/health/politics/article/2001477485/lsk-police-should-not-use-excessive-force-during-protests> Accessed on 19 September 2023.

[48]Mike Yambo, 'Excessive force: Finding the location of viral video of man beaten by police during Azimio demos' Nation (Nairobi,15 July 2023)<https://nation.africa/kenya/news/finding-the-location-of-viral-video-of-man-beaten-by-police-4304224> accessed 31 July 2023.

[49]HRW, Kenya: End Abusive Policing of Protests - Accountability, Fundamental Reforms Urgently Needed. https://www.hrw.org/news/2023/05/31/kenya-end-abusive-policing-protests

[50]Angeline Ochieng, Daniel Ogetta, 'Police brutality: Kisumu student shot 9 times discharged as death toll keeps rising' Nation (Nairobi, 30 July 2023) <Police brutality: Kisumu student shot 9 times discharged as death toll keeps rising | Nation> accessed 1 August 2023.

[51]Emmanuel Kipchumba, 'LSK: Police should not use excessive force during protests' Nation (Nairobi,18 July 2023) <https://www.standardmedia.co.ke/health/politics/article/2001477485/lsk-police-should-not-use-excessive-force-during-protests> accessed on 19 September 2023.

[52]Nation Correspondent, 'The Daily Nation, Police have killed 30 protesters since March 2023-Amnesty International' The Daily Nation (Nairobi, Thursday, July 20, 2023) <https://nation.africa/kenya/news/police-have-killed-30-protesters-since-march-2023-amnesty-international-4309868> Accessed on 19 October 2023

[53] Esther Nyambura, 'You are doing a good job, Ruto tells police,' The Standard, (Nairobi, 19 August 2030)

with decisively.[54] Additionally, the police arrested more than 300 people amidst the public outcry.[55] The opposition leader's condemnation of brutality, and other global leaders call for the investigation of the police brutality on unarmed protesters was also reported. [56]

The law limits the use force by police to necessary such as achieve a legitimate objective like prevent further physical harm, and where possible issue an advance warning.[57] And in the context of violent protests, the use of tear gas must be proportional to the seriousness of the offense, must meet a legitimate law enforcement objective, and must be used in a way that minimizes the risk of harm.[58] The deliberate use of lethal force is only permissible when it is strictly necessary to protect life.[59] These guidelines are formulated to guide Member States in ensuring and promoting the proper role of the police and should be always upheld in the interest of human rights. Notably most cases of violence by the police go unreported because of the 'blue code' through

https://www.standardmedia.co.ke/national/article/2001477738/you-are-doing-a-good-job-ruto-tells-police

[54] Ibid.

[55] Al-Jazeera, More than 300 including lawmaker arrested after Kenya protests <More than 300 including lawmaker arrested after Kenya protests | Protests News | Al Jazeera> accessed on 19 September 2023.

[56]Africa news, Kenya's Odinga denounces 'unprecedented police brutality' against protesters. 25 July 2023. <Kenya's Odinga denounces 'unprecedented police brutality' against protesters | Africanews> accessed 1 August 2023.

[57]United Nations Office of the High Commissioner, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (07 September 1990), <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-use-force-and-firearms-law-enforcement> accessed 31 July 2023.

[58]Ibid.

[59] United Nations Office of the High Commissioner, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (07 September 1990), <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-use-force-and-firearms-law-enforcement> accessed 31 July 2023.

which the police protect each other. And when a civilian successfully reports a matter, it is never recorded or investigated.[60]

3.4. Police brutality towards the Media

Freedom of the press is guaranteed by the Constitution of Kenya 2010.[61] Attempts to suppress accountability on the part of the government through police crackdown on journalists covering the protests were documented.[62] Reportedly, the police assaulted journalists using water cannons and teargas, destroyed their equipment, harassed, and even forced some to delete footage captured.[63] And in yet another incident, the police manhandled a journalist within the precincts of the Milimani Law Courts during the arraignment of one Hon. Babu Owino. The court condemned the high-handedness of the police.[64]

[60]Thomas Reuters Foundation, Journalist Fellowship Paper: Media coverage of police brutality in Kenya's informal settlements (June 2002),https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-08/RISJ%20paper%20_Maurice_TT22_Final.pdf> accessed 31 July 2023; The Star, Media Council of Kenya condemns police attack on journalists during Thursday demos. 31 March 2023. <https://www.the-star.co.ke/news/2023-03-31-mck-condemns-police-attack-on-journalists-during-thursday-demos/> accessed on 1 august 2023.

[61]Article 34(1) of the Constitution provides that the State shall not interfere with the functioning of the media or penalize the media for opinions expressed.

[62] The Nation 'Kenyans describe officer who attacked journalists as embodiment of police brutality' The Nation (Nairobi,1 April, 2023) <Kenyans describe officer who attacked journalists as embodiment of police brutality | Nation> accessed 1 August 2023.

[63]Ibid.

[64] Citizen Digital, Judiciary Condemns Harassment of Journalists by Police at Milimani Court, 21 July 2023. <https://www.citizen.digital/news/judiciary-condemns-harassment-of-journalists-by-police-at-milimani-court-n323953> accessed 1 August 2023.

4.0. The Law Underpinning the Right to Protest in Keny

4.1. The Constitution of Kenya, 2010

Article 37 of the Constitution postulates for every person's right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities. The importance of this provision could not have been captured better than in Ferdinand *Ndung'u Waititu & 4 others v Attorney General & 12 others where it was said that the* of assembly provides an avenue for airing grievances by those who may be disenchanted, regardless of whether their opinion is popular or otherwise.[65]

Article 24 provides a framework for the rationale for limitation of rights and fundamental freedoms. It provides that rights can only be limited in accordance with the law and only to the extent that a limitation is reasonable and justifiable.[66] This provision is buttressed by Article 239(3) of the Constitution provides that in performing their functions and exercising their powers, the national security organs shall not act in a partisan manner; further any interest of a political party or cause; or prejudice a political interest or political cause that is legitimate under this Constitution.

Article 29 further speaks to the right to security of the person including the right not to be deprived of freedom arbitrarily or without just cause; detained without trial, and prohibition of torture, while Article 49 on the rights of arrested persons to be produced in court in 24 hours or as soon as practicable, Article 51 on the rights of persons in detention and even Article 53 (1)d on rights of children not to be exposed to violence among others. These provisions of domestic law embedding the right to peaceful demonstration are in tandem with international law, which is part of the law in Kenya by virtue of Article 2(5) and 2(6) of the Constitution. All these clauses complement the right to peaceful assembly.

[65] Paragraph 28.

4.2. The 1950 Public Order Act (as amended)

It articulates that as a pre-condition for convening a public assembly, the police must be given between 3 and 14 days' notice,[67] and where deemed fit, the police may prevent the holding of a public assembly if the date, time, and venue proposed by the organisers are already taken by another person or group.[68] The rationale for the said 'notification' is only for the police to arrange to provide adequate security for the protesters and must never be misconstrued seeking 'permission' from the police. Thus, any public assembly held contrary this law is an unlawful assembly, punishable by one year imprisonment.[69] Reportedly the Interior Cabinet Secretary proposed to amend the Public Order Act through Parliament by introducing a list of 10 conditions to be met before a protest is approved.[70] The conditions include limitations on the number of demonstrators, responsibility for clean-up costs and payment of damages to those harmed by activities demonstrators among others.[71] This paper posits that the proposed amendments do not align with the letter and spirit of the 2010 Constitution as they retain archaic claw back provisions that impede enjoyment of Article 37. This position is informed by the decision on ***Ferdinand Ndung'u Waititu & 4 others v Attorney General & 12 others***.[72] This study also points out that the 2019 amendment of the Public Order Act to introduce section 5(11A) and (11B) for imprisonment of protesters and for holding protesters

[67]Section 5(2).
[68]Section 5(6).
[69]Section 2(9).
[70]Victor Abuso 'Kenya: Government announces plans to amend laws on protest' The Africa Report (Lyon, March 30 2023)<https://www.theafricareport.com/296671/kenya-government-announces-plans-to-amend-laws-on-protest/> accessed on 23 October 2023.
[71] Institute for Democracy and Electoral Assistance, In Kenya, government announces plans for legislative amendment limiting constitutional right to assemble and protest<https://constitutionnet.org/news/kenya-government-announces-plans-legislative-amendment-limiting-constitutional-right-assemble> Accessed on 23 October 2023.
[72] [2016] eKLR.

accountable to pay compensation for property damaged during protests is unconstitutional as it limits the right to picket. This position is informed by the holding in the constitutional petition of the ***Law Society of Kenya v Attorney General & another.***[73]

4.3. The Universal Declaration on Human Rights (UDHR)

The above domestic legal framework is buttressed by international law, which is part and parcel of the laws of Kenya through Article 2(5) and 2(6) of the Constitution of Kenya. The Therefore, the UDHR, the Magna Carta of all human rights instruments is part and parcel of the law in Kenya. UDHR's Article 20(1) provides that 'everyone has the right to freedom of peaceful assembly and association,' which corresponding with Article 37 of the Constitution of Kenya as pertains to peaceful protests.

4.4. The International Convention on Civil and Political Rights (ICCPR)

Kenya has ratified the 1966 ICCPR Article 21 of which not only recognizes the right to peaceful assembly but also prohibits restriction thereof, where such restrictions do not align with laws that support democracy in the society, and those contrary to national security, public safety, public order, and even freedoms of others. This is reinforced by General Comment No. 37 by the UN Human Rights Committee[74] on Article 21 of the ICCPR, which embeds a comprehensive overview on the right of peaceful assembly, outlining the responsibilities of states in promoting the right to protest as well as providing guidance for protest organizers. Paragraph 8 invites States to respect the right to protest and to ensure its exercise without discrimination besides providing protection to protest participants. Paragraph 17 recognizes that there is not always a clear divide between assemblies that are peaceful and those

[73] [2021] eKLR
[74] Adopted in 2020.

that are not, but there is a presumption in favour of considering assemblies to be peaceful; isolated acts of violence by a portion of participants should not be attributed to the whole group. In this understanding therefore, some participants in an assembly may be covered by Article 21, while others in the same assembly may not.[75]

4.5. The African Charter on People's and Human Rights (ACHPR), 1981

Kenya is a State Party to the 1981 ACHPR and is therefore bound by Article 11 which recognises the right of every individual to assemble freely with others, subject only to necessary restrictions provided for by laws enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.[76] Thus, neither the police, the minister of interior, nor the president has the authority to outlaw protests. This notwithstanding, in the July 2023 protests, the government of Kenya through its machineries responded to the resumption of protests with intimidation and hostile rhetoric and in effect escalating civil unrest.[77]

5.0. Legal Framework Governing Police Operations

Many studies have been done on the police service in Kenya to find out why it has consistently failed to deliver. The thread that runs cross the

[75]United Nations, General Comment No. 37 on Article 21 of the ICCPR (Right of peaceful assembly) 17 September 2020 <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-37-article-21-right-peaceful> Accessed on 19 September 2023.

[76]Kenya is a State Party to the African Charter having ratified the Charter on 23 January. 1992.<file:///C:/Users/JO11956/Downloads/ACHPR_UPR35_KEN_E_Main.pdf > Accessed on 23 October 2023.

[77]Human Rights Watch, Kenya: Officials Threaten Protesters with Violence - Authorities Should Curb Hostile Rhetoric, Hold Police Accountable. https://www.hrw.org/news/2023/07/18/kenya-officials-threaten-protesters-violence.

public reports include the rising incidences of crime within the force, corruption, and unprofessional responses of the police to situations including mismanagement of peaceful protests.[78] Excessive use of force has been cited as well.[79] Some of these are attributable to systematic underfunding or misappropriation of funds. Consequently, the police force has been unable to develop into a service that meets international professional standards.[80] Although Kenya has enacted laws to guide and implement police reforms, their impact on police practice is at bare minimum, as powers of the day seems to only support reforms that are not radical enough to promote effective and impartial policing.[81] The following laws governing police operations in Kenya.

5.1. The Constitution, 2010

Vide Article 243 of the Constitution of Kenya, the National Police Service comprising of the Kenya Police Service and the Administration Police Service is established. The body ensures professionalism and discipline of the police service and promotes their transparency and accountability and in compliance with both constitutional and other human rights principles[82] The Inspector-General of the National Police Service is a presidential appointee with the approval of Parliament. He/she shall exercise independent command over the National Police

[78]Ruteere and Pommerolle 2003; Akech 2005; Commission of Inquiry into Post-Election Violence 2008; National Task Force on Police Reforms 2009; UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 2009, 2011; ICTJ Briefing paper2010; Ruteere 2011).

[79] Ibid.

[80]Anneke Osse, Police reform in Kenya: a process of'meddling through' Policing and Society (2016) Vol (26)8 <https://www.tandfonline.com/doi/epdf/10.1080/10439463.2014.993631?needAccess=true&role=button> accessed 1 August 2023.

[81]Anneke Osse, Police reform in Kenya: a process of'meddling through' Policing and Society (2016) Vol (26)8 <https://www.tandfonline.com/doi/epdf/10.1080/10439463.2014.993631?needAccess=true&role=button> accessed 1 August 2023.

[82] Article 244 Constitution of Kenya.

Service, and perform any other functions prescribed by national legislation.[83] And the Kenya Police Service and the Administration Police Service is headed by a Deputy Inspector-General appointed by the President in accordance with the recommendation of the National Police Service Commission.[84]

5.2. Public Order Act, 1950

As has been alluded to in the foregoing sections, this Act is concerned with maintenance of public order and ancillary matters thereto. Section 14(1) thereof addresses the magnitude of force which may be used under the Act, as to be 'not be greater than is reasonably necessary for that purpose.' Section 14(2) provides that nothing in the section prohibits and individual from using force for self -defence or to defend his/her property. Therefore, the police cannot apply force as it pleases, rather, force must only be applied where the situation warrants it, with due considerations of the effect of such use and of course, with the approval of supervisors. This law is buttressed by the National Police Service Act enunciated below.

5.3. National Police Service Act, 2011

Schedule Six of the National Police Service Act provides that police officers must employ non-violent means of crowd management, force may only be used when non-violent means are ineffective or without any promise of achieving the intended result. However, such force used shall be proportional to the objective to be achieved. Where the use of force results in injuries, the concerned police officers are mandated to provide medical assistance immediately, and failing to do so without a good reason is a criminal offence. Additionally, any use of force should

[83] Article 243 (1) and (2)
[84] Article 243 (3)

immediately be reported to a superior who shall then weigh in and advice, subject to these regulations.[85]

Additionally, should the use of force lead to death, serious injury and other grave consequences, Schedule Six requires that such be reported immediately by the officer in charge or another direct superior of the person who caused the death or injury, to the Independent Police Oversight Authority for investigation. This law prohibits Police officers from using firearms, particularly against children.

5.4. The Independent Policing Oversight Authority Act, 2011

It establishes the Independent Policing Oversight Authority (IPOA) to hold the police accountable to the public in the performing their duties; uphold professionalism, transparency and accountability; and to ensure independent handling of complaints about the service.[86] IPOA's vision is to conduct independent and impartial investigations, inspections, audits and monitoring of the National Police Service to enhance professionalism and discipline in the Service.[87] By virtue of its role, IPOA is smack at the centre of the current tension between the police and civilians. This is particularly so because many things went wrong in how the police handled the demonstrations, a lot of expectations the public has with the IPOA, yet so little to show in terms of impact. This is evident from the confession by the IPOA that it will 'soon' release a report, from the call on the IPOA by the Kenya National Commission on Human Rights to expedite on its investigations,[88] and the call by the

[85] Schedule six.
[86] Section 5.
[87]Section 6(a)of the Independent Policing Oversight Authority Act 2011
[88] Kenya National Commission on Human Rights, Kenya's Dangerous Path Towards Degeneration of Law and Order Amid Ongoing Demonstrations. Press release Nairobi, Tuesday 25th July 2023. <file:///C:/Users/JO11956/Downloads/KNCHR%20Press%20Statement-Kenya's%20Dangerous%20Path%20Towards%20Degeneration%20of%20Law%20and%20Order%2025%20July%202023%201030.pdf> accessed 1 August 2023.

opposition leader that the international community intervenes, or that the opposition is collecting evidence of police brutality to take to the International Criminal Court, since it did not appear like much was being done.[89] The public is imploring IPOA to urgently conclude investigations into police involvement in deaths of protesters through unjustified use of force in a bid to guarantee the right to peaceful assembly and protest for all, going forward.[90]

5.5. Persons Deprived of Liberty Act, 2015

The Act brings to life Articles 29 (f) and 51 of the Constitution regarding the protection against inhuman and degrading punishment on the one hand and rights of arrested persons on the other hand. It proscribes the right to humane treatment and human dignity of persons deprived of liberty; that they shall at all times be treated in a humane manner and with respect for their inherent human dignity;[91] and makes it a punishable offense to subject a person deprived of liberty to cruel, inhuman or degrading treatment.[92] It further promotes the right of an arrested person to communicate with their family or other person of their choice.[93]

[89] The Independent, Opposition in Kenya gathers evidence of 'police atrocities' against protesters to take to the ICC, July 25 2023. <Opposition in Kenya gathers evidence of 'police atrocities' against protesters to take to the ICC | The Independent> accessed 1 August 2023.

[90] Maryanne Anyango, 'IPOA rarely investigates protest related killings, HRW boss Says' The Standard (Nairobi, August 2023) <https://www.standardmedia.co.ke/counties/article/2001477642/ipoa-rarely-investigates-protest-related-killings-hrw-boss-says> accessed on 23 October 2023.

[91] Section 5(1).

[92] Section 5(2).

[93] Section 7(g).

5.6. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

These guidelines note the vital role of law enforcement officials in the protection of the right to life, liberty and security of the person enunciated in both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[94] In relation to dispersal of violent assemblies, Para 4 of the principles articulate that law enforcement officials may apply non-violent means before resorting to the use of force and firearms. Force and firearms may only be used only if other means remain ineffective or without any promise of achieving the intended result according to para 5. Additionally, arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence ,[95] and the guidelines shall not be deviated from unjustifiably.[96] These provisions align with Kenyan law which allows for the use of firearms during demonstrations in extremely exceptional circumstances, that is, whenever the circumstances,[97] and when used due caution and deliberation must be exercised.[98]

6.0. Discussion of Findings and Conclusions

The following are the highlights of the findings of this research:

Brutality and abuse of human rights is a well-grounded culture among police officers in Kenya**:** Violence and abuse of the law has been the hallmark of policing in Kenya from the precolonial period when the primary role of the police to assist the colonialists achieve their agenda,

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[94] Preamble of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-use-force-and-firearms-law-enforcement

[95] Para 7.

[96] Para 8.

[97] Schedule 6 of the National Police Service Act.

[98] Ibid.

to date.[99] This continued throughout *Mzee* Kenyatta's into Moi's, Kibaki's, Uhuru Kenyatta's and now Ruto's regimes in which police have been used to create disorder and to neutralize dissenting opinions. Sadly, 60 years later, little has changed as the police have become more braze due to lack of accountability for breach of duty.[100] Consequently, police violence towards civilians has culminated to estranged police-public relationship, which was one of the greatest contributing factors to the call for the 'famous' police reforms.[101] Reforms can transform the institution from the draconian policing style characterised by brutality, unresponsiveness and lack of accountability to responsive policing governed by law.

The second major finding is that Kenya's legal framework supports the right to picket domestically, regionally and even internationally.[102] Domestic level includes the Constitution of Kenya and supporting legislations.[103] The same goes for the regulation of police conduct in

[99] The Conversation, Why violence is a hallmark of Kenyan policing, and what needs to change (June 5 2020)https://theconversation.com/why-violence-is-a-hallmark-of-kenyan-policing-and-what-needs-to-change-139878#:~:text=What%20can%20account%20for%20the,poor%20accountability%20for%20police%20actions.
Accessed 27 July 2023.

[100]Afripost 'Is Kenya's police force above the law?' <https://afripost.net/2016/07/kenyas-police-force-law/> accessed 23 October 2023.

[101]Winfred Gakii 'The right to protest in poor Kenyan urban neighbourhoods' <https://www.article19.org/resources/blog-the-right-to-protest-in-poor-urban-neighbourhoods/> accessed 23 October 2023.

[102]Article 11 of the African Charter on Human and Peoples' Rights which provides that 'Every individual shall have the right to assemble freely with others; Article 11 of the Universal Declaration on Human Rights (UDHR) which provides that 'everyone has the right to freedom of peaceful assembly and association'; Article 21 of the International Convention on Civil and Political Rights (ICCPR) provides that the right of peaceful assembly shall be recognized without restrictions other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety.

[103] Art 37 of the Constitution of Kenya protects the right to demonstrate peaceably and unarmed; Article 24 which provides for the rationale for limitation of rights

situations of protests. Both laws speak a single language; that the powers of the police within the contexts of protests are to facilitate the processes by keeping the peace, and that force must be used as only as the last resort to achieve a specific objective, and with requisite permission.

This research further exposed a gap between the legal position and practice: The police are required by law to be non-partisan,[104] and to clearly communicate decisions and actions taken during or regarding the assembly and to manage the crowd by proactively to defuse tension. Their duty is not to disperse or call off a peaceful protest.[105] Guided by this therefore, the rhetoric that the government has repeatedly thrown around during the demonstrations that 'the opposition shall be held responsible for the death and destruction of property (if any) resulting from the demonstrations' have no place.[106]

Additionally, the Constitution of 2010 now articulates more vibrant provisions to reduce the powers of the police whilst enhancing the rights of civilians. However, the attempted reforms notwithstanding, little has changed for reasons including the lack of commitment to the process by

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and fundamental freedoms, that is, in accordance with the law and only to the extent that a limitation is 'reasonable' and 'justifiable' ; Article 29 provides for the right to security of the person including the right not to be deprived of freedom arbitrarily or without just cause; detained without trial, and prohibition of torture; Article 49 on the rights of arrested persons; Article 51 on the rights of persons in detention and Article 53(1)d protects children from violence.

[104]Particular attention is drawn to the Public Order Act, section 5 of which articulates that as a pre-condition for convening a public assembly, the police must be given between three- and fourteen-days' notice. The duty to notify the police has been misconstrued to mean asking for permission from the police, yet nothing could be further from the truth, as this a natural right only recognised and protected by the state.

[105] Kenya National Commission on Human Rights, 'The Right to Freedom of Peaceful Assembly, A Check-list for the Kenya Police and the Public' p 4. https://www.knchr.org/Portals/0/Statements/The%20Right%20To%20Freedom%20of%20Peaceful%20Assembly.pdf?ver=2017-07-27-112500-287

[106] *See fn.* 69.

key reform actors, that political support seems only to be for those (aspects of the) reforms that do not substantially enhance effective and impartial policing and that keeping the police service disorganized makes it easy to control and or misuse.[107] There is lapse in ownership and implementation of the law in this regard.

Third, regarding the latitude of human rights violations in the context of March-July 2023 demonstrations, this paper found that beside deaths, physical injuries were visited on civilians indiscriminately from infants through children, adults and even senior citizens, whether participating in the protest or not, nobody was spared from the violence. Other violations include death threats, arbitrary arrests, intimidations of protesters, violence towards the media, including violence within court precincts etc. It is also clear that the intensity and gravity of police abuse of human rights is escalating to heights not seen before as children/infants are assaulted as well, and police now invading private spaces such as homes.

Finally, an elaborate legal framework on the role of the police notwithstanding, the police service has fell short of it by far and for a long time. Factors promoting police brutality include but not limited to lack of accountability and partisan outlook of the police service. Lack of accountability is a thread that runs through police culture from pre-independence and is the bedrock of impunity in the service. This is evident from the IPOA receipt of over 1000 complaints revolving around police brutality,[108] and the Kenya National Commission on

[107] Centre for Human Rights and Policy Studies (CHRIPS), African Policing Civilian Oversight Forum (APCOF), Local Policing Accountability in Kenya Challenges and Opportunities for Action (2014) p 15 http://apcof.org/wp-content/uploads/2016/12/Local-Policing-Accountability-in-Kenya-Final-Report.pdf
Accessed 27 July 2023.

[108] The Star, IPOA receives over 1,000 complaints about police inaction, 13 July 2023. <https://www.the-star.co.ke/news/realtime/2023-07-13-ipoa-receives-over-1000-complaints-about-police-inaction/> accessed 1 August 2023

Human Rights (KNCHR), issued a press statement that increased police violence and degeneration of law and order indicated that Kenya was plummeting into anarchy.[109] KNCHR called out the police regarding torture, contempt of court, brutality towards journalists and civilians, arbitrary arrests and abductions, infiltration of the police by gangs *et cetera*. It further called upon the IPOA to hasten its investigations into the allegations of torture and ensure perpetrators face appropriate legal consequences.[110] Consequently, serious questions have been raised around IPOA's effectiveness.[111] This warrants an urgent review of its operations.

7.0. Recommendations

This paper reveals the forbidding picture of the pandemic of abusive policing of peaceful protests in Kenya, suggesting for immediate necessity for the government to take actions tackle the problem in the manner following hereunder:

One, inquiry into the Police acts/omissions in the March and July 2023 protests: Since IPOA appears to be overwhelmed, unwilling or lack capacity to deal with the matter, then a task-force be constituted to probe complaints surrounding human rights abuses and other forms of

[109] An independent National Human Rights Institution created by Article 59 if the Constitution of Kenya 2010 and established through the KNCHR Act of Parliament in 2011. The Commission, out of its mandate of watching over the Government performance in human rights providing key leadership in moving the country towards a human rights state.

[110]Kenya National Commission on Human Rights, Kenya's Dangerous Path Towards Degeneration of Law and Order Amid Ongoing Demonstrations. Press release Nairobi, Tuesday 25th July 2023 <file:///C:/Users/JO11956/Downloads/KNCHR%20Press%20Statement-Kenya's%20Dangerous%20Path%20Towards%20Degeneration%20of%20Law%20and%20Order%2025%20July%202023%201030.pdf> accessed 1 August 2023.

[111]Maryanne Anyango, 'IPOA rarely investigates protest related killings, HRW boss Says' The Standard (Nairobi, August 2023) <https://www.standardmedia.co.ke/counties/article/2001477642/ipoa-rarely-investigates-protest-related-killings-hrw-boss-says> accessed on 23 October 2023.

violence against civilians including arbitrary arrests, kidnapping, torture, assaults and even death of civilians including children, and those who gave orders for the same. Rogue officers should be prosecuted and punished to inculcate discipline.

Two, law Reform: Amending section 5 of the Public Order Act in 2019 to introduce 5(11A) and 5(11B) should have never happened in the first place. The amended sections should be expunged as they are unconstitutional, intended to limit the freedom of assembly through the backdoor by shifting responsibility from the police and placing the same on the participants of a protest. Additionally, the amendments proposed by Cabinet Secretary for interior in 2023 should not pass for the same reasons.

Three, institutional Reform: From the foregoing, the police reforms did not meet its objectives, as there is no difference between the 'police force' and 'police service' There is need to ensure ethnic and tribal balance in the police.

Four, continuous capacity building of the police in relation to their duties and the laws of Kenya: From the foregoing, the problem of anarchy in the police service is not the absence of law but enforcement thereof. There is need to engage the police on the law enlighten them on their roles under that framework.

Five, townhall with the Police: There is a disconnect between the police service and the people. Further, the police do not seem to appreciate the role of the media. This can be remedied through continuous engagement with the public. A dialogue with governments and civil society, and law enforcement department is an important step towards reconciliation.

Six, reorganisation of the IPOA: Despite 13 years of existence, IPOA does not have significant impact on the police, given that they have

continued harassing, maim, and even kill innocent civilians unabated. Reorganise and refocusing it to emphasise more on addressing pertinent as opposed to cosmetic issues is imperative. Additionally, if IPOA continues to get funding from the government, it will never be objective. This needs to be reviewed as well.

Multi Legal Dimensions of Image Rights Protection and Enforcement: Its Judicial Interpretation Hurdles in The Tanzanian Legal Context

Jackson Masoud Issah*

Image right is one of the legal devices covered under numerous laws falling under different legal dimensions of criminal and property laws. These multi legal dimensions to which image right is covered and so reflected are: the constitutional legal dimension on the first instance under two different constitutional auspices of human right as reflected under the constitutional right to privacy and individual right to property ownership. The second legal dimension of image right, is a criminal aspect of law which comes as an extension to the constitutional protection of individual's right to privacy. The presence of this legal plurality on image right protection and regulation, imposes its complex legal enforcement mechanisms emanating from those different legal auspices of its legislation. While legislative instruments of most state on protection of image rights are divided into criminal and property legal aspects, but the same legal discourse, does not clearly and precisely state as to how individuals may enforce image rights under those criminal or constitutional given legal basis of image right protection. Other legal complications on image right protection, are held under its proprietary legal aspect in which image rights are required to be enforced as either copyrighted works or trademarks. Enforcing image right under Intellectual Property Laws (IPL) however, seems to be complex too because of its nature. It is from the same legal complications that generally, courts of law have been giving verdicts on cases

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involving image rights on quite unclear and non-consistent legal basis in that context of judicial interpretation of image rights. Thus, this piece of writing was planned and conducted to understand and show how those regulatory challenges on protection and enforcement of image right are resolved in the Tanzanian jurisprudence. In its end, the writing concludes that, the same general legal controversies on image right protection exist under the Tanzanian laws with imprecise and ineffective court's reaction on effective legal protection and enforcement of image right by the Judiciary of Tanzania.

Keywords: Image Rights; Legal Challenges on Image Rights; Image Rights Protection; Image Rights in Tanzania.

1.0 Descriptive Aspect of Image Right

Image right is defined to mean among others, the right which an individual exclusively has to use his personality rights including autography, bibliography, characterisation, image, voices, photography and likeness against others. Image right has been symbolised through different names depending on the jurisdiction within which it is so referred to. Image right is referred to as publicity right in the United States of America, personality right in Europe and image right itself, the legal terminology that is commonly used in the United Kingdom (UK) laws and most common law jurisdictions. Image right therefore is more concerned with individuals' exclusive right to use his image in that given context of its regulation and protection.

Personality rights aspect of an individual image has two dimensions much as its practical use is concerned. These two practical dimensions are; publicity use of individual image for commercial purpose and privacy aspect of publicity. Legal initiatives and all other protective measures surrounding image right, therefore, address those two practical dimensions in a legal attempt to regulate and protect individual image in that given regulatory context.

From the legal context presented above therefore, image right seems to cut across both constitutional rights to property ownership and individual's right to privacy. Thus constitutional protection of individual image use to that end therefore, is centered into two constitutional dimensions of individual's right to property ownership[1] on the first instance and individual's right to privacy on the second instance of it.[2]

The commercial aspect of publicity is one of the common uses of individuals' images falling under those two constitutional segments above. This is because the individual's image may be used for commercial purpose and benefit by the individual image owner or any other person with the image owner's consensus. Likewise individual's image use may result into an interference with its owner's constitutional right to privacy which is measured in the end result of it plus the owner's consensus for that image given use.

There is a legal controversy however regarding qualification of individual's publicity in the same context of commercial aspect of it. This is because in most jurisdictions, only megastars in sports, meaning the athletes, have had been considered to be potential claimants in image right cases against commercial companies and individuals using their images for commercial purpose and use without their consent.[3] There is a minute possibility therefore to see ordinary citizens from streets successfully institute image right cases in those jurisdictions against commercial use of their image without their consent. Image Protection to these ordinary individuals are covered under constitutional right of privacy which is constitutionally guaranteed to all persons with no any sort of classification in that given

[1] See Article 24 of the Constitution of the United Republic of Tanzania, 1977 and Articles 19(1) (f) and 31 of the Constitution of India, 1949.
[2] Section 16(1) of the Constitution of the United Republic of Tanzania, *ibid*
[3] See https://www.txpatentattorney.com/blog/what-are-image-and-personality-rights/.

context of image right. It is from the same observation that, individuals will only have claims against use of their images in a way infringing their privacy, out of which ,a street man would have no legal action for use of his image without his consent thereto.

The above presented legal dimensions of image right are both constitutional and statutory, much as protection and regulation of individual image are concerned. Commercial aspect of publicity as a reflection of its constitutional protection is regulated by Intellectual Property Laws (IPL), the copyright laws on the first instance and the trademarks laws on the second instance of it, so to speak. Privacy aspect of publicity which is also a constitutional right, is regulated by Cybercrimes and Personal Data Protection laws where both of the two criminalise unlawful use of an individual's identities and personality unless through legally prescribed circumstances. Regulation and reflection of constitutional image right therefore, is regulated by Intellectual Property legal regime under copyright and trademarks law on the first context and criminal aspect of law held under Cybercrimes and Personal Data Protection laws in the second instance of the same given legal context.

Contextualisation of image right into statutory books subjects the former to the legal right which the image owner has against the entire world. It is from the same legal proposition that, image right is also enforced under the province of torts law much as its commercial aspect of publicity is concerned. There are two torts which are directly connected to unlawful use of image right. These torts are statutory tort of infringement of intellectual property rights and passing off image right. Tort of infringement would be extended to infringement if the image right had it been possible to prove its originality as required under the copyright laws[4] or otherwise registration as required under

[4] *Asege Winnie vs Opportunity Bank (U) Ltd & another HCCS No. 756 of 2013*

the trademark's laws.[5] These however are the legal requirements which image right in its nature has not managed to so hold. It is because of the inability to comply with those IPs regulatory legal requirements that image right has had been enforced and adjudicated under the tort of passing off .

Protection and enforcement of image right Therefore is of three legal wrinkles much as its legal aspects of protection are concerned. These three aspects which need an elaborative presentation are; constitutional safeguards of individual's image ; legislative aspect of image right and right in rem aspect of image right (the legal province of torts law).Elaborative presentation of these three legal aspects of image right protection and enforcement as elaborated before is made through the following academic route of presentation;

1.1 Constitutional Aspect of Image Rights

As it has been already observed above, image right is held under the auspices of constitutional proprietary rights and right to privacy. These two constitutional facets of image right are the basis of its legal recognition and enforcement. Thus any other legislative or administrative initiative relating to it, is required, under constitutional supremacy, to not offend, rather protect it, as an extension and reflection to Its constitutional protection and regulation. From the same constitutional position and reflection therefore, image right is acknowledged in different jurisdictions including Tanzania as an individual property which every image owner has in that particular context of its protection.[6] The second legal proposition from the same constitution province, makes image right an aspect of individual

[5] *Ibid.*

[6] See Article 24 of the Constitution of the United Republic of Tanzania, *ibid.*

confidentiality held under individual right to privacy incorporated in the constitution of different countries including Tanzania.[7]

From the above gone paragraph therefore, it may generally be concluded that, as an aspect of property, image right confers proprietary rights to its owner. The proprietary rights so conferred impose both right in personam (contractual right) and right in rem (rights accruing from tortious province of law) to the owner against others either individually or the entire world in the same legal context and set up of different given legal circumstances.

It is from the same legal promulgation above that, numerous cases have had been initiated, heard and decided against the use of one's image contrary to contractual terms and legal principles surrounding its lawful use. This is exemplified by the decision of the Zambian High Court,(commercial division), which came to conclude that, use of the plaintiff's image by the defendant did breach terms of their contract because of the defendant's extended use of it beyond the contractual scope of its use.[8] The case illustrates contractual liabilities accruing from a breach of contract which involves agreement between the parties on a use of one's image by the other under some commercial considerations, the legal position of image right, which is held under the right in personam.

There is important legal theme to understand on the above elaborated regulation of image right and this suggests that, individual image is a constitutional right held under proprietary rights and individual's privacy which the owner is constitutionally protected of. It therefore lays down both rights in personam and in rem to suit two different legal circumstances of its enjoyment as explained before. As an aspect

[7] See Article 16(1) of the Constitution of the United Republic of Tanzania.
[8] *Mulenga Beatrice Mubanga v. Chasemah and Advertising Media Limited* 2009/ Hpc /0524.

of proprietary rights, image right is always associated with Intellectual Properties (IPs) something qualifying it to the IPs regulatory and protection legal framework in different given jurisdictions. It is from the same reason that, legislatively, image right is protected by the Copyright laws protecting music, literary, sound recording and cinematographic works and trademarks laws which deal with trade identities in forms of symbols, letters and other marks having descriptive effects on the business and commercial merchandises and inventiveness. In the same context of proprietary rights aspect, image right is protected under two dimensions of torts law which are infringement of Intellectual properties and the tort of passing off which is available at common law.

The basic distinction between infringement and passing off in a context of copy right and trademarks laws under which image right is covered, is that, the registered trademarks including the image right need to be registered in order for a claimant to have a cause of action against the defendant where trespass is committed against them. Passing off in the same context is an action which stands against the defendant where the plaintiff's unregistered trade mark has been interfered by the same defendant. It is an action which is available in the United Kingdom laws and states having a common law legal system including Tanzania. Passing off therefore is only available in countries where unregistered trademarks would be enforced prone to its legal recognisance in relevant laws of those given countries or otherwise basing on common law approach in the given countries whose legal system recognise application of common law and its related legal principles.

On the instance and area of constitutional right to privacy, image right is considered and significantly used to protect human dignity and standards. Legal initiatives on this area therefore aim at protection of image rights owners from unlawful exposure of their images contrary to the human dignity and set standards of human rights protection and

promotion. To meet this constitutional precious legal aspect, governments have always been making criminalisation of some acts which are offensive to the lawful use of image right. Thus different laws have always been crafted to provide criminal redress on the same unlawful use of image right. Different states have put in place cyber-crimes and data protection enactments with a purpose of deterring unlawful or criminal use of image rights. To that end therefore, legislative aspect of image right holds both criminal and civil liabilities accruing from unlawful use of it.

1.2 Legislative Aspect of Image Rights

As it has already been stated before, constitutional reflection of image right in most countries is obvious. It is from the same constitutional reflection that, legislative measures have had been taken to govern and regulate image rights as a way of giving legislative impetus and practical manifestation of the constitution on the same aspect. Image right in Tanzania like so many other states however, does not have its specific and directly related statute. Image right is connected and subjected to copyright and trademarks laws though. The underlying legal requirement for copyrights is its legal need to be in its original form while the underlying legal requirement for trademark is its legal features of being registered.

This legal position above communicates an idea that ,as an aspect of copyright and trademarks laws, image right would be enforced if it is original (where enforced as a copyright) or where it is registered(where enforced as a trademark) failure of which, would bar the image right owner, on the same legal reason from claiming and enforcing it as his exclusive right.

It is from the legal position above that, image right is protected as the legal right which its owner is protected of against unauthorised use of it. As it is common to all other legal rights other than contractual

entitlements, image right imposes legal obligations towards the entire world and on that reason, protects individual image owner against any person standing nearby or distant to the image right owner. Through the same legal proposition, any person unlawfully uses the image of another becomes subjected to tortious liabilities in case the same owner sustains injury from such unlawful use of his image.

Sincerely speaking, enforcement of image right, takes its legal route under the IP's laws as stated before above. Enforcement may be through statutory tort of IP's infringement or passing off depending on whether the particular IP has statutory qualification to be recognised as a property under the same IPs laws. This observation is supported by what was observed in one Nigerian case of Banire vs Nta Star Tv[9] where it was held among other things that;

> … under Nigerian law, a category of rights known as image rights does not exist, and that where a dispute arose with respect to the ownership and exploitation of rights in a photograph in Nigeria, the law per the provisions of Sections 10 and 51 of the Copyright Act, was clear in the sense that, it is the photographer and not the person in the image that owns the copyright to the picture. In the words of Honourable Justice Muhammed Baba Idris (JCA), "What is evident from the above provision is that, the person who is a muse or the person in the photograph is not in fact the author and therefore he/she does not own copyright in the photograph. Rather it is the person who took the photograph that is the author."[10]

The case above therefore paints a legal memo that, image rights under copyright and trademarks laws will have its exclusive protection where it is original and registered prone to copyrights and trademarks laws in that legal context.

[9] (Ca /A/345/ 2017).
[10] *Ibid.*

In respect of the publicity aspect of privacy right as it was stated before, the legislative documents are the cybercrimes laws and personal data protection which criminalise unlawful use of one's image without his consent. It is through these legal perspectives that, these laws are extended to protection of constitutional right of privacy which the image owner has. It is an incidence therefore having legal implications against the user of one's image where it is proven that, such his unlawful use had an ill intention including tarnishing the owner's image to the public, defamation or any other exposure of the image calculated to be criminal acts. The same constitutional protection may be backed by constitutional litigation through legal procedures and avenues available for enforcement of bill of rights as provided for, in each given jurisdiction.

1.3 Image Rights in Torts Aspect of Law

As stated before, image right stands as a legal entitlement which an individual has under the statutes, making an inference of it being the legal right which a person exclusively has of the others (the right in rem).It does not necessarily need presence of contractual or any other related relation between the image right owner and the defendant for it to attract and impose legal liabilities in case it has been interfered with. The law of torts therefore comes in protection of image right within unlimited scope of socio-economic relations between the image right owners and the entire world as any other legal right would command and direct in the same protective and regulatory context.

It is from the same legal position above that, enforcement of image right takes the legal flow and status it has under relevant protective laws of it. Image right is therefore accompanied by two major types of torts in their enforcement which are the infringement of IPs rights on the first instance and passing off the image right depending on whether or not the same right in a given jurisdiction has statutory enforcement qualifications per relevant laws including originality and registration

requirements . Sincerely speaking, in the United Kingdom (UK) and other laws of most common law states, infringement of image right or any other Intellectual property right is a legal action which only stands where the particular image right or any other IP right can be proven to bear originality or registration requirement where it is a copyrighted work or trade mark consecutively.

It is from the legal auspices above, infringement of image right as enforcement legal device does not exist because of the originality and registration legal requirements surrounding enforcement of copyright and trademarks requirements under the IPLs. The nature of image right makes it difficult to prove its originality as originality in a photograph as one of the cinematographic works under the copyright law rests under a photographer other than the image owner.[11] The same legal position makes useless the registration of image right as the individual image would change differently according to the context and circumstances in which it was taken in terms of location, colour, geographical features and other different attribute surrounding it.

The courts in the United Kingdom and most common law jurisdictions have departed from statutory capture above by avoiding those statutory requirements in protection and enforcement of IPs right to which image right relates under the IP's laws. This avoidance of legal complications and restraints under the statutes has been effectively made through passing off which is the common law action involving enforcement of unlawful use of unregistered IPs rights including image right in that given legal discourse of image right protection and enforcement.

[11] *Ibid.*

1.4 Realisation of Image Rights under the Laws of Tanzania

Image right has been realised under the laws of Tanzania including the constitution of the United Republic of Tanzania[12] where right to property and individual right to privacy have been constitutionally realised and protected. It is from the same legal base that, other legislative measures were effected from these two constitutional dimensions of constitutional proprietary rights and individual right to privacy. Proprietary rights laws in respect of image right protection in Tanzania are the Copyrights and Neighbouring Act[13] and the Trade and Services Marks Act.[14] These laws were enacted for the purpose of protecting and promoting moral and economic rights of the artists, creators and owners of trade and services marks in the country. Image rights are attributed to the copyrights and trademarks as the cinematographically created works on the first part and the commercial descriptive marks on the second instance.

The Cyber Crimes Act[15] and the Personal Data Protection Act[16] are the legal instruments that were crafted for the purpose of meeting constitutional requirement of having individual privacy protected in the country. These legal instruments are there for the purpose of protecting and promoting human dignity and rights which in their nature and importance need to be recognised, realised and subsequently protected by the legal regime of the country. As it is common to criminal statutes and regulatory initiatives, the end purpose of these two statutes is a need to deter unlawful abuse of the image rights within the country .The purpose behind this criminal Legal aspect being a way of preserving

[12] *Ibid.*
[13] No 7 of 1999.
[14] No 12 of 1986.
[15] No 14 of 2015.
[16] No 11 of 2022.

and protecting individuals' images against their unnecessary exposure and use to public domain without their consent .

Monetary compensation in this aspect of legal domain may not be something suiting commercial value of the individual's image especially where the image subject is a famous person in a public domain. These people of public significant command like "Diamond Platinum's"; and Ally Kiba; Harmonize; Mbwana Samata ; John Bocco and a so many others may in no way become satisfied with payment of TZS 100,000/= and TZS 1,000,000/= payable from unlawful use of one's image as the minimum payment stipulated under the Personal Data Protection Act[17] depending on where such unlawful use of image has been committed by individual person(s) or corporate entity consecutively. The purpose here therefore is deterring members of public from unlawful use of image of others in a way offending individual's privacy which has its protection under the constitution.

As an aspect of IPs protected by copyrights and trademarks laws, image right lacks a more practical and possible statutory protection in the country. This is because while IPs are protected when they are in original forms and registered, originality of image right is a legal concept which attracts practical challenges including attributing copyright claims to photographers other than the image owners. This is a position which is complicated even in the states where copyright protection seems to be far high than most developing states including Tanzania. This may be exemplified by a decision in one of the US court's decisions regarding image right in a photography. This is the case of Burrow-Giles Lithographic Company v. Sarony[18] in which the US Federal court although allowed the photographer's copyright in the photograph he had snapped; the contrary but very logical argument was however raised by the other party asking how mechanical production

[17] *Ibid*.
[18] 111 US .53 (1884).

would be a creative work conferring the photographer with copyright in the work so mechanically made over the individual image owner.

Had the nature of image right subjected it to a possibility of registration as required under the trade mark and services Act, it would on that reason, have been easier to enforce the unlawful use of it by the owners of image rights against trespassers as the legally protected trade or services marks. Registered trademarks, including image rights (in case they were to be so registered) , have a tendency of excluding all other users to use the same trademark or the like trademarks to those registered and this was once observed in Tanzanian case of Kenafric Industries Limited vs Lakairo Industries Group Co. Ltd and 5 Others,[19] where it was observed among other things that, while defendant's registration of trademarks which were identical to those of the plaintiff was trademark infringement by the same defendants against the plaintiff , the supply of goods in a manner that could imply they were the plaintiff's,(the incidence which in its nature would not be subjected to the registration requirements) was a passing off the same either trademarks or goods.

From the academic communication above therefore, it may obviously be opined that, enforcing an image right under Intellectual Property laws is not an easy thing neither the obviously practical one, as proving legal requirements captured under those statutes may be something challenging. Suing under infringement of image right which requires originality and registration of the particular image right within relevant laws therefore, would mean to be something difficulty in that particular context of image right protection and enforcement. This is because of statutory compliance challenges as noticed above plus the fact that, most of public figured individuals are not used to the culture of registering their images. In England for example only very few

[19] Commercial Case No 132 of 2018, High Court Commercial Division (Dar es Salaam).

grandees have registered their images rights including the English famous footballer of all the days, David Beckham whose image right has been registered for community trading in different commercial merchandises.

Sincerely speaking as we communicate this scholarly work, there are only few cases which have been decided in respect of image right protection and enforcement in Tanzania. These few cases may be exemplified by the two cases of ;

i. Deogras John Marando vs Managing Director, Tanzania Beijing Huayuan Security Guard Service Co. Ltd[20] and

[20]Civil Appeal Number 110 of 2018 TZCT. The appellant in this case was the employee of the respondent since December, 2015. He lodged civil case no. 71 of 2017 before the Kisutu Resident Magistrates Court. The claim by the appellant was that, the respondent had used attributes of his identity or likeness to advertise his security company without the permission. Consequently, the appellant herein sought **inter alia**, compensation for such unlawful use of his image from which the respondent obtained profit. The matter had had been heard *ex-parte* before the trial Court following the defendant's default to appear. Despite of *ex-parte* proof, the trial Court dismissed the suit on 2nd day of February 2018. At page 3 of the typed judgment, the trial Court had the following reasoning; "... actually the plaintiff never told the Court that he suffered anything out of the act by the defendant and further he says that the defendant managed to make profit out of it but he never told how the defendant realised profit. It is always the duty of he who alleges to prove his allegation not just to throw a blanket the way he did. All what was done by the defendant was done in line with the employment of the plaintiff as a security guard. I don't think and it could not be wise to ask for the permission to advertise the company using him as employee so as to attract benefit for the plaintiff himself to get salary and to meet running cost of the defendant/Company." On appeal it was decided on the appellant's side and the court among others stated that, whilst personality rights are not much well established in our jurisdiction, Article 16 (1) of the Constitution serves the purposes. Other laws are inter alia, the Copyright and Neighbouring Rights Act, 1999 and the Cybercrimes Act, 2015 and for that reason therefore , there is no standalone law through which celebrities are protected of their images or likeness.

ii. John Raphael Boko vs Princes Leisure (T) Ltd,[21] Civil case Number 118 of 2022, The High Court of Tanzania, and Dar es Salaam Registry (unreported)

From the two cases above therefore it is, the plain truth that, image right has its protection in both theoretical and practical aspects of law within the country. Judicial decisions in the two cases above however raise some legal queries relating to effective protection and enforcement of image right in Tanzania. The queries so referred cut across three important legal aspects surrounding the same protection and enforcement of image right in Tanzania especially on the following: Legal Status of image rights under the Intellectual Laws of Tanzania; uncertainty on Enforcement of Image Rights under Torts Law, and, the Magnitude of Image Right under the Tanzanian Jurisprudence.

[21] Civil Appeal Number 118 of 2022 High Court of Tanzania, Dar es salaam registry (unreported).
In that case the defendant was the registered sport betting company in Tanzania. The plaintiff was named and presented as the successful footballer who has had been successfully playing in different domestic and international football game with his **Simba Sports Club** (SSC), the duly registered and successful football club within domestic and international football competitions and matches. Between *18th November 2021* and *1st December 2021,* the defendant, without the plaintiff's consent, using his instagram page, fixed the appellant images in her football betting advertisement for commercial purpose and gain. It was decided on merit among other things that, the use of the plaintiff's images in football betting advertisement had several adverse implications against the plaintiff including the possibility that, the competitive companies which would have had become interested to have a lawful commercial use of the plaintiff's image might have had been prevented to so use on that reason of the defendant's use of his images. It is from this position that the plaintiff was awarded with **Tshs 200,000,000/=** by the court to redress the loss that might have had occurred from such intervening prevention.

I. The Legal Status of Image Right under the IPL's of Tanzania

This is the important question that was to be raised and answered by the court in those judicial instances surrounding legal protection and enforcement of image right under the legal province of proprietary rights protection within Tanzania. The reason as to why this question was very much important to be raised and answered in that judicial context , takes into account three general propositions surrounding image proprietary rights protection and enforcement in each particular jurisdiction and Tanzania being one of them. The propositions are that:

a) Enforcement of image right would be made basing on individual's constitutional right to privacy or otherwise tort law under the auspices of legal right determined by relevant statutes, the IPs laws in a particular.[22]

b) Where it is decided on constitutional base of individual's right to privacy,*the human rights petition* or otherwise *criminal prosecution instruments and procedures ,* need be the legal channel through which the enforcement is so initiated and litigated pursuant to Article 30(3) of the Constitution of the United Republic of Tanzania[23] ; the Basic Rights and Duties Enforcement Act[24] in human rights enforcement fora and the criminal legally established procedures in criminal courts pursuant to the Personal Data Protection Act[25] and the Criminal Procedure Act.[26]

c) Where it is to be enforced under legal auspice of torts law, its enforcement must flow in the legal channel of either *infringement* or *passing off* image right, depending on whether the image in

[22] MLYAMBINA, J, in the case of *Deogras John Marando vs Managing Director, Tanzania Beijing Huayuan Security Guard Service Co. Ltd. Ibid*
[23] *Ibid.*
[24] No 33 of 1998.
[25] *Ibid.*
[26] CAP 20 of the Laws of Tanzania.

claim is covered under either the IPLs statutory compliance or under common law, much as its legal protection and enforcements are concerned.

It was a legal misfortune however that, the former case was generally decided basing on constitutional both base of right to privacy and proprietary rights in repect of image right enforcement without any regard as to whether the cause of action would have been either *infringement* or *passing off* image rights in the same given context of the court's proceedings and judgment.[27]

Different from the first case and its related judgment, the second case was instituted and determined under the tort of *passing off* without much discussion on justification of the same legal basis and approach in reference to Tanzanian laws and precedents, in its judgment and so

[27]The judge seems to be very much concerned with general legal discourse in which image right may be enforced. He, on that reason labored himself into a citation and discussion of various international legal instruments including the Universal Declaration of Human Rights (1948) and International Covenant on Economic Social and Cultural Rights,(1966);Constitutions of various states including that of India (1949); England Human Rights Act, 1998 and Article 16(1) of the Constitution of the United Republic of Tanzania to justify the constitutional right to privacy held in the image right. The same judge made a critical survey to various state copyright and trademarks related laws to justify infringement of image rights including the England Copyright, Designs and Patents Act 1988 ; The England Data Protection Act, 2018;The England General Data Protection Regulation, 2018 ; The England Trade Marks Act, 1994, and the common law judicial authorities. The same judge too went as far as, to the point of mentioning *passing off* as one of the causes of action under which image right would be enforced without however a discussion neither explanation regarding how *passing off* might have been attributed to enforcement of image right in the given context of his judgment. Despite the judge's efforts to explore out different legal dimensions of image right protection and enforcement which seems to be laborious, but his failure to identify and exemplify precisely the legal scope of image right protection under the relevant laws of the country and its connection with province of tort law, justifies an observation that, his judgment failed to precisely, correctly and clearly establish the precedence regarding effective and appropriate legal protection and enforcement of image right in Tanzanian jurisprudence.

quite was the submission made before the court.[28] Lack of comprehensive and specific discussion on a legal discourse of image right enforcement in those two cases among others, has made a failure to really appreciate whether image right is reflected and subsequently covered by the copyright and trademark laws in the country.

II. Enforcement of Image Rights under Torts Laws in Tanzania

As stated before, whether *infringement* or *passing off* image right is a legal position determined by its legal status under Intellectual Property Laws (**IP**Ls), both the copyright and trademarks laws of each given jurisdiction. It is obviously stated that, for a copyrighted work to be infringed, it must be proved by a claimant that his *artistic*; *music*; *literary*; or *cinematographic* work has a copyright. The work will be copyrighted among others, if it is original. The issue of image right originality is an idea subjected to some legal and factual complications, as it has been observed before that it was at some point of time held that; *the owner of copyright in photography is the photographer who snapped it and not the image right owner*.[29] It is from the same complication therefore that, a superficial mention of the legal discourse

[28] The judgment was made without much reference to statutory provisions which have legal shortfall regarding image right protection and enforcement within a legal context of Tanzania. The court may be appreciated for the efforts of citing common law cases and judgments from neighbouring jurisdictions including the Kenyan courts' decisions with no attempt to exactly explore out the Tanzanian jurisprudence to see what was exactly missing and on that reason to substantiate the departure from the by then Tanzanian legal position in order to give audience with the opportunity to see and appreciate court's contribution to the image right protection and enforcement within a legal context of the country. The court's failure to critically appraise the Tanzanian legal position regarding image right protection and enforcement before resorting to the common law tort of *passing off*, built unintended limited appreciation to this noble judicial creation and innovation on image right in the same legal route of its protection and enforcement in Tanzanian jurisprudence.

[29] *Ibid.*

to which image right relates without a more discussion of its legal ownership in those different legal dimensions would be nothing than judicial timidity to create and establish the *appropriate*, *precise* and *clear* legal position regarding image right ownership, protection and enforcement under the Tanzanian legal regime.

The same legal quandary is obvious regarding position of image right under the trademarks laws as an aspect of **IPL**. In some jurisdictions including **Nigeria**, courts of law have been refraining to enforce image right on the reason that, determination of its validity takes into account its legal status under Intellectual Property(IPLs) Laws of the country which normally requires a copy righted work to be original and the trademark to be duly registered , and otherwise that, the image right owner may have no legal action against its interference.[30]

The more complications regarding enforcement of image right are brought by what has been the legal status of image right protection and enforcement in the United Kingdoms (UK) laws and most common law countries, where image right has been legally recognised, protected and subsequently enforced under the common law tort of *passing off* available to the owners of unregistered trademarks. Image rights in those countries therefore, are regarded as unregistered trademarks the enforcement of which may be made via a common law tort of *passing off*.

III. Extension of Image Right to the Common Man in Street

This is another area surrounded by legal controversies in cases involving image right recognition, protection and enforcement within legal regimes of different countries. While in some countries including the United States of America (USA) and UK laws, image proprietary rights are attributed to individual's personality evaluated from public

[30]*Banire v. Nta Star Tv*, *ibid.*

assessment and insight on him. Image right in constitutional aspect of privacy however, is attributed to all individuals who are generally constitutionally protected and the enforcement of which, is done through human rights petitions and criminal procedures in relevant human rights and criminal courts. Thus proprietary rights of image right are afforded to individuals with high public command of their publicity other than ordinary men from the street in those given jurisdictions.

The case in the first instance gave a judgment in a favour of the Appellant, the formerly employed security guard to the respondent, the incidence in which TZS 50,000,000/=was paid as compensation for commercial use of image without his consent. The issue of publicity magnitude in this context seemed to be of less relevancy in substantiating claim in the case and so was in ascertainment and justification of the amount payable as compensation for such unlawful use of his image. Different story is brought by the decision in the second case where payment of **TZS 200,000,000/=** was awarded to the appellant, among other things, on the ground that, his image, as the famous footballer which had been used in commercial advertisement by the respondent without his consent, was something benefited the latter financially.

The legal scrutiny from those two judicial decisions therefore concludes that, the decisions did not add any anything new to the legal status of image right in Tanzania despite its unclear statutory reflection under the country legal system as indicated before. This is because from the same decisions above, neither of them triggered to comprehensively take into account the elements of *passing off image right* which in that given context would have had included a claimant's good will or a reputation which stands as something giving value to the individual's image right. It is from the same value of image that, the defendant accumulates gain from unauthorised use of the particular claimant's image.

In the former case as it has been stated somewhere before in this piece of literatures, the verdict was made basing on both constitutional right to privacy on the first instance and proprietary right which the image owner has against the entire world. Thus it is a case the decision which lacks clarity and coherence on exact cause of action from which the image right legal action would be said to have had accrued and subsequently justified thereafter. It is in this legal generality and plurality that becomes difficulty to clearly assess whether compensation was given to the claimant on constitutional base of his *privacy right* or *passing off* his image right by the defendant in that particular trend.

In the second case above at least some initiatives to unfold the elements of *passing off image* was attempted although not in a more detailed account of its full legal discourse. This is because at least compensation of **TZS 200,000,000/=**was ordered to be paid to the appellant from unlawful use of his image with a consideration that, as a celebrity, the appellant had sustained loss from such unguaranteed use of his image. From the general premise of the court's judgment, the following are the substantiating elements which were used as the ground for such compensation.

i. That, the appellant's image had a good will owned by him
ii. That, the image was used by the respondent without the owner's authorization
iii. That the use of image resulted into misrepresentation among the individuals that there was a commercial endorsement by the appellant
iv. That, the defendant obtained benefit from the image use and;
v. That, the appellant sustained loss from such use of his image without his consent.

It was in consideration of those legal discrepancies that, the High court of Tanzania would have been expected at least to a reasonable extent, coming up with a practical legal position relating to protection and

enforcement of image right in order to avoid imprecise and quiet unclear legal discourse regarding it ,in the legal system of the country. General terms and superficial discussion on enforcement of image right with no specified legal discourse in the decided cases, brought nothing significantly new, except presentation of new legal theme without any new input brought in that given judicial context of the court's adjudicatory role on interpreting the legal status of image right under the Tanzanian jurisprudence.

There may be several reasons for the judiciary missed out in the discussed legal discourse of Tanzania but the most underlying factor might have been expert judgements which were given in both trial and appellate instances of both the two decided cases above. Had both parties appeared in each particular case above , the High court, would conceivably get an abundant time of hearing them on merits. Legal submissions that would have been made by both sides would have on the same reason, assisted the court with a more critical legal research on image right protection more than it happened to be in those *ex parte* hearings and their relative judgments. It is from the same unbalanced hearings of the cases that their decisions haven't exhaustively answered some legal critical questions relating to legal regonition, protection and enforcement of image rights in the Tanzania legal context as observed above.

1.5 Concluding Remarks

From the discussion above therefore , it is very clear that, image right has been generally recognised by the constitution of the country in two provinces of human rights protection which are constitutional right to privacy and proprietary rights which the image owner would be entitled to. It is from these two constitutional proclamations that, image right protection and enforcement are attributed to two legislative waves of *criminal* and *civil* laws. Criminal legislations on image right protection

are the cybercrimes Act[31] and the Personal Data Protection Act[32] as observed above while IPs legislations in the same attribution form civil dimension of image right. The problem regarding enforcement of image right despite its constitutional and statutory recognition, is its lack of precise and clear provisions reflecting its protection under the laws of Tanzania. The constitutional lack of a more specific and precise protection of image right, has been causing a big confusion and lack of articulated scope of image right under the legislative instruments and judicial judgments as case studied by the two cases above.

Lack of clearly incorporated statutory proposition conferring legal rights to image owners has been another legal knock-back on the enforcement of the image right in proprietary aspect of it. It is from the same observation that, courts of law in Tanzania have not yet established a legal position whether enforcement of image right in the country can be initiated under the *infringement* or *passing* off image right something which has caused a missed legal base behind its enforcement in the country. Lack of precise and correct contextualisation of image right into the legal regime of the country by the courts of law in two studied cases has resulted into the judiciary's missed opportunity of coming up with precise and legally defined elements on *passing off* image rights cases in Tanzania.

The fact that, realisation of image right has its place in Tanzanian legal regime, makes an alert to have a clear legislative and judicial position regarding its protection and enforcement by demanding two important things on the board. These two areas of legal reforms are constitutional precise and clear proclamation on protection of image right and its related proprietary rights on the first occasion and appropriate assignment of the image right in the statutory provisions regarding its protection and regulation as the second instance of the given legal

[31] *Ibid*.
[32] *Ibid*.

reform. In pendency of these constitutional and legislative measures, judicial intervention in this quite unclear legal position relating to protection and enforcement of the image right, would have been more demanding than in its contrast legal circumstances. It is therefore called upon to make such legal reforms and judicial intervention in order to have accurate and elaborative legal regime in which image right is enforced in the appropriated and predictable legal circumstances as it is the projection under this piece of statute that, many cases will flow from this initial enforcement of image right protection and enforcement in the country.

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