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Editorial

Welcome to the second Issue of Volume II of the Institute of Judicial Administration Lushoto Journal for the year 2020. The issue comprises a total of eight (8) articles from various contributors. Contribution presented by the articles is immense and invalauble, giving insighful contributions to development of jurisprudence in Tanzania and commonwealth jurisdictions.

The first article is by ***Dr Oba***. The article gives a holistic view of innovative approaches used by the Federal Government of Nigeria in combating corruption. The article critically examines the mandate of Anti-Corruption and Transparency Units and the challenges that the units are facing, which must be properly addressed to avoid suffocation of the units.

In the second article, ***Ms. Mwanabaraka*** and ***Mr Kiwango*** dwell on the right to bail in the context of juvenile justice in Mainland Tanzania against the backdrop of general criminal justice. They review most recent literatures and case laws relating to juvenile justice and criminal justice. Of significance, this article shows how the juvenile criminal justice affects the general criminal justice and suggests how finetuning and harmonization ought to be done to create a holisitic framework for implementation of juvenile justice.

Dr. Tasco recapitulates access to justice before the East Africa Court of Justice (EACJ). He examines the rules and procedure in relation to accessing the EACJ. In so doing, Dr Tasco makes strides by showing challenges that the court encounters.

The fourth article is by ***Ms. Kaunda.*** It clinches on the African Growth and Opportunity Act (AGOA). It explores legal-economic challenges of accessing the US Market through AGOA using Tanzania's trade experience.

Mr. Eyongndi and ***Mr. Moronkeji*** look at the propriety of Nigeria's employee's right of resignation during the pendency of disciplinary action. Scenarios in which the courts have upheld the employee's right to resign and employer's right to terminate contract of employment are earmarked, and the authors recommend on how to balance the contending interests involved when an employee chooses to resign during the pendency of disciplinary action.

Dr. Satyanarayana examines the fears of foreign investment by a host country against the backdrop of the socio-economic benefits of the foreign investment, effectiveness of the law regulating the investment and dispute settlement machinery available. Lastly the author argues for enactment of universal law and establishment of world investment court as a means of addressing the challenges relating to foreign investment for both foreign investors and host countries.

Mr. Mshana in this article shows how ICT work as a tool of enhancing accessibility of justice in Tanzania. The authour recommends measures for improvements for effective use of ICT to enhance access to justice.

Mr. Lameck, in this article, highlights on the law and practice of plea bargaining in Tanzania. He examines the existing law in relation to the issues pertaining to satisfactory disposition of a case through plea bargaining agreements, participation of the victim during the whole process of bargaining, and the involvement of the court during the negotiation processes between the parties.

With the above snapshot, on behalf of the Editorial Board, I commend, and thank the contributors for choosing to publish with us. And in a recognizable manner, I would like to extend sincere and heartfelt appreciations to our Reviewers for ensuring that the articles published in this issue are rigorously peer-reviewed to assure quality. It is my strong conviction that readers will find the articles industrious, moving, and inspiring in developing jurisprudences.

Mr. Archibald Aristarch Kiwango
The Chief Editor

INNOVATIVE APPROACHES IN COMBATING CORRUPTION: AN EXAMINATION OF THE ANTI-CORRUPTION AND TRANSPARENCY UNITS IN MDA (S) IN NIGERIA

By *Dr. Caroline O. Oba*[1]

Abstract

The fight against corruption has proven to be very expensive and preventing it is cheaper and more effective. The setting up of the Anti-Corruption and Transparency Unit in the various ministries, departments and agencies (MDAs) of government in Nigeria is a response to the call for new and better ways of combating corruption in public service. Corruption as practiced in MDAs in Nigeria is a complex web and it will take an insider who understands the weaknesses inherent in the system that allows such corrupt practices to fester to be able to identify such weaknesses and review the system or otherwise carry out investigations that will expose corrupt persons. This work interrogates the effectiveness of this Unit and posits that though the initiative has great potentials in combating corruption in MDAs, the present procedure for the composition and funding of the Unit presents conditions that suffocate these potentials and will ultimately kill the initiative. The work recommends true independence of the Units from their parent MDAs in terms of security of their appointments as public officers and in funding of the Units as the way out of the present quagmire the Unit is in.

Key words*:* Corruption, Public service, MDAs

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1.1 Introduction

Corruption in Nigeria is endemic. It has eaten deep into the fabric of the Nigerian society such that it is safe to say in many respects that it has become the norm.[2] Those who have been entrusted with public funds have over the years in the life of the nation abused the trust and plundered the collective resources for their personal gains. The gravity of the looting of public funds is so outrageous that twenty-two years after the death of a former Head of State of Nigeria, monies that he is said to have allegedly stolen are still being recovered.[3] Needless to say that it has affected every sphere of the Nigerian Society ranging from, the educational sector, health sector, infrastructural developments, justice sector, and religious institutions. Decades of corruption in Nigeria had led to economic recession, high unemployment rates, poverty, near collapse of public educational systems, pollution of cultural and moral values and general indiscipline in the society. It has been said that, "… corruption continues to be considered the main barrier to foreign investment, inclusive growth and poverty alleviation in Nigeria".[4] Corruption is arguably one of the greatest challenges to national development in Nigeria.[5]

What the term corruption means has no universally accepted definition. The Corrupt Practices and Other Related Offences Act defines corruption to include acts such as bribery, fraud and other such like offences.[6] Corruption has also been defined as abuse of trust, abuse of public office for personal gain.[7] It is the exploitation of a system for undeserved advantage. These definitions encompass a whole range of acts including nepotism, bribery, embezzlement, extortions, collusion, unethical business practice, influence peddling, etc.

In the last twenty years the government had taken many laudable steps to stem this menace. These include the setting up of the Independent Corrupt Practices and Other Offences Commission (ICPC), the Economic and Financial Crimes Commission,[8] and the Due Process Office. These institutions add to existing ones such as the Code of Conduct Bureau. There are also pieces of legislation put in place to help the anti-corruption bodies effectively fight corruption. Examples of such laws are the Code of Conduct for public Officers,[9] Corrupt Practices and Other Offences Act, Economic and Financial Crimes Act, the Money Laundering Prohibition Act 2012, the Public Procurement (Amendment) Act 2017, the Administration of Criminal Justice Act 2015, the Criminal Code[10], the Penal Code[11] and various codes at the state levels criminalizing corruption and corrupt practices. The establishment of these bodies and laws has somewhat increased public attention to anti-corruption strategies and mechanisms.[12]

2 This opinion is also shared by Olaleye-Oruene T. *Corruption in Nigeria: A Cultural Phenomenon,* Journal of Financial Crime 1998 Vol5 No 3 pp 232-240 at p. 232 available at https://doi.org/10.1108/eb025836 accessed on 6 August, 2020, Igiebor G.O. *Political Corruption in Nigeria: Implications for Economic Development in the Fourth Republic, Journal of Developing Societies* 35, 4 (2019) 493-513. Available at https://journals.sagepub.com/doi/full/10.1177/0169796X19890745 accessed on 6 August 2020.

3 Nwabughiogu L. *Abacha Loot: How Much did the Late Head of State Steal?* Available at https://www.vanguardngr.com/2020/03/abacha-loot-how-much-did-the-late-head-of-state-steal/ accessed on 29 May 2020.

4 Oluokun F. *Corruption Risk Assessement and Intergrity Planning: Preventive Measures to Addressing Corruption in Nigeria*, (UNDP Nigeria, 2016, 11) available at www.undp.org/content/dam/nigeria/docs/gov/corruption%20Risk%20Assessment_Nigeria_2016.pdf accessed on March 7 2020.

5 Dania, P.O., Emuebie, J.E *Social Studies Education in the 21st Century a Tool for Fighting Corruption in Nigeria* African Research Review 2012, Vol 6(2) No 25, pp 181-191.

6 Section 2 of the Corrupt Practices and Other related offences

7 Bako G.N. *Legal and Institutional Framework for preventing and Combating Corruption* being a paper presented at a workshop on Data Collection and Investigative Skills for Corruption Prevention in MDAs for ACTUs held between 6-8 June 2017.

8 Economic and Financial Crimes Commission (Establishment) Act Cap E1 Laws of the Federation of Nigeria (LFN) 2004.

9 Fifth Schedule to the 1999 Constitution of the Federal Republic of Nigeria as amended.

10 Cap C38 LFN 2004.

11 Cap 89 Laws of Northern Nigeria 1963.

12 Ladan M.T. *The Role of the Administration of Criminal Justice Act, 2015 in the Trial of Corruption Cases in Nigeria,* being a presentation made at the Bayero University Kaduna State Law Students Association, Bayero University, Kano, Faculty of Law

To deal with the pervasive nature of corruption in Nigeria requires the collective involvement of all so as to stem the tide of corruption in Nigeria and particularly in the public service in Nigeria. Corruption perpetrated in Ministries, Departments and Agencies (MDAs) is in the most part systemic and usually strive on weaknesses and loopholes in the system. The anti-corruption bodies have long realized that investigating and prosecuting persons for corruption is very expensive and time consuming. It is easier and more effective to prevent corruption than to prosecute persons for corruption and recover proceeds of corruption. The ICPC needed to come up with an innovative approach to prevent and investigate corruption in MDAs.

Due to the fact that corruption in MDAs is in the most part systemic, it requires in-depth knowledge of the internal operation of these MDAs and how their day-to-day running breed corruption to effectively tackle it. How can the anti-corruption bodies accomplish the task of understanding the internal operations of the MDAs and be able to discover the weaknesses in the system that allows corruption to fester and proffer solutions to address such weaknesses? The issue of the know- how of the operations of an organization is not only a function of the expertise in a particular field but also about familiarity with the day-to-day workings of such entities. The most appropriate persons therefore to fit into this description are persons working in such establishment. In the words of the ICPC, those working directly in the running of MDAs should have a better understanding and ability to discover causes and fertilizing agents of corruption within such MDAs. [13]

The ICPC came up with the initiative of having a unit in every MDA. However, the unit will not be made up of officers from the ICPC but by members of Staff of the MDAs where this unit will be established. The rationale behind this was that the officers' work in each of these establishments and as such understand their operations and are in a good position to identify the system failures that allow corruption to be perpetrated and can undertake system reviews to address them. An approach of fighting corruption in MDAs that incorporates the staff of these MDAs becomes paramount. This led to the birth of the Anti-Corruption and Transparency Unit (Unit). The Unit operates as an extension of the ICPC in every MDA where they are present. Although it is mandatory for every MDA at the federal level to have established in it the Unit, the same cannot be said of the states in Nigeria.

This laudable initiative has great potentials to bring corruption in the MDAs to the barest minimum and have recorded some successes but in the main has not been able to utilize its full potentials in preventing and fighting corruption.

This work posits that the reason for this rests squarely on two factors, namely, the mode of funding of the Unit, and the control factor over the members of the Unit by the management of the MDA where they operate.

The remaining part of this article is divided into four segments. The first segment looks at the legal foundation for the operation of the Unit. The second segment examines the functions and powers of the Unit and the successes recorded. The third segment interrogates the reasons why the Unit has not achieved its full potentials. The concluding segment presents a conclusion which summarizes the author's observations and recommends the way forward.

theatre held on Saturday, 4 June 2016.

13 Gold F. *Impacts and Challenges of Anti-Corruption and Transparency Units* available at https://icpc.gov.ng/2018/03/05/establishment-impacts-and-challenges-of-anti-corruption-and-transparency-units-actu/ *accessed on 6 January 2020 at 3:59 pm.*

2.1 Legal Foundation for the Operation of the Anti-Corruption and Transparency Unit

The Independent Corrupt Practices and Other Related Offences Commission (ICPC) was established in Nigeria for the purpose of investigating and prosecuting persons alleged to have been involved in corrupt practices.

Section 6 of the Corrupt Practices and Other Related Offences Act 2000 empowers the ICPC to carry out specific functions. First, the statute empowers the ICPC to receive and investigate any report of conspiracy to commit corruption or the commission of corrupt practices. Secondly, the ICPC can carry out or supervise the carrying out of system review in public bodies which the commission finds out that such system facilitates fraud or corruption. Thirdly, the ICPC is empowered to instruct, advise or assist any officer of a public body on ways of minimizing or eradicating corruption and related offence from their establishments. The anti-corruption body can also advise heads of public entities on contemporary practices, systems and procedures that are compatible with the efficient discharge of the duties of such public entities and have the capacity to reduce the incidence of bribery, corruption and related offences. The ICPC is also mandated to educate the general Nigerian public about corruption and corrupt practices and its implication on nation building. Lastly, and very germane to this work is that the graft body is enabled to enlist and foster public support in helping it to combat the venomous vice called corruption.

The ICPC in carrying out its mandate and in line with the extant laws sought for approval to enlist public servants to help in the task of curbing corruption in the public service. The Federal Government of Nigeria gave approval to the ICPC to set up in every MDA in the country an Anti-Corruption and Transparency Unit (Unit).[14] The mandate of the Unit was to complement and strengthen the efforts of the ICPC in the areas of monitoring, reporting and preventing corruption in the various MDAs where they operate.[15] As such, the power to establish the Unit is conferred on the ICPC by the Corrupt Practices and Other Related Offences Act, 2000. With the above stated provisions, it is clear that the Unit has legal backing for its operations. Although the Unit is not directly a creation of statutes, the power of the ICPC to operate such a Unit having been derived from statute, it can be argued that the Unit has legal backing for its establishment and operations because section 6 (f) of the Corrupt Practices and Other Related Offences Act, 2000 empowers the ICPC to enlist public support in combating corruption. The setting up of the Unit is a form of enlisting the public to combat corruption.

In addition, the Chairman of the ICPC is, by section 7 and 70 of the Corrupt Practices and Other Related Offences Act 2000, empowered to make Standing Orders and Rules respectively for giving effect to the provisions of the Act. Based on these provisions, the Chairman of the ICPC made the Standing Order for the operations of the Unit.[16] The Standing Orders provide for the powers and functions of the Unit, its status,

14 By Circular Ref. No. OHCSF /192/94 dated 2 October 2001 and Circular Ref. No. OE/MS/MSO/196/S/7 dated 16 April, 2003.

15 *Gold F. "Establishment, Impact and Challenges of Anti-Corruption and Transparency Unit" available at https://icpc.gov.ng/2018/03/05/establishment-impacts-and-challenges-of-anti-corruption-and-transparency-units-actu/ accessed on 6 January 2020 at 3:59 pm.*

16 The extant Standing Order being the Standing Order for the Operations of the Anti-Corruption and Transparency Units (ACTUs) in Ministries, Department and Agencies (MDAs) 2014 which came into effect on the 1st of January 2014.

the composition and appointment of members of the unit, the tenure of members, protection mechanism for members and informants, funding of the unit, meetings and reports of the unit. These will be discussed in the segment of this work. Within the scope of this work, only the status, composition and appointment of members of the Unit, the functions of the Unit, and the funding of the Unit will be discussed.

2.2 The Status of the Unit

By regulation 3.1-1 of the Standing Orders, the Unit shall operate in each organization as an autonomous outfit with functional linkage with the office of the Chief Executive of the respective establishment. In addition, the guarantee for the independence and protection of the Unit rests on the MDAs where the Unit is operating. The Unit is to operate independent of the management of the MDAs in which they are operating. In carrying out their functions, they do not need the consent of the chief executive officer. They can investigate any allegation of corrupt conduct and carry out system review of any department independently without recourse to the management of the MDAs. The efficacy of this autonomous status will be interrogated subsequently in this article in conjunction with other parameters of the Unit's operation.

2.3 Composition and Appointment of Members of the Unit.

The Unit is made of a Chairman, a secretary and such number of other members as the size, peculiarity or complexity of a particular MDA may accommodate. However, in any case the membership of the Unit shall not be less than five.[17]

The head of the Unit, who is referred to, as Chairman, must be an officer of Management Level not being less than Grade level 15 in the Federal civil service.[18] However, in Parastatals, Agencies and Local Governments lower Salary Grade Level officers not below Grade Level 12 may be appointed as head of the Unit.[19]

The chairman shall be appointed by the office of the Head of Service of the Federation, and the other members of the Unit by the head of the institution where they work or by the Permanent Secretaries.[20] In the selection of persons to the membership of the Unit, regard is had to a spread of persons from different relevant profession and skills. Special emphasis is made on inclusion of persons with accounting, procurement, and audit background.[21] The appointing authority is required to ensure widespread consultation in the selection process. All the appointments are subject to confirmation by the ICPC after screening.

Experience, competence and honesty are some qualities that are considered in the selection process. Due to the fact that it is only those who work closely with such officers can only know these qualities, the nomination comes from the MDA where such persons work. In practice, all the members of the Unit are nominated by the head of their respective departments to the ICPC for appointment. They are appointed for a term of years renewable for a maximum tenure of three years.[22] Their term of office commences from the inauguration of the members by the ICPC.[23]

3.1 Powers and Functions of the Unit

The Unit has powers and performs functions, which can lead to the curbing of corruption in MDAs in Nigeria where all the parameters are right. The Standing Orders for the Operation of the Unit give the Unit all the functions and powers of the ICPC as contained in section 6 (a)-(f) of the Corrupt Practices and Other Related Offences Act 2000

except that of prosecution. In other words, it is safe to say that the Unit is like having an ICPC domiciled in each MDA in Nigeria. When the Unit finds a case of corruption that should be prosecuted, they forward their report to the ICPC for further investigation and possible prosecution.[24] The Unit also monitors and oversees compliance with some categories of civil service rules such as rules against suppression of records, false claim and falsification of records.[25]

The Unit is also responsible for promoting Ethics and enforcing integrity compliance with ethical codes within the MDA. They achieve this by developing an Ethics and Integrity Compliance Advisory Program for the MDA that guide personnel on staff conduct and discipline.[26] Through this instrument, the Unit monitor and assess ethic and compliance standards contained in the ICPC Act, the provisions of the Public Service Rules that relates to corrupt practices, fraud and related offences, the National Anti-Corruption Strategy, the National Ethics Policy and other standing rules and codes.[27] It is the duty of the Unit to monitor and ensure compliance in respect of the provisions in the annual budget of their MDA. The Unit is required to forward a mid-year and annual report to the ICPC with a copy to the Management of their respective MDA. In carrying out its functions, the Unit conducts in –house training for the staff of the organization. This is done through forums such as seminars, workshops, enlightenment campaigns and such like method that will educate staff of the MDA of the activities of the Unit and how staff of the organization can help the Unit in achieving its purpose. The Unit meets once every month and the ICPC Desk Officer assigned to a particular Unit is expected to attend such meetings once in every quarter of each year. Minutes of such meetings are to be forwarded to the ICPC quarterly.[28] In addition, at the end of every calendar year, the Unit submits its annual reports to the ICPC.

The Unit is entitled to have budgetary provisions made for it in the budget of their MDAs. The Standing order for the operations of the Unit provides that Ministries, Departments and Agencies should make separate budgetary provisions under the specific sub-head of Anti-Corruption and Transparency Unit and such should be adequate for the effective operations of the Units.[29] The Chairman of the Unit is in charge of the Unit's vote and the Unit shall submit quarterly financial report to the

17 Regulation 4.1-1 of the Standing Order for the Operations of the Anti-Corruption and Transparency Units (ACTUs) in Ministries, Department and Agencies (MDAs) 2014.

18 Regulation 4.1-2 of the Standing Order for the Operations of the Anti-Corruption and Transparency Units (ACTUs) in Ministries, Department and Agencies (MDAs) 2014.

19 Regulation 5.1-5 of the Standing Order for the Operations of the Anti-Corruption and Transparency Units (ACTUs) in Ministries, Department and Agencies (MDAs) 2014.

20 Regulation 5.1-1 of the Standing Order for the Operations of the Anti-Corruption and Transparency Units (ACTUs) in Ministries, Department and Agencies (MDAs) 2014.

21 *Ibid.*

22 Regulation 6.1-1 of the Standing Order for the Operations of the Anti-Corruption and Transparency Units (ACTUs) in Ministries, Department and Agencies (MDAs) 2014.

23 Regulation 6.1-2 of the Standing Order for the Operations of the Anti-Corruption and Transparency Units (ACTUs) in Ministries, Department and Agencies (MDAs) 2014.

24 Regulation 7.1-1 & 7.1-4 of the Standing Order for the Operations of the Anti-Corruption and Transparency Units (ACTUs) in Ministries, Department and Agencies (MDAs) 2014.

25 Regulation 8.1-1 of the Standing Order for the Operations of the Anti-Corruption and Transparency Units (ACTUs) in Ministries, Department and Agencies (MDAs) 2014.

26 Regulation 9.1-2 of the Standing Order for the Operations of the Anti-Corruption and Transparency Units (ACTUs) in Ministries, Department and Agencies (MDAs) 2014.

27 Regulation 10.1-1 of the Standing Order for the Operations of the Anti-Corruption and Transparency Units (ACTUs) in Ministries, Department and Agencies (MDAs) 2014.

28 Regulation 22.1-1 of the Standing Order for the Operations of the Anti-Corruption and Transparency Units (ACTUs) in Ministries, Department and Agencies (MDAs) 2014.

29 Regulation 19.1-1 of the Standing Order for the Operations of the Anti-Corruption and Transparency Units (ACTUs) in Ministries, Department and Agencies (MDAs) 2014.

management of their MDA as well as the ICPC. A typical budgetary provisions for the Unit includes provisions for enlightenment campaigns, stationeries, recording devices, training cost for members of the Unit, sitting allowances for members of the Unit (the Unit is required to meet once every month), and allocation for phone calls.

This appears to be the most problematic of the provisions regulating the operations of the Unit. The implication of the provisions on funding of the Unit implies that the Unit is financially autonomous from the MDA where it is operating. The members of the Unit are officers of a particular MDA. The prospect of that MDA preparing a separate budget line for the Unit has proved to be very difficult. When the ICPC discovered that the MDA appears to be finding it difficult to comply with these provisions, the Federal Government of Nigeria issued circulars to all MDAs to comply with the requirement. Despite the intervention, the compliance level has been abysmal to say the least. This challenge is a recurring topic of deliberations during training workshop organized by the ICPC for members of the Unit in all MDAs, which holds twice yearly.[30] The effect is that the operation of the Unit is crippled and the members have to 'beg' the management of their respective MDAs to be able to get funds to do anything. It is a common saying that he who pays the piper detects the tune and it is common view that this impinges on the independence of the Unit needed for them to undertake the task of fighting corruption in their respective MDAs.

3.2 Successes Recorded by the Unit

In the over nineteen years of its existence the Unit has been established in various MDAs which have recorded a considerable amount of success in some aspects of its work. Firstly, in the area of system review a considerable amount of work has been done. Members of the Unit undertake system review of different departs in their MDA especially those that are more corruption prone. These reviews identify, the weaknesses, catalysts in such department that allow corruption to thrive and records to the management of their MDA solutions that address the areas of operation of such Unit that breeds corruption. For example, reviews at the tertiary educational level found that reducing the physical interface between students and staff of such institutions in departments like Admission's Offices, Student's Affairs Offices, Exams and Records offices by computerizing and creating online platforms for student to make enquiries, apply for what they need and be attended to greatly minimizes the corrupt practices that go on in such departments. This has introduced some level of accountability and probity in the manner these department carry out their operations. These system reviews have led some MDAs to identify corruption vulnerabilities within their system and deploying the recommendations made by the Unit that have helped to block such loopholes.[31] The System review conducted by the Unit in the Ministry of Niger Delta Affairs led to the recovery of N209 billion alleged to have been misappropriated.

Secondly, some of the Units have embarked on investigations of allegations of corruption and corrupt practice going on in their MDAs. This has exposed a lot of rot in such systems.[32]

The Unit in Ken Saro Wiwa Polytechnic, Bori, Rivers State in South-South Nigeria investigated improprieties relating to the institution's payroll system pertaining to huge sums of money and this led to dismissal and suspension of some staff while others were made to refund the monies illegally collected.[33] The recommendation of the Unit flowing from this investigation led to a system upgrade of the payroll system in the institution to block loopholes that were identified in the course of the investigation.

Another example of success of the Unit made public by ICPC is the investigation of twenty-five lecturers of the Federal Polytechnic Nekede, Imo State in South East of Nigeria with regards to their involvement in some corrupt practices. The result was that the management of the institution demoted the said lecturers. The long-term effect of the investigation by the Unit in this institution was that there are reduced incidents of illegal sales of academic literature (popularly referred to as handout), gratification and sexual harassment.[34]

In educational institutions, students are not excluded from the operations of the Unit. It was found that students can be very vital partners in the fight against corruption in tertiary institutions. They are usually very enthusiastic about it and do provide very useful information about corrupt activities of their colleagues and staff of the institution. For example, at the Federal University of Technology, Owerri in South East Nigeria, investigation by the Unit led to the rustication of over 500 students over their involvement in various offences proscribed by the institution.[35] In the institution where the author works investigations by the Unit led to a discovery of bursary racketeering by some students and the Unit made recommendation for the students to be queried and made to refund the monies illegally collected.

Thirdly, the Unit in several MDAs has developed ethics and corruption prevention instruments for their MDAs which have in no small measure helped in educating staff of required standard of conduct and serves as guideline as to the sanctions that breach of such code of ethics will attract. Examples of publicized codes of ethics by the Unit is the one developed by the Unit in University of Ilorin, Kwara State in North Central Nigeria and in the National Agency for Food, Drug Administration and Control.[36] The Unit also on a continuous basis embarked upon sensitization programmes geared towards educating staff and other relevant stakeholders in their MDAs of the activities of the Unit and solicits for the support of all to fight the scourge of corruption. These programmes usually take the form of workshops, placing of billboards, and sign post with catching captions of anti-corruption slogans.

Fourthly, the Unit in some MDA has constantly demanded probity from public office holders, especially in the allocation and spending of such MDA's budget. It is part of the mandate of the Unit to monitor and ensure compliance with budget implementation.[37] Through

30 By Regulation 14.1-1 of the Standing Order for the Operations of the Anti-Corruption and Transparency Units (ACTUs) in Ministries, Department and Agencies (MDAs) 2014, Unit members must submit themselves to such trainings as may be organized by the ICPC or any other body as may be approved by it to enable them effectively perform their functions.

31 Examples of chapters of the Unit that have achieved this feat include the Unit in the National Health Insurance Scheme (NHIS) state offices of Lagos, Edo, Kaduna and Kwara, the Unit in the Nigerian Custom Services, the Unit in the Ministry of Niger Delta Affairs etc. This information was obtained from *Gold F. Establishment, Impact and Challenges of Anti-Corruption and Transparency Unit available at https://icpc.gov.ng/2018/03/05/establishment-impacts-and-challenges-of-anti-corruption-and-transparency-units-actu/ accessed on 6 January 2020 at 3:59 pm.*

32 In the University of Calabar in South- South Nigeria, the investigation carried out by the Unit exposed employment racketeering going on in the institution. The Unit in Federal Polytechnic Nekede carried out investigation into allegation of extortion via text message by an academic staff of the Polytechnic. This information was obtained from *Gold F. Establishment, Impact and Challenges of Anti-Corruption and Transparency Unit available at https://icpc.gov.ng/2018/03/05/establishment-impacts-and-challenges-of-anti-corruption-and-transparency-units-actu/ accessed on 6 January 2020 at 3:59 pm.*

33 *Ibid.*

34 *Ibid.*

35 *Ibid.*

36 *Ibid.*

37 Regulation 13.0 of the Standing Order for the Operations of the Anti-Corruption and Transparency Units (ACTUs) in Ministries, Department and Agencies (MDAs) 2014.

the carrying out of this mandate, the Unit in the Nigeria Immigration Service in 2014 discovered an attempt to divert the sum of N11 million naira from a budget of N30, 850,000.00, when the actual cost and payment made was N19, 750,000.00.[38] Similarly,, the Unit in the Directorate of Technical Co-operation in Africa also discovered the transfer of N6 million originally budgeted for Youth Empowerment and Development Program to the personal account of a Director in addition to discovering a fraud perpetrated by buying a second-hand 2012 Toyota Camry Car instead of a brand new 2014 model that was budgeted for at the cost of N11 million.

These discoveries were facilitated by the federal government circular mandating that the Unit members be in attendance in committees involved in procurement and incidental matters. Committees such as Tender Boards, and Procurement Committee are under obligation to notify the Unit of their meeting and some members of the Unit are to attend as observers. This has availed the Unit members the opportunity to understand the procurement process of their MDA and ensure that due process is adhered to. This practice has put the management of MDAs on their toes and cut down on sharp practices perpetrated in procurement processes in many MDAs.

From the above, it can be said that the Unit has recorded a level of success in line with its mandate. However, given the potentials that this innovative approach to fighting corruption in MDAs possesses, their achievements are in my opinion but a drop in the ocean. This is on the backdrop of the endemic nature of corruption in many MDAs in Nigeria and the fact that the corruption index of Nigeria has not improved over the years and the poverty indices of its populace is on the rise. The way businesses are conducted in MDAs in Nigeria forms part of what determines the corruption index of a country. According to Transparency International, Nigeria ranked 146 out of 180 countries of the world in corruption index in 2019.[39] This obviously does not reflect an improvement in the corruption status of the country. This is despite the fact that the Unit had been in existence for over eighteen year at the time of this ranking. The question then is whether the achievement of the Unit is in line with the expectations for setting it up or whether the Unit is performing below its potentials. It is the opinion of the author that the Unit has the potentials to perform far beyond its present output. The posture of this work is that the reason why the Unit is not exhibiting its full potentials is due to the lack of security from victimization of its members and the funding structure of the Unit. It will be argued in the next segment of this work that the presence of these two factors from the outset puts this laudable initiative in a position where its wings were clipped from birth and therefore it lacks the capacity to fly.

4.1 Interrogating the Effectiveness of the Anti-Corruption and Transparency Unit under its Present Structure.

In this segment, a look is taken at how effective the Unit has been against the backdrop of its current structure. The structure referred to here is the security from victimization for members of the Unit and funding of the Unit.

38 *Gold F. Establishment, Impact and Challenges of Anti-Corruption and Transparency Unit available at https://icpc.gov.ng/2018/03/05/establishment-impacts-and-challenges-of-anti-corruption-and-transparency-units-actu/ accessed on 6 January 2020 at 3:59 pm.*

39 *TI anti-corruption ranking: Nigeria moves to 1444th from 148th. Vanguard* News, January 25, 2019 available https://www.vanguardngr.com/2019/01/ti-anti-corruption-ranking-nigeria-moves-to-144th-from-148th/ accessed on May 20, 2020.

4.2 Security from Victimization for Members of the Unit

As earlier pointed out, the mandate of the Unit is anchored on three cardinal objectives, namely, identification of weakness inherent in a particular system that allows corruption to thrive, reviewing of such system to address the weaknesses, and investigating corruption in an MDA and forwarding the findings to the ICPC for possible prosecution. For these objectives to be achieved, it is essential that members of the Unit are able to work without fear or favour. The members must have no fear of being victimized as a result of their functions.

The members of the Unit are nominated by the heads of their organization to the ICPC who under the rules are to conduct due diligence on the nominees. Whether or not this due diligence is undertaken is not clear as in the course of this research no evidence was found to draw a conclusion that it is done. This leaves one likely possibility, which is the heads of the various MDAs are the sole determinant of who gets to be a member of the Unit. Members of the Unit are meant to be watchdogs over the MDA where they operate including the head of the MDA. Making a person who is amongst the persons to be 'watched' by a body to be the sole determinant of the composition of that body appears counter-productive to the objectives of such a body. This however, is not a problem if the Unit upon appointment is given full independence to operate such that the head of such MDA does not have both the bread and the knife. Full independence in this context is hinged on several parameters. Firstly, the job and career progression of a member of the Unit must not be threatened in any way as a result of the member's action taken within the limits of the mandate of the Unit. No doubt when a member of the Unit whistle blows on corrupt practices going on in their MDA it will not go down well with those involved. Where those involved are the superiors of the member of the Unit concerned, victimization may follow. The issue then is not the presence of victimization but the modalities put in place to checkmate it. This leads to the second issue which is whether there is clear cut procedure of reporting, investigating and prompt action taken to give a member a sense of security in the event of a threat to the member's job knowing that someone got his back and the authorities will not allow him to be victimized for doing a job he was appointed to do, And whether there are clear- cut provisions to tackle situations like this with respect to the Unit. The Standing Order for the Operations of the Anti-Corruption and Transparency Units (ACTUs) in Ministries, Department and Agencies (MDAs) 2014 attempts to make provision for the protection of members of the Unit.[40] Reports of victimization of members are to be investigated and where established appropriate steps taken to redress the matter. The problem is that there is no legislative framework for the protection promised to members of the Unit under the Standing Orders. This is because the Corrupt Practices and other Offence Act 2000 establishing the ICPC does not contain provision for protection of whistle blowers from victimization as a result of information given that exposed corruption. The provisions of section 64(1) of the Corrupt Practices and other Offence Act 2000 only protects the identity of the source of information. This provides no benefit for a member of the Unit as their identity is already known. Besides, sections 43(5) and 63(1) of the Corrupt Practices and other Offence Act

40 Regulation 18.1-2 of the Standing Order for the Operations of the Anti-Corruption and Transparency Units (ACTUs) in Ministries, Department and Agencies (MDAs) 2014.

2000 only protects an informant from criminal or civil actions with respect to the information given. As a result of this, there are no clear -cut and established procedures for insulating members of the Unit from victimization. Reports of victimization are therefore treated at the discretion of whoever holds sway at the ICPC. As such, there are reports of victimization that are not even investigated at all and such members of the Unit are left on their own. This does not give the necessary assurance needed for members to undertake the task of the Unit. Self-preservation is the first instinct of man and it is unlikely that any public officer will be willing to embark on a task where his means of livelihood may be taken from him with no assurances of redress. This can only be possible when the members are assured that their 'destiny' is not in the hands of their superiors in the establishment. How will an officer who knows that whether he retains his job or not, whether he advances in his career or not, whether he is punitively transferred or not rests with individuals within the establishment he is required to act as a watchdog over? Such an officer is not likely to act without fear or favour. The picture that can be seen will be rather that of someone likely to tread with caution.

It is documented that some members of the Unit experience hostility from their parent MDA, which can sometimes graduate to harassment, malicious transfers to stations far from where such member's family reside, suspension and even dismissal from employment.[41] The ICPC itself openly acknowledging this challenge stated that:

> *In many organizations, rather than being given support, the units, are perceived to be spies who report on the activities of the chief executives and other staff... Other challenges faced by ACTU members are the fear of loss of jobs, fear of danger to self and family, and a general apathy to duties as obtained in the public sector.*[42]

In addition, there is the possibility that a member of the Unit can be charged to court for breaching the Official Secret Act 1962. The Corrupt Practices and Other Offences Act makes no provision suspending the operation of the Official Secret Act. As such, a member of the Unit who comes across information exposing a corrupt practice by reason of his office as a public servant working in an MDA and discloses this information to the Unit and this is further disclosed to the ICPC, stands the chance of being dismissed from employment or prosecuted for breaching the official Secret Act. There is a need for a legal framework to help the Unit in this regard. The attempt by the government to offer some form of protection through its Whistleblowing Policy 2016 as laudable as it has not changed the situation as a governmental policy cannot supersede the provisions of an Act of Parliament. The documented experiences some public officers who had exposed corrupt practices is not encouraging. The case of Mr Ntia Thompson, an Assistant Director in the Department of Technical Cooperation in Africa, which is an agency under the Ministry of Foreign Affairs, who was victimized for exposing financial fraud in the agency to

41 Thematic Compilation of Relevant Information Submitted by Nigeria
Article 6 UNCAC: Preventive Anti-Corruption Body or Bodies available https://www.unodc.org/documents/corruption/WG-Prevention/Art_6_Preventive_anti-corruption_bodies/Nigeria.pdf accessed on 28 May 2020.

42 *Gold F. Establishment, Impact and Challenges of Anti-Corruption and Transparency Unit available at https://icpc.gov.ng/2018/03/05/establishment-impacts-and-challenges-of-anti-corruption-and-transparency-units-actu/ accessed on 6 January 2020 at 3:59 pm.*

the tune of $229,000. He was sacked in December 2016 and though the Federal Government of Nigeria reinstated him several months after, he continues to suffer victimization.[43] There is also the case of Aaron Kaase who got sacked in 2015 for reporting that the Chairman of the Police Service Commission, Mike Okiro, was involved in fraud of N275.5m in the Commission. Despite getting a court judgment reinstating him in November 2017, he was only recalled in March 2018, and had not been paid his salary for three years.[44] There is also the case of Murtala Ibrahim who worked in the Federal Mortgage Bank of Nigeria who was dismissed for exposing corrupt practices. [45]

With reports of this nature, without concrete provisions backed by statutes for the protection of members of the Unit, it is the view of this article that it will continue recording below expected achievements and the Unit will just be in existence in name only and corruption will continue to thrive in MDAs in Nigeria.

4.2 Funding of the Unit

By the Nigerian Government regulation, funding of the Unit is to be provided for by the MDA for which the Unit is established. This has proved to be one of the major challenges to the success of the Unit. It is not in line with the culture of corruption to expect organizations that are at the receiving end of the corruption chain to willingly finance the fight against it. The regulation provides that the MDA where the Unit is operating should create a line of budget for the Unit in its budgeting process but imposes no sanctions for failure to comply. The result is that many MDAs have failed to obey this regulation and absolutely nothing has been done to sanction the erring MDA. The author was a chairman of the Unit in the institution where he worked for three years and in such period none of the budget presented by the Unit had been approved. This is to be expected. Starving the Unit of funds to operate will effectively ground it and that is the surest way to make the Unit exist in name only. For the MDAs to comply with the directive that they provide funds for the Unit's operation, there must be consequences for failing to comply. Anything short of this is paying lip service to the funding of the Unit. The Unit needs funds to run its operations from enlightenment campaigns, investigating petitions and reports, attendance of capacity building workshops, and costs of phone calls to mention a few. When funds are not released to the Unit as a matter of course and members have to go 'begging' the management for it, the independence needed to work without fear or favour is compromised. If the Unit must actualize its full potentials then the funding of the Unit needs to be revisited by the ICPC. For the Unit to function effectively, it must not only be autonomous, it must be seen to be. The process of funding the Unit is top on the indicators of how autonomous the Unit really is.

5.1 Conclusion and Recommendation

The setting up of the Unit is an innovative approach to combating corruption in MDAs. The initiative holds great potentials to address the systemic corruption in MDAs in Nigeria because the members of the Unit being officers in that MDA, understand better how corruption is perpetrated in their Department or have the opportunity to do so. They not only have the understanding of how corrupt

43 Olawoyin O. *Nigerian Govt Recalls Sacked Whistleblower* available at https://www.premiumtimesng.com/news/top-news/235168-nigerian-govt-recalls-sacked-whistleblower.html accessed on 31 May 2020.

44 *Ibid*.

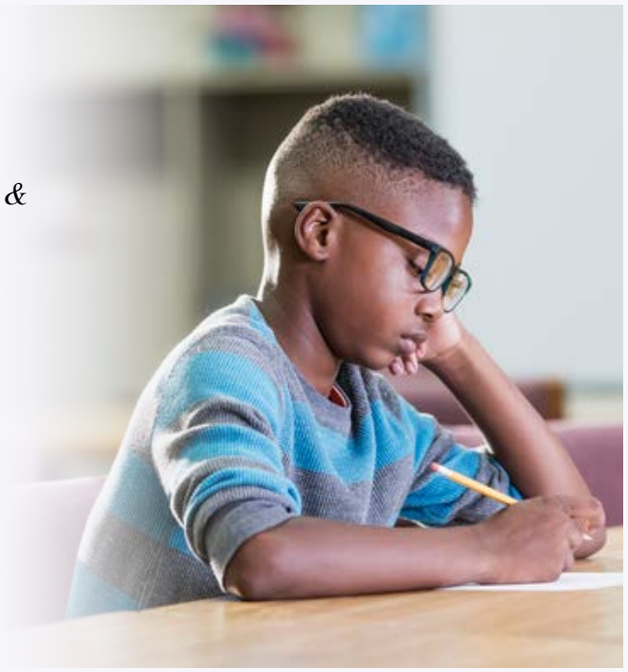
45 *Ibid*.

officers work, they can also easily identify the weaknesses in the system that allows corruption to fester and can review such system and eliminate the weaknesses and loop holes. However, for the potentials of the Units to be fully actualized, the issue of security against victimization of members of the Units and the funding of the Units must be tweaked. In this light, this work makes some recommendations.

Firstly, the promotion, transfer, suspension and dismissal of any member of the Unit should be made subject to the confirmation of the ICPC. In this way, the management of the MDA will not be the final say on these issues with regard to a member of the Unit. This will minimize incidents of victimization of members of the Units.

Secondly, the funding of the Units should be borne solely by the ICPC. The ICPC should create a line of budgeting in its annual budget dedicated to the funding of the Units in all MDAs. This way the Units will be truly autonomous and can express and achieve their full potentials. The ICPC should not rest on its oars but take the bull by the horns to see to it that this innovative approach to curbing corruption in MDAs succeeds in Nigeria.

THE RIGHT TO BAIL IN THE CONTEXT OF JUVENILE CRIMINAL JUSTICE IN MAINLAND TANZANIA



By Mwanabaraka Salehe Mnyukwa[1] & Archibald Aristarch Kiwango[2]

> *Prior to the turn of the 20th century, children were treated as adults by the court system… the concept of juvenile justice emerged from such sheer neglect and abuse of juvenile offenders to the situation where society had to treat such children with some degree of humanity according to their needs and not their deeds.[3]*

Abstract

The article delineates underlying legal underpinnings facing Juvenile Criminal Justice in Mainland Tanzania. Special attention is given to right to bail which have resulted into some ramifications to juvenile justice. Juvenile is in most of the jurisdictions regarded as a vulnerable group warranting special treatment while best interest of the child being of paramount consideration. Bail being one of the human rights ought to be given wholeheartedly without any inroads and/or appalling conditions. To the dismay**,** bail for juveniles characterize the use of the criminal law for adult offenders. The question that lingers is, why should the two be treated as they are at the same footing or else at par? Why the law pertaining to bail for adults be applicable to the juveniles in its all fours? Why should they (juveniles) be subjected to the same appalling bail conditions as their adult counterparts? If the juvenile system has in fact come to serve the same function as the criminal system in criminal justice this should be made aware to the public and if so, should the juvenile not be accorded the rights and privileges as adult criminals however with some reservations or peculiarity be prescribed thereto? This article addresses the above issues, and

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3 Mohammed, S.H, and Mashamba, C.J (2014) *Child Rights and the Law in East Africa*, Law Africa Publishing (T) Ltd, Dar es Salam, p.330.

recommends for holistic implementation of juvenile justice.

Keyword: Criminal, Juvenile Justice and Bail

1. Introduction

The juvenile process for quite sometimes in most of the jurisdictions had been characterized as civil, rather than criminal since its goals were rehabilitative and beneficent rather than punitive. This phenomenon was based on the adherence of the parens *patriae doctrine*[4] which believed that the adjudication of delinquency is not a conviction.[5] The limitations, both in theory and in execution, of strictly rehabilitative treatment methods, combined with public anxiety over the seemingly irresistible rise in juvenile criminality, have produced a rupture between the theory and the practice of juvenile court dispositions.[6] While statutes, magistrates, judges, and commentators still talk the language of compassion and treatment, it has become clear that in fact the same purposes that characterize the use of the criminal law for adult offenders-retribution, condemnation, deterrence, incapacitation-are involved in the disposition of juvenile offenders too. These are society's ultimate techniques for protection against threatening conduct. It is inevitable that they should be used against threats from the young as well as the old when other resources appear unavailing.

4 This doctrine came to atone the situation that, child's natural protectors-the parents – were unable or unwilling to provide an appropriate level of care, thus the court had to take the place of parents, ie. *Parens patriae*-by providing specific protection to dependent and neglected children, most of whom were juvenile delinquents. This theory or doctrine was very important in the wake of evolution of Juvenile Justice the other one is the doctrine of "*Welfarism"* this as well assumed an important role in protecting child.

5 See, e.g., *Pee v. United States*, 274 F.2d 556 (D.C. Cir. 1959).

6 This trend /move underwent radical transformation thus changed the way how criminal and juvenile justice was perceived

The foregoing underscores the fact that, any criminal justice system in any legal system aims to balance the interest of both the state and an individual.[7] This is due to the fact that the underlying objective in criminal law which deals with the relationship between an individual and the state is achieved by punishing offenders and compensating victims as it may be determined by a particular set of law in a given society. This will ultimately ensure the members of that particular society live in peace, harmony and tranquility.

In realization of peace, harmony and tranquility, criminal law is bed rocked under several principles. One of the cardinal principles in the administration of criminal justice system (under Common Law jurisdictions) is the *presumption of innocence.* This principle, holds that everyone who has been charged (an accused) shall be presumed innocent until proved guilty according to law by a competent court/tribunal regardless of whether that accused is a child or not.[8]

The above principle aims to ensure that one of the fundamental rights of an individual to be at liberty and to be free from arbitrary detention is not jeopardized. In order to achieve that end, the need for an accused to be released on bail come into question. Whether the right to bail is not delusional thus enjoyed to an accused person particularly the child is as well a subject matter of discussion in this Article.

2. Bail to Juveniles

7 This is one of the paramount issues when bail comes in as is for the courts of law to strike a balance between the interests of the individual and that of the society in which he lives. This wisdom has been applied by the courts for centuries in Tanzania. See for instance the landmark case of *D.P.P v. Daudi Pete* (1993) TLR 22

8 For example, a child in conflict with law as provided under Part IX of the law of the Child Act, No. 21/2009 or Cap: 13 RE: 2019

In ordinary language, the term Juvenile is associated to a Child[9], and Juvenile Justice is associated to the system of dispensation and administration of justice pertaining to a child or children. From the precept above, it suffices to provide for what a child is or *"the construction of the child"*.

In Tanzania, the word "child" is construed as …. *[a] person below the age of eighteen years shall be known as a child…*[10] The term bail has much been referred to than defined. However, it may simply be defined as a security for the appearance of the accused person who has been released.[11] This concept has for sometimes been recognized as a right that inhere to a person. Bail may be granted while the accused is in police custody (Police Bail). It may also be granted pending trial or committal to the High Court[12] or pending an appeal or revision, or pending confirmation of a sentence.[13]

Bail is a very old concept which involves the release of an accused person on furnishing surety or security. The question of what to do with an accused person between arrest and judgment poses a severe conflict for any system of criminal law.[14] The release on bail is mainly based on the assumption that the accused is not yet proved guilty and therefore, denying him bail is like having his innocence pre-judged. On the other side of the coin, the conflict seems to arise when the accused breaches bail conditions, interfere with investigation and commits another crime while on bail.[15] The conflict poses a dilemma in a criminal law system.

9 See the definition of who is a juvenile as ascribed under section 2 of the Criminal Procedure Act (CPA) RE: 2019

10 Section 4 of the *LoCA*.

11 Gardner F.G., *et al*, (1957) *South African Criminal Law and Procedure*, 6th Ed, Cape Town: Juta & Co., p. 252.

12 *Republic v. Dodoli Kapufi and Patson Tusalile* ,CA (T), Criminal Revision No. 1/2008

13 Mirindo F., *Administration of Justice in Mainland Tanzania*, 2011 Law Africa, Nairobi, p. 322 & 323.

14 Mallick M.R., *Bail Law and Practice*, Calcutta New Delhi, Eastern Law House Private Limited, 3rd Ed. p.3

The primary purpose of remanding an accused person in custody is not to punish him but to ensure that he will appear to take his trial and not to seek to evade or abdicate by leaving the jurisdiction of the court.[16] Bail as a matter of right and presumption of innocence are two complementary concepts. Whereas the former is the basic right of any accused person in any criminal proceedings, the latter is the rationale for the former.

The presumption of innocence forms one of the pillars of the rule of law. A person is presumed to be innocent until his guilty is proved by due process of the law.[17] This principle underlines the rules of natural justice especially the one demanding that *"no person should be condemned unheard."*[18] The principle of presumption of innocence is enshrined in the Constitution of the United Republic of Tanzania.[19] According to the Constitution, the presumption of innocence applies to every person charged with a criminal offence.

The presumption of innocence applies more broadly than just to the burden of proof at trial. Provisional release decisions arguably implicate the three aspects which are (i) the person charged

15 See section 148 (5) (b) (c) and (d) of the Criminal Procedure Act, Cap: 20 RE: 2019, herein after referred to as CPA.

16 *Jaffer v. Republic* (1972) HCD n. 92.

17 Peter, C.M, (1997) *Human Rights Cases in Tanzania: Selected Cases and Materials*, Rudiger Koppe Verlag Koln, p. 529.

18 This Natural Justice Principle is well known in latin maxim as *audi alteram partem* as deliberated in the landmark case of *Ridge v. Baldwin* [1962] 2 ALL ER 66.

19 See Article 13 (6) (b).

with a crime must be treated as being innocent until proved guilty; (ii) The burden of proof that the accused is guilty of the crimes with which he is charged, lies on the prosecution, and (iii) the court must be convinced of his guilty according to a certain standard of proof, which in common law countries is beyond a reasonable doubt.[20] These aspects show that it is prudent for a person to be temporarily released on bail since his guilty has not yet been established. However, the practice shows that it is not in all circumstances prudent for an accused to be released on bail even if his guilty has not been established. As such, detention of an accused person might sometimes be the safest option for him.

2.1 Bailable and Non-Bailable Offences

It is most common that in many legal systems the accused is not released at large in all offences. The tendency has been one of categorizing offences into bailable[21] and non-bailable/unbailable offences.[22] This means that the precise definition of bail as a security given for the due appearance of a prisoner or accused person (as the case may be) in order to obtain his release from imprisonment or custody that is a temporary release of an accused upon security[23] does not apply in all offences. This phenomenon covers an accused child in the sense that bail is only granted when certain conditions are fulfilled.[24] The categorization of offences into bailable and unbailable is based on their severity, for example offences that are generally considered to be cognizable and threatening the violation of peace in the society are categorized as non-bailable.[25]

20 Davidson, C.L (2010) *No Shortcuts on Human Rights: Bail and the International Criminal Trial*, American University Law Review: Vol.60, pg. 14 and 15 available at http://digitalcommons.wcl.american.edu/aulr/vol60/iss1/1 accessed on 5th May 2020.

21 Section 148 (1) of *CPA* provides for bailable offences.

22 For example, Section 148 (5) (a) of the *CPA* provides some of the offences which are non-bailable.

23 *Ibid*, footnote No. 1 at page 1.

24 Section 101 of the *LoCA, Ibid.*

2.2 Right to Bail under the International Human Rights Regime

Most of the International human rights instruments embody the principle of presumption of innocence to an accused. The principle is also well accommodated in the International human rights instruments dealing with the rights of the Child. It therefore means that a child offender has also a right to be presumed innocent until his guilty is established by a competent court or tribunal.

The following are some of the International Human Rights Instruments that recognize the principle of Presumption of Innocence;

i. The Universal Declaration of Human Rights (UDHR, 1948).

The common understanding of the basic rights of the accused person including a child that need to be enjoyed by him is very important for the purposes of promoting and protecting it. Being the first documented International Human Rights Instrument,[26] it recognizes the right of everyone charged with a penal offence to be presumed innocent until proved guilty according to law in a public trial at which he has all the guarantees necessary for his defence.[27] The relevant provision of the Universal Declaration of Human Rights of 1948 (UDHR) is very clear that the right of every person to be presumed innocent reinforces the right provided under Article 1 of the UDHR that all human beings are born free and equal in dignity and rights. Consequently, detention of an accused person including a child, whose right to be presumed innocent is guaranteed under the UDHR, is tantamount to the curtailment of his right to be at liberty and from arbitrary detention. This automatically interfere his right to be born free and considered as innocent until his guilty is established.

25 What can be deduced here and be seen of paramount importance is for the courts of law to strike a balance between the interests of the individual and that of the society in which he lives. This was the wisdom given by Makame, J (as he then was) in *Said Gurhl Shabel and 3 Others v. Republic* (1976) LRT. No. 4.

26 General Assembly of the United Nations, Resolution 217A, passed in Paris France, 10th December 1948.

27 Article 11(1) of the *UDHR* of 1948.

ii. The International Covenant on Civil and Political Rights (ICCPR, 1966)[28]

In the effort to bring harmony and realizing the enjoyment of civil and political freedom to all human beings, the need to have the Covenant in place was inevitable. Unlike the UDHR, the ICCPR gives some limitations on realizing an accused person's rights while awaiting his trial. Article 9 of the ICCPR provides that:

"...It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise for execution of judgment..."

Considering the above provision, one may argue that, as a matter of the general rule, the ICCPR blesses the right of an accused person to be temporarily released on bail so long as there is an assurance that the accused person will be available at the time required to take up his trial. This means that it is the duty of the court/tribunal of which an accused person appears before it, to release an accused person subject to certain conditions which might ensure appearance of the accused person whenever he is required to do so. But it should be noted that in making conditions as criteria for appearance, the court must consider the conditions which are practicable and not excessive. Conditions which are impracticable and excessive are tantamount to giving an accused the right of liberty in one hand and taking it back by the other.

28 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.

iii. Convention on the Rights of the Child (CRC, 1989)

The Convention on the Rights of the Child[29] (CRC) is a specific International Human Rights Instrument which enshrines the rights of the child in all aspects.[30] It is also one among the widely ratified Conventions. As the UDHR, 1948 proclaimed that a child is entitled to special care and assistance, the CRC underlined that a child needs special safeguard and care, and appropriate legal protection before and after his birth because of his physical and mental immaturity.[31] Because of its vulnerability, a child who is in conflict with the law would undoubtedly need special care and protection regardless of whether the child is familiar with that legal protection that he is entitled to or not.[32] Thus, the machinery dealing with the administration of juvenile justice should ensure that a child who is in conflict with the law is given adequate legal protection as a matter of right and not privilege. One of its important rights is the right to be at liberty and not to be

29 Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Came into force on 2nd September 1990.

30 Tanzania ratified the *CRC* in 10th June 1991.

31 See the Preamble of the CRC of 1989

32 *Ibid*

subjected to arbitrary detention if it is not in his best interest.

This is because the principle of the ***Best Interest of The Child*** is one of the underpinning principles in any action undertaken either by the public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. In any such actions, the best interest of the child must be a primary consideration.[33] Therefore, the state is duty bound to ensure that the best interests of the child is highly achieved as a key promoter and protector of the human rights including the rights of a child and right to bail to a child accused of any offence. In this connection the CRC categorically states:

> *...that a child who is alleged to have infringed the penal to be presumed innocent until proven guilty according to law….*[34]

The above article presupposes that, an accused child must be temporarily released on bail when he is alleged to have infringed the penal law unless his guilty is determined by a competent court/tribunal.[35] As a matter of principle, the guilty of any accused person is reached when the matter is heard and determined in accordance with the due process of the law.

2.3 Rights to Bail under Regional Human Rights Instruments

As it was with the International Human Rights Instruments, the right to presume the accused person innocent until proved guilty of the offence charged is also well provided in the Regional Human Rights Instruments. Some of these instruments include but not limited to the following:

(i) The African (Banjul) Charter on Human and Peoples' Right (the Banjul Charter)

The Banjul Charter on Human and Peoples Right[36] is one of the International (Regional) human rights instruments that is intended to protect and promote human rights among the Africans. The Charter provides for a right of an individual to be presumed innocent until proved guilty by a competent court or tribunal.[37] In other words, when his guilty is not yet established, the accused child/person has all rights including the right not to be arbitrarily detained for whatsoever reason.

(ii) The African Charter on the Rights and Welfare of the Child (ACRWC)

The African Charter on the Rights and Welfare of the Child[38] is a comprehensive instrument that sets out rights which need to be promoted and protected. It is considered as a mirror in several areas on child rights and child justice because it includes some of the traditional harmful practices which can negatively affect the child's upbringing.

In the aspect of the administration of juvenile justice, member states in this Charter agreed that, the state party shall in particular ensure that every child accused in infringing the penal law shall be accorded special treatment,[39] and no child who is imprisoned, should be tortured or otherwise mistreated.[40] Notably, the Charter does not explicitly provide for presumption of innocence, but as the Regional Approach to Human Rights is not alien to the international one, out of which the charter is derived, suggesting the wording *"... special treatment..."* connotes among other things presumption of innocence henceforth right to liberty to a child. The presumption of innocence to an accused child is very important as it gives an opportunity to an accused child to have a bond with his family during a trial. This may widen a scope to the family members to have a chance to provide counselling during the trial as well as avoid pre punishing him by arbitrary detention if he will not be released on bail. Since the essential aim during the trial or when he is found guilty is reformation, reintegration into his or her family and social rehabilitation[41]is crucial while, detaining him into custody is contrary to what the member states have agreed.

It has to be noted that, the reformation and reintegration of the juvenile offender is a key aspect in the administration of the juvenile justice as it is believed that a juvenile offender may come into conflict with the law because of his level of immaturity. Therefore, detaining an accused child into a custody not only curtail his rights to movement but also it does not achieve the end results of reformative and reintegration as he will be far away with the family or the social welfare officer who plays an important role to achieve that end.

2.4 Relevance of the Human Rights Instruments

Most states become parties to these International Human Rights by ratification and accession. Once a treaty is opened up for signature and once the state has agreed to be bound by the provisions of that treaty, it is known and taken to have ratified the treaty. Once the state ratifies the convention in some legal systems such as monist, the provisions within that Treaty automatically bind them and become part of the domestic law, and in most cases this remains to be persuasive.

In the dualist system and common law system, Tanzania being an *epitome*, a further action is required that is *domestication*. In other words, for international treaties (in dualist states) to acquire the force of law or become legally enforceable in courts, mere ratification of the treaty in question is not enough until when the Convention is domesticated into the law.[42] There are *plethora* of case laws through which the relevance of these international instruments as to the arena of human rights and their persuasive nature were explained *emphatically*. They include the case of George *Eliawony & Three others v. Republic* [43] and the case of *Mbushuu @ Dominic Mnyaroje & another v. Republic.*[44]

> *...We have no doubt that international conventions must be taken into account in interpreting, not only our Constitution but also other laws, because Tanzania does not exist in isolation, it is*

33 See Article 3(1), *Ibid*
34 Article 40(2) C, *Ibid*
35 See Article 40 (2) b (i), *Ibid*
36 Adopted on 27th June, 1981, OAU Doc.CAB/LEG/67/3 rev.5, 21 entered into force 21 October, 1986.
37 Article 7(1) b.
38 Came into force on 29th November 1999, Tanzania ratified it in March, 2003.
39 The Charter does not explicitly provide for presumption of innocence, but as the Regional Approach to Human Rights is not alien to the international one, out of which the charter is derived, suggesting the wording "*…special treatment…"* connotes among other things presumption of innocence henceforth right to liberty to a child.
40 See Article 17(2) c (i) of the *ACWRC.*
41 See Article 17(3) of the *ACWRC*
42 Elifuraha Laltaika, *Tanzania: Should Nation opt to embrace monism The Citizen Newspaper, 17th May, 2011*
43 [1998] TLR 190
44 [1995] TLR 97

part of a comity of nations. In fact, the whole of the Bill of Rights was promulgated in the Universal Declaration of Human Rights...[45]

3.0 Discerning National Laws on the Right to Bail and the Historical Underpinnings as to the Right to Bail in Tanzania

Since Mainland Tanzania became a British colony in 1920, bail was regarded as a right of an accused person and not a privilege. Unless the court was convinced by concrete evidence from the prosecution that to grant bail would result in a failure of justice, the court would not deny bail.[46] . The wisdom of the late Judge, Mwesiumo was echoing the sentiments of Judges like Wilson, J who in 1945 in the case of *Abdullah Nassor v. Rex*[47] stated:

The test should be whether the granting of the application for bail will be detrimental to the interests of justice and good order. But such detriment must be satisfactorily substantiated by solid reasons and not based on vague fears or apprehensions or suspicions. And bail should not be lightly refused.[48]

The same wisdom was manifested in the case of *Panju v. Republic,*[49] when the late Justice El- Kindy had hammered the point back home to the following effect:

If courts are simply to act on allegations, fears, suspicions, then the sky is the limit and one envisages no occasion when bail would be granted whenever such allegations are made.[50]

Afore premise that prevailed since 1920 never enjoyed its honeymoon. As would appear, bail as a matter of right for an accused and not a privilege never lived long to pass the 1980's as such an enjoyment came to a halt in 1985 with the advent of the provisions of section 148 (4) and (5) of the CPA. This law put the liberty of an accused at stake or rather standstill. One wonders whether the right to bail as provided under the CPA and if it is also read together with LoCA is in any way in *tandem* with the Constitution and if not whether it is saved under the provisions of the Constitution.

3.1 The Constitution

The 1977 Constitution of the United Republic of Tanzania incorporates a number of enforceable fundamental human rights in its Bill of Rights and Duties. Tanzanian courts have, on a number of occasions, refused to be held back by the dualist theory by holding that the Constitution incorporates the Universal Declaration of Human Rights as well as other global and regional human rights treaties, which courts should consult when interpreting provisions in the Bill of Rights and Duties.[51] This is contrary to our neighbours, Kenya, through their new 2010 Constitution of Kenya which innovatively has done away with the "*albatross around our necks*"[52] by declaring categorically that international treaties ratified by the Kenyan Government to be a source of law[53] and general principles of international law to form part of the law of Kenya.[54] Thus, one of the rights that are enshrined in the Tanzania Constitution is the right to bail.

The right to bail is impliedly provided for in our Constitution under article 13(6) b and article 15 (1) and (2) of the Constitution of the United Republic of Tanzania. [55] Article 13 (6) b provides that:

"No person charged with a criminal offence shall be treated as guilty of the offence until proved guilty of that offence"

It is common in Tanzania as is in other jurisdictions that the case cannot be disposed of in the same day due to many reasons.[56] This may call for an adjournment of the case. When the case is adjourned to another date for mention or hearing, the accused person's right to be at liberty and to be free from detention becomes an issue. Since the Constitution is the mother law of the land in Tanzania, the above article suggests the accused to be presumed innocent. In other words, it impliedly blesses the accused to be released on bail pending the determination of his case.

3.2 Judicial interpretation of the Provisions of the Constitution on the right to Bail

The position suggested by the relevant provisions of the constitution as above shown was affirmed in the landmark decision of *Daudi Pete v. DPP*.[57] In this case, the Court of Appeal, among other things stated clearly that bail is a right and not a privilege and therefore section 148 (5) (e) of the CPA which denied bail to an accused of armed robbery was declared unconstitutional since it infringed right to personal liberty. The sentiments to the same effects were given a steadfast opulence in the case of *Prof. Ricky Costa Mahalu & Another v. AG* [58] which further advanced, as hereunder quoted,

...a law which directly or by its effect discriminately deprives a person of his liberty contravenes the provisions of article 13 (2) of the Constitution. Having found that the impugned provision is unconstitutional because of its discriminative nature, we find it appropriate to order that such defect be rectified so that the right to bail can be enjoyed equally by any person charged under the Act without any discrimination...[59]

From the above decision, the presumption is that when a case is adjourned an accused must be released on bail.

45 *Christopher Mtikila v. AG* (2006) TLR 279, p. 30.
46 [1995] TLR 97.
47 [1921-1952] 1 T.L.R (R) 289.
48 Similar observation was *embraced* by Mkeha, J in the case of *Suleiman Masoud Suleiman & Aisha Khalfan Soud v. Republic*, Misc. Application No. 10 of 2020, HC (T) District Registry of Shinyanga, when stated that, *..." A mere allegation by the learned Senior State Attorney, that, the applicants would, if granted bail, interfere with the ongoing investigation, is in my respectful opinion not sufficient to be a basis of denial of bail to the applicants. The offences charged, being bailable offences..."*
49 [1973] E.A 282, p. 283.
50 The then CJ, Justice Biron, seemingly to have aligned himself on the vein of the same thinking in the case of *Patel v. R* [1971] H.C.D No. 391 , commented that *...A man whilst awaiting trial is as of right entitled to bail, as there is a presumption of innocence until the contrary is proved....*
51 See *John Mwombeki Byombalirwa v. Regional Commissioner and Regional Police Commander, Bukoba Another* [1986] TLR 73, 84; *Legal And Human Rights, Lawyers' Environment Action Team (LEAT) and National Organisation For Legal Assistance V The Attorney General* High Court of Tanzania, at Dar es Salaam (Main Registry), Misc Civil Cause No 77 of 2005 (unreported) 39.
52 M Ocran '*Access to Global Jurisprudence and Problems in the Domestic Application of International Legal Norms',* Keynote address at the 2nd West African Judicial Colloquium, 8 October 2007, Accra, Ghana, http://www.brandeis.edu/ethics/pdfs/internationaljustice/WAfricaColloq.pdf (accessed on 9th June 2020). See as well, Hon. Mr. Justice Robert V. Makaramba*: Trial and Management of Election Petitions By Courts: A Case of Tanzania,* A Paper presented at the Ninth EAMJA Annual Conference and General Meeting from the 11th – 15th October, 2011 at the Imperial Resort Beach Hotel, Entebbe, Uganda.
53 Article 2(6).
54 Article 2(5).
55 Of 1977 as amended from time to time.
56 It might be investigation is incomplete, a key witness cannot be procured during the first hearing or exhibit cannot be tendered on that day for whatever reason.
57 HC (T) at Mwanza, Misc. Criminal Cause No. 80 of 1989 (*Unreported*).
58 CAT, at Dar es Salaam, Misc. Civil cause No. 35 of 2007 (*Unreported*).
59 Bwana S.J and Benjamin, M.K (2014) The *Laws of Tanzania Through Cases*, LawAfrica, p. 341.

Another provision subject to deliberations is article 15 (1) and (2) of the Constitution. The article impliedly underscores the right to bail under the ambit of the right to personal liberty. The article provides:

(1) Every person has the right to freedom and to live as a free person.

(2) For the purposes of preserving individual freedom and the right to live as a free person, no person shall be arrested, imprisoned, confined, detained, deported or otherwise be deprived of his freedom save only-

(a) Under circumstances and in accordance with procedures prescribed by law; or

(b) In the execution of a judgment, order or a sentence given or passed by the court following a decision in a legal proceeding or a conviction for a criminal offence.

From the wording of article 15 (1), the article by implication underscores the right to bail. The same applies to sub article 2. However sub article 2 gives fundamental right to a person to live freely, not to be confined, detained or otherwise. It as well qualifies or curtails the enjoyment of the right as provided under article 15 (2) (a) and (b) which mandates curtailment of such a right in accordance with procedures prescribed by the law.

Despite such limitations (of the laws) being prevalent in our jurisprudence, the case of *Attorney General v Jeremia Mtobesya*[60] further fortified the stance that the issue of considering whether to grant or refuse bail "*....is not a magisterial or executive act.....*" but a judicial one to be performed under the Constitution. And there must be a strict interpretation of any law that seeks to limit fundamental rights of an individual in order to ensure that it does not render the constitutionally guaranteed rights meaningless *(emphasis mine).*[61]

4.0 Delineation of Juvenile Justice in Conflict with the Law

Apart from the general purview observed herein above from the Constitution, there are other laws subject to deliberations and analysis as hereunder provided, i.e. the law that governs criminal culpability, or when a child or juvenile comes into conflict / contact with the law, i.e. the CPA and the LoCA.

The law that provides for bail for juveniles at present in Tanzania is the LoCA.[62] Prior to this law, there was the Children and Young Persons Ordinance, which was to the effect that, where a child or a young person- in one word a juvenile- is charged with an offence, the court was supposed to handle the case with care because of the special nature of the person at the dock. [63] The court had four options open to it under the Act. They were to remand the juvenile in custody; to grant him bail; to permit the juvenile to go at large, or to remand him to a person or an institution.[64] As it was once contended forcefully by Mwalusanya, J (as he then was), in *Republic v. Musuba Nyeisao and Another:*

The Parliament did not want juveniles to be remanded in custody or sent to prison even if found guilty of an offence.[65]

The above sentiment by Mwalusanya, J. was a resultant of psychological danger of sending juveniles to such places. A juvenile was to be sent to prison only as a last resort. This special treatment of juveniles in general by the judicial system finds universal support.[66]

At present, in Tanzania when juveniles come into conflict with the law, juvenile justice as an integral part of human rights finds its footing and thus coming into play basing on their criminal responsibility and age. Under juvenile justice, when a juvenile comes into conflict with the law, the issue of age and criminal responsibility as they distinctly relate come into play. Firstly, the issue relate to the age at which children are deemed as having no mental capacity to commit a crime *(doli incpax);* and secondly, it relates to the age at which it is appropriate to render them liable to prosecution and formal sanctions *(doli capax).*[67]

As it may be recalled from the law governing juveniles as it was also in the previous law, the aim of the law is to protect the liberty of the children who come into conflict with the law.[68] In realizing the foregoing, the LoCA provides for a special court[69] vested with jurisdiction over criminal cases against a child over the minimum age of criminal responsibility[70] and also over committal hearings in relation to offences for which the High Court has original jurisdiction.[71] The LoAC under section 99 provides for procedures for conducting proceedings which are to be made by the Chief Justice.[72] In realizing the foregoing, other supplementary and complementary Government Notices were promulgated. They are the Law of the Child (Designation of Juvenile Courts)[73] and Judicature and Application of Laws (Practice and Procedure in Cases Involving Vulnerable Groups) Rules, 2019.[74]

In as far as criminal responsibility of juveniles and their right to bail is concerned in Tanzania, the governing law includes the Penal Code,[75] the CPA and LoCA read together with the Juvenile Court Rules.[76]

The LoCA also recognizes the application of the CPA, in particular section 148 of the CPA which provide for bailable and non-bailable offences. Accordingly, if a child is apprehended with or without a warrant and cannot be brought immediately before a Juvenile Court, the officer in-charge of the police station shall release the accused on bail:

60 Civil Appeal No. 65 of 2016 (*Unreported*)

61 The position of case laws *vis a vis* the provisions of the Constitution are subject of discussion later.

62 Prior to this law which is as of now Chapter 13 of the Revised Laws 2019, was the *Children and Young Persons Ordinance* as repealed under section 160 of the *LoCA*.

63 Peter, C.M, *op.cit*, at pg. 529.

64 It will be observed that the avenue for the same trend to be practiced remains to the courts concerned.

65 HC (T) at Mwanza, Misc. Criminal Cause No. 80 of 1989 (*Unreported*).

66 CRC, 1989.

67 Bottoms, A and Dignan, J (2004) 'Youth *Justice in Great Britain'*. In Tonry, M. and Doob, N *Youth Crime and Youth Justice: Comparative and Cross- National Perspectives* (Volume 31) Chicago & London: The University of Chicago Press, p. 121.

68 Most of the children in conflict with the law in urban areas are alleged to commit sexual offences. This is in accordance with Evaluation Report on Provision of Legal Aid for Children in Conflict with the Law: WLAC in Dar es Salaam, 2014 and Tanganyika Law Society in Mbeya.

69 This is the Juvenile Court as established under the *LoCA*, Section 97, this was so established in its commitment to implement international and regional standards relating to access to justice for children as per article 40 of CRC and article 17 of the *ACRWC*.

70 Section 98 (1), *Ibid.*

71 Section 103, *Ibid.*

72 Section 99 (1), *Ibid.*

73 GN. No. 158/2019 which had the premises of Primary Courts designated as Juvenile Courts as scheduled.

74 GN. No. 110/2019, which are made with intent to accelerate the determination of cases involving vulnerable groups, juveniles being amongst.

75 Cap. 16 RE 2019, as well as section 3 of the *LoCA* that defines the word *"offence"*.

76 GN. No. 182/2016.

(a) *Unless the charge is on homicide or any offence punishable with imprisonment for a term exceeding seven years*

(b) *Unless it is necessary in the interest of that child remove him from association with any undesirable person; or*

(c) *Unless the officer has reason to believe that the release of that child would defeat the ends of justice release such child on a recognizance being entered into by himself or by his parent, guardian, relative or without sureties.* [77]

When the provision is read, it is crystal clear that, there are circumstances in which a child may be granted bail ***(police bail)*** or court ***(court bail).*** Police have the discretion not to grant bail, in which case a child must attend a hearing within twenty four hours, unless the offence is a serious one and the child is arrested on a Friday, in which case it is permissible for the hearing to be conducted on Monday in which case the child should be held in the care of a fit person or institution prior to the hearing.[78] This position of the law is very acrimonious to the overriding principle of the *best interests of the child*. It is trite position under the ACWRC *(supra)* that member states are not to subject a child under inhumane conditions, discrimination, arbitrary arrest and detention. When such a child is detained under the provision, it is as good as prejudging the child whose fate or guilty is yet to be established by competent authorities. This is, by no means, for public interest whose definition is blurred, neither is it for the safety of a child. It should be noted that, the state is the custodian of justice as it was under the principle of *parens patriae*.

Thus, by detaining a child, the state is neglecting and absconding from its noble duty of satisfying safety of the child which cannot be met by having him detained and denied his right to education among others. It cannot therefore be said that detaining a juvenile offender as the law provides is surely not consistent with the overall objective of rehabilitating, re-integrating and reforming a child offender.[79] The juvenile offender is, in such circumstances, curtailed of his/her rights and denied the protection afforded by the principle of the best interests of the child.

The JCR provides that when it is not possible to bring an arrested child to the court, the child should be placed in an approved residential home, institution or with a fit person. Despite the wording of the provision of rule 23(5) (b) of the JCR, this requirement of the law has not been a reality. It has been a clarion call of the welfare officers and the courts to get these fit persons[80] and institutions as finding the same has been a difficult task.

Refusing bail to a child simply because the parents refuse to attend at the police station or they cannot be found is very awkward and unwelcoming. In such circumstances, the LoCA calls the police to make a child protection referral to the social welfare department.[81]

The *abracadabra* that manifested in getting a fit person applies as well to fit institutions[82] as these residential homes which are licensed homes to provide a substitute temporary family care or other approved institutions by Commissioner for Social Welfare [83]are not enough to cater for the districts within which designated juvenile courts operate.[84] Considering the above situations, it is crucial that ***the police bail*** is granted to a child facing a charge of a bailable offence. The bail will enable such a child to keep on integrating with the society, family members that may use such an ample time to do counseling to the child whilst receiving his or her basic right to education among others.

There is a presumption under section 101 of the LoCA that bail will not be granted where there is a specific provision denying admitting an accused person to bail as is the case with the provision for homicide[85] or other offence punishable with imprisonment for more than seven years, or it is necessary to remove the child from association with undesirable person or if the police officer feels that release would defeat the ends of justice.

Given the above circumstances, as long as an offence is bailable, a child should be released on bail, and on conditions which are practicable and not unreasonably excessive. Releasing a child on bail on unreasonable conditions amount to giving liberty by one hand and taking it by another while a child's physical and health immaturity, need special safeguard.

In Tanzania, homicide is one of the unbailable offence as provided under section 148 (5) (a) (i) of the CPA. The section implies that when a juvenile offender is accused to have committed homicide his liberty is out rightly curtailed, as bail cannot be granted to a juvenile offender. A juvenile offender is thus subjected to a prolonged incarceration regardless of his physical and mental health pending investigations and prosecution whose timeframe to their finalization is uncertain. This leaves a juvenile offender in psychological trauma.

Section 148 (5) of the CPA that provides for unbailable offences, was once declared unconstitutional in its entirety in the case of *Paulo Sanga v. the Attorney General* [86] for the reasons, *inter alia* that the provision violates the right to personal liberty and presumption of innocence embodied in article 13 (6) (b), and 15 (1) and (2) of the Constitution.

The position *supra* was soon thereafter in *Attorney General Dickson Paulo Sanga*[87] overturned by the Court of Appeal of Tanzania following an appeal against the decision of the High Court which was lodged by the Attorney General. The Court of Appeal of Tanzania declared the said provisional constitutional. To recapitulate the background to the impugned decision of the trial court in *Dickson Sanga (supra),* the High Court among others declared the impugned section as a whole unconstitutional as was violating article 13 (6) (b) and 15 (1),(2) and (3) of the Constitution. On appeal, the Court of Appeal, in its endeavor was of a considered view that section, 148 (5) (a) (i), (ii) (iii), (b), (c), (d), and (e) of the Constitution is constitutional as the provision is saved by article 30 (2) of the Constitution.

77 Section 101 of the *LoCA*.
78 Rule 23 (4-5) of the JCR.
79 Rule 28 of the JCR
80 Section 3 of the LoCA, defines who is a fit person.
81 Section 94(5) of the LoCA.
82 Section 3 of the LoCA, defines an approved residential home
83 Rule 3 of the JCR.
84 The Guardian, dated 20th September, 2018 "UNICEF recommends Tanzania to invest more on "Fit Family" scheme.
85 Black's Law Dictionary, 6th Ed., defines Homicide as … *the killing of one human being by the act, procurement, or omission of another…*, p. 734.
86 Misc. Civil Cause No. 29 of 2019 as per Masoud, Kulita and Masabo JJJ.
87 Civil Appeal No. 175 of 2020 as per Mugasha JA, Ndika JA, Mwambegele JA, Kwariko JA, and Kitusi JA.

As the juvenile justice in Tanzania is inextricably linked with criminal justice in Tanzania, the LoCA read together with the CPA, allows the courts to release on court bail[88] accused persons pending determination of their cases by the courts However, whilst granting the bail, the court is called upon to use its discretion wisely and not to set excessive conditions. [89]

Section 148 (5) (a) (i), (ii), (iii), (b), (c), (d), and (e) of the CPA provides for unbailable offences. Consequently due to the existing relationship between juvenile and criminal justice in Tanzania, the said provision applies to juvenile offenders.[90] The section states that a police officer in charge of a police station or a court will not grant bail where, an accused person is charged with any of the following offences, (a) murder; (b) treason; (c) armed robbery; (d) defilement; (e) illicit trafficking in drugs; (f) an offence involving heroin, cocaine, prepared opium, opium poppy (papaver setigerum), poppy straw, coca plant, coca leaves, cannabis sativa, or cannabis resin (Indian hemp), methaqualone (mandrax), Catha edulis (khat) or any other narcotic drug or psychotropic substance specified in the Schedule to this Act (CPA) which has an established value certified by the Commissioner for National Co-ordination of Drugs Control Commission, as exceeding ten million shillings; (g) terrorism against the Preventive of Terrorism Act, 2002;[91] (h) Money Laundering contrary to the Anti-Money Laundering Act,[92]; and (i) Trafficking in persons under the Anti-Trafficking in Persons Act, 2008.[93] Other circumstances that an accused person may be denied bail thus adding the width and breadth of the discretion in charging for non-bailable offences are found under section 148 (5)(b)[94],(c)[95],(d)[96],&(e)[97] of the CPA. Apart from the CPA, unbailable offences are as well prudently embodied in other legislation as the Economic and Organised Crimes Act[98] and the Drug Control and Enforcement Act.[99]

When read with rule 28 of the JCR, one thing is clear that a juvenile offender is denied bail as long as the offence committed is premised under the ambit of section 148 (5) *supra*. Rule 28 allows a child who is in conflict with the law to be released on bail into the care of his parent, guardian, fit person, fit institution or the commissioner of social welfare unless the offence with which the child is ***charged is unbailable offence***.[100] This rule is complementary and supplementary to section 148 (5) of the CPA.

From the clear wording of the statute (CPA), the courts and even the Officer in-charge of a police station are all handcuffed when a person is found charged of offences provided under section 148 (5) of the CPA which provides for non-bailable offences.[101] It is the imperative connotation from the above rule that, a child is allowed to be given bail and be released to the areas identified, Such position is in contemplation of realizing and implementing the overriding principle governing juvenile justice. The principle is provided under the UNCRC[102], ACRWC[103] and the LoCA. It provides for the ***Best Interests of the Child*** that calls for a child to be treated with respect and without discrimination of any kind.[104] It should be bone in mind that the LoCA, and Rules, JCR, are not to be read in isolation, but with the Penal Code that provides for the offences. The Penal Code is a penal statute that provides for offences that a juvenile offender is to be charged as the LoCA and the CPA[105]

Liberty is a statutory and Constitutional guarantee which envisaged under the Constitution as it has been pondered and cemented in many cases including cases of *Prof. Ricky Costa Mahalu*, and *Daudi Pete's*. However, the issue of liberty or bail to a child or juvenile has not been an easy ride when it comes to granting bail, upon an application. In the circumstances, bail application has been bewildered with notable mishaps, difficulties and challenges, not only to the police but also to the courts. This is particularly so when juveniles are vagabonds not having fixed abode, or if their parents are unwilling to supervise them, or simply because they are without parental care.

The challenges are also apparent when juveniles have committed non-bailable offences as provided under section 148 (5) of the CPA. The denial of bail in some circumstances has been given an applause by the courts. It was in such respect once observed and stated by the Court of Appeal in *D.P.P v. Daudi Pete*, that the Constitution recognizes the limitation of individual liberty provided that the requisite prescribed procedure for denying bail to the accused person has been followed.[106]

The provisions of the CPA read together with the LoCA and the JCR Rules, 2016 implies that refusal of bail application is an exception. However, the CPA and the LoCA read together with the JCR, 2016 and section 101 (a-c) of LoCA also set down both objective and subjective criteria for the denial of bail. The objective criteria set out under section 148 (5), section 101 (a-c) read together with rule 28 (1) of JCR, summarily deny bail. The Court is just required to verify the nature of the offences, if it is non-bailable as the section and the rule provide then the accused is so denied. This is in total disregard of the principle of the best interest of the child.

The notable legal repercussions of the *Attorney General vs Dickson Sanga* (supra) is that, if a person (an adult offender) or any other person, including a juvenile offender is accused of unbailable offence as provided for under section 148 (5) (a) (i), (ii), (iii), (b), (c), (d) and (e) of the CPA, then such accused is not to be granted bail. In other words, this means that once the accused person is charged with any offence listed under section 148 (5) of the CPA or he fits into any listed situations under the section, the courts of law or a police have no option apart from denying him bail. According to this decision the limitation that section 148 (5) is subjected to under Article 15 (2) of the Constitution is a valid restriction or limitation which does not render the law inoperative, and in no way the section 148(5) of the CPA violates article 15 (1) and (2) as there cannot be anything like

88 See Section 148 (6) and (7) of the CPA
89 [1988] TLR 252, p.258.
90 Rule 28 (1) of the JCR on bail to unbailable offences
91 Act No. 21 of 2002.
92 Cap: 423 RE: 2019.
93 Section 39 of *Anti- Trafficking in Persons Act*, No. 6 of 2008.
94 Situations relate to previous sentence of imprisonment term exceeding three years.
95 Record of absconding or failing to comply with bail conditions.
96 Protection and safety of an accused person.
97 Value of money or property involved in the offence.
98 Chapter 200 RE: 2019
99 Chapter 95 RE: 2019
100 Rule 28(1) of JCR
101 Under the precept of Rule 28 (1) of LoCA it includes a juvenile offender
102 *UNCRC* is provided under Article 3 (1).
103 *ACRWC* is provided under Article 3 (1).
104 Sections 4, 5, 11 and 99 of the *LoCA*.
105 See the case of *Goodluck Kyando v. R,* Criminal Appeal No. 118/2002, Court of Appel of Tanzania at Mbeya, reported in the TLR [2006].
106 Criminal Appeal No. 28/1990.

absolute or uncontrolled liberty wholly free from restraint for that would lead to anarchy and disorder.[107]

Rule 28 of the JCR and the section 148(5) of the CPA are not devoid challenges when it comes to juvenile justice. The holding of the Court of Appeal in the case of *Dickson Paulo Sanga* (*supra*) that the offences contained in the impugned provision constitute circumstances in which bail can be denied, is quite frustrating, and thwarting the overriding objective of the *Best interests of the child* (s*upra)*. This is as provided by clawing the inalienable Constitutional right to bail or liberty in unbailable offences while a child is supposed to be treated with benignity and recognized as vulnerable group as stated:

> *"Particular groups of people who, due to adverse social, economic, cultural and practices present in society are weak and marginalized or have traditionally been victims of violations and these include widows, children, elderly people and persons with disabilities.*[108]

If the above definition caters across to the children, it is unclear why they are curtailed their inherent right to liberty if at all they are vulnerable. As they are vulnerable, they were to be accorded not the same weight when it comes to offences charged (non-bailable offences) as their counterparts-adult offenders, and this among other things it was for upholding both overriding principles that the LoCA embraces, and the best interest of the child among others.

It ought to be remembered that, a juvenile is to be detained in custody for these non-bailable offences or in remand prison for the unknown period of time when investigations or prosecution is ongoing. The authors are hereby taxed with one question, why the said offenders are not to be vented on bail paying regard to children's best interest as to education and many others? Despite the wording of *Judicature and Application of Laws (Practices and Procedure in Cases involving Vulnerable Groups)* demanding finalization of cases involving persons from a vulnerable groups to be finalized within six months, this has not been a reality and the laxity of extension of time in exceptional circumstances upon the lapse of six months for not more than three months has been and is subject to abuse as to be found in the section.[109]

For a juvenile to remain in custody for six to nine months pending investigations or prosecutions is it not against *Public Interests* for the juvenile to be denied his basic rights to education, free movement and many others during this period? It should be noted that in most of the circumstances, the Republic while denying bail to the offenders only makes a ***blanketing statement*** that the denial is in the interest of justice or of the public and that the offenders are denied bail as they would tamper with the investigations. These are mere allegations with flimsy, or unfounded and lacking substantiating evidence to support the averment. This practice tends to encroach liberty of these vulnerable groups based on the baseless submissions. This was once condoned in the case of *Suleiman Masoud Suleiman & Aisha Khalfan Suleiman v. R* (supra).[110]

It is glaring that Tanzania does heed to its international commitments. When section 101 (a) (b) & (c) of the LoCA is read together with rule 28 (1) of the JCR and section 148(5), it is crystal clear that the provisions are unwelcoming. Treating juvenile offenders as their counterpart adult offenders is by itself discriminatory, bearing the special circumstances that juveniles are and are being nurtured. Fortifying the foregoing, the provision merely have blanketing provisions, lacking prescribed procedures regulating refusal of bail on the offences listed.[111]

5. CONCLUSSION AND RECOMMENDATIONS

It is agreeable that liberty of the individual must be guarded, protected and promoted but the interests of the society, of which the individual is component, must be taken into account if society is to move forward and flourish instead of stagnating and breaking apart. In balancing the interest between the two, the underpinning and overriding principles in juvenile criminal justice, and the best interests of the child, need to be embraced.

A juvenile need not to face neither arbitrary arrest nor detention, henceforth bail should be given to a juvenile. Bail must not be punitive, but assurance of accused attendance before the court of law when needed. This underscores the reason why there is bail which reflect the constitutional principle on innocence waiting to establish guilty of an accused person.

However, there are some grounds which prevent the suspect or accused person from being given this right. It depends with the degree of the crime committed or the nature of the crime committed or sometimes the circumstances in which the crime was committed or the relationship between the suspect or accused person and the surrounding society. It also depends on the characteristics or behaviors of the said person. For instance, if his release may affect the criminal investigations and procedures to the extent of affecting the protection of other's rights hence occasion injustice other than justice to the victim(s).

Thus the practice of denying bail to juveniles in Tanzania in whatever grounds is gloomy. It is also quite disturbing and unwelcoming, when laid underpinnings of juvenile justice particularly on his liberty re disregarded. Whatever form of detention is uncalled for to the juveniles, bearing the fact that juvenile justice is in *juxta* position to ordinary criminal justice involving adult offenders, as the former is hinged towards reforming, rehabilitating and reintegrating a juvenile, any law contrary to this should not be given a nod.

Should be remembered that, Children are the most vulnerable individuals in our society. They are also the most precious commodity that the world has and have a right to be protected from all forms of abuse at all cost. Therefore, the state is duty bound to ensure that the best interest of the child is highly achieved as a key promoter and protector of the human rights including the rights of a child as the juvenile justice must give way to rehabilitation and restorative justice.

107 Pgs. 42, 50 and 51 of the CAT Judgment.

108 Section 3 of the *Judicature and Application of Laws (Practices and Procedure in Cases involving Vulnerable Groups)* Rules, 2019.

109 See section 4 of the Rules, *Ibid.*

110 By Mkeha, J, the HC (T) at Shinyanga Registry, Misc. Application No. 10 of 2020, p. 18.

111 See p. 66 of the printed Judgment of *The Attorney General v. Dickson Paulo Sanga*

Thus raft amendments should be done on liberty for juveniles whilst keeping into contemplation the best interest of the child, and international instruments that Tanzania has ratified. This may be achieved by making all offences bailable based on their oddity which is to be applicable to juvenile offenders for the reasons that were well articulated herein above. The earmarked amendments are to consequently affect section 101 (a) of LoCA and rule 28 (1) of the JCR.

The powers as for to granting bail or not should not be vested to the police and prosecutors. In other words, the issue of granting bail or refusal is not magisterial or executive one, rather judicial as per the Constitution.

Reports from the Child Justice Forum have to be worked upon. Forum has cried of its reports not being worked on, it is a call for their recommendations to ameliorate Juvenile Justice be worked upon.

As some children come into contact or into conflict with the law by chance, that is by being at a wrong place with a wrong person when the offences are committed, the Government should look at the possibilities of increasing approved centres that would take care of these children at risk of offending (ie. children working and living at the streets) as children in need of care and protection.

It is high time now for the Police General Order 240 on treatment of juvenile offenders to define what minor offences are. As the PGO mandates police officers to give verbal warnings for minor offences, but nowhere the word is defined, this may sometimes be misused for juveniles to remain incarcerated.
Rehabilitation programmes and fit institutions be should be established. It is quite dismaying for the country like Tanzania, having more than two hundred and thirty six (236) designated Juvenile courts to have few fit institutions or rehabilitation programmes. Underpinning principle of the best interest of the child encompasses a need to protect liberty of a juvenile, by having few institutions of the kind is as well as denying the right to a juvenile keeping into consideration the cost involved.

ACCESS TO JUSTICE BEFORE THE EAST AFRICAN COURT OF JUSTICE: EXAMINING THE RULES AND THE PROCEDURE

By Dr. Tasco Luambano[1]

Abstract

The present East African Community (EAC) is one of the strongest regional economic communities in Africa with a significant history. The EAC came into being following lessons learned from the *de facto* EAC which, was established in 1967, and collapsed in 1977. Currently, the EAC is comprised of six partner states, namely, the Republic of Burundi, the Republic of Kenya, the Republic of Rwanda, the Republic of South Sudan, the United Republic of Tanzania and the Republic of Uganda.[2] To date, the implementation of the objectives of the EAC is done through established organs and institutions of the community like the East African Court of Justice (EACJ).[3] This article examines "access to justice" before the EACJ with special focus on the rules of procedure of the court, the role and mandate of the Court in administration of Justice to the East African Community (EAC) Partner States and challenges facing the court.

Key words: EACJ Rules and Procedure

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2 While the Republic of Burundi and Rwanda joined the EAC in July 2007, South Sudan joined the EAC in April 2016.

3 Article 9 of the EAC treaty provides for the establishment of organs and institutions of the EAC.

1.0 Overview of the East African Court of Justice

Basically, a Court or Tribunal established either at the national, sub-regional or regional level plays a significant role in law making process. It normally compliments the core functions of a legislative body by interpreting provisions of a particular legislation or treaty and, in so doing, it makes case law. The East Africa Court of Justice (EACJ) is one such courts, which in its day-to-day functions compliments the key functions of the EALA, in form of case laws.[4] With regard to the role of the EACJ, article 23 of the EAC Treaty states that:

> *The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with the Treaty.*

In other words, the major role of the Court is to act as an overseer of the acts of Partner States to ensure that they are in line with the provisions of the EAC Treaty. The EACJ has also a role of ensuring that institutions established under the EAC Treaty operate in accordance with the objectives of the treaty. On the jurisdiction of the EACJ,[5] the EAC Treaty stipulates two categories of jurisdiction: Firstly, the interpretative jurisdiction and secondly, the advisory jurisdiction of the Court.

4 Article 9 EAC Treaty establishes the EALA. According to article 49 of the EAC Treaty, the EALA is the key legislative organ of the Community.

5 Jurisdiction of the court means powers of a Court, Tribunal or other judicial body to entertain a matter brought before it. Every judicial mechanism or organ possesses jurisdiction over matters only to the extent granted to it by establishing legal provision. However, in the current study, the term jurisdiction is considered as the powers ascribed to the EACJ either by the EAC Treaty or any related Protocol adopted by the Partner States. See. Mbondenyi M., (2011) "International Human Rights and their Enforcement in Africa." LawAfrica Publisher.

2.1 Interpretative Competence of the East African Court of Justice

Since the EAC Treaty binds only state parties to the said Treaty, the Vienna Convention on the Law of Treaties provides for the general rule in interpreting the EAC treaty, which the EACJ is obliged to follow.[6] The general rule is that, a judicial body should interpret a treaty in good faith, by considering the objectives and purpose of the treaty.[7] In the interpretation of the Treaty annexure and preambles are considered as part of the treaty.[8] Similarly, this rule also binds the EACJ.

The EAC Treaty establishes the EACJ as an adjudicatory body of the Community. Originally, the Jurisdiction of the Court was provided for under article 27 of the EAC Treaty which provided that:

1. *The Court shall initially have jurisdiction over interpretation and application of the Treaty.*
2. *The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a Protocol to operationalise the extended jurisdiction.*

However, when the EACJ became operational, the Heads of States (the Summit) amended the provisions of the EAC Treaty in relation to the Court by adding a proviso to article 27(1) and introducing article 30(3) to the EAC Treaty.[9] The added proviso to article 27(1) reads that:

> *Provided that the court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.*

Furthermore, the new Sub-article 3 of Article 30 of the Treaty provides that:

> *The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to institutions of a partner states.*

Technically, before the amendment to introduce the proviso to Article 27(1) of the EAC Treaty, the EACJ had unlimited jurisdiction to entertain disputes arising from the provisions of the EAC Treaty. At the moment, the jurisdiction of the EACJ is limited to the interpretation and application of the EAC Treaty. The EAC Treaty likewise excludes certain matters to be entertained by the EACJ, especially where the EAC Treaty confers such jurisdiction on organs of Partner States.[10] Therefore, according to the proviso, the jurisdiction of the EACJ to interpret and apply the provisions of the EAC Treaty can also be conferred to other organs of the Partner States.

The new amendment to article 30 of the EAC Treaty that introduces paragraph 3, excludes the jurisdiction of the EACJ on certain matters. Indeed, the EACJ is limited to exercising its powers in the circumstances where an Act, regulation, directive, decision or action has been reserved under the EAC Treaty to an institution of a Partner State.[11] This implies further that, under Article 30(3) of the EAC Treaty, institutions in Partner States enjoy similar powers, in certain circumstances, with the EACJ.

In the case of *the East African Centre for Trade Policy and Law v. The Secretary General of the East African Community*,[12] the EACJ discussed at length the legality of the amendment introduced by the EAC Partner States in 2006/2007.[13] In this case, the applicant challenged the amendment of Chapter Eight (8) of the EAC Treaty, by introducing Article 27(1) and Article 30 (3) to the EAC Treaty. Another allegation by the applicant was that, the Customs Union[14] and Common Market Protocols[15] introduce new disputes settlement mechanism which take away the jurisdiction of the EACJ in handling disputes arising from the Protocols, thus defeating the supremacy of the EACJ.[16] After considering a number of related issues, the EACJ stated that:

> *The Proviso to Article 27(1) and Article 30(3) undermine the supremacy of the EACJ and therefore contravene Article 5, 6, 8(1), (4) and (5) and 23 of the Treaty.*[17]

6 See Article 26 of the Vienna Convention on the Law of Treaties, 1969.

7 See Article 31(1). *Ibid.*

8 See Article 31(2). *Ibid.*

9 The EAC Treaty was amended on 14th December 2006 and 20th August 2007, respectively.

10 See the Proviso of Article 27 (1) of the EAC Treaty.

11 See Article 30(3) of the EAC Treaty.

12 Application No.9 of 2012.

13 The EAC Treaty was amended on 14th December, 2006 and 20th August, 2007.

14 On 3rd March 2004, Customs Union Protocol was conclude and entered into force on 1 January 2005. The Protocol is also available at: http://www.eac.int/eac. Accessed on 10th September, 2014.

15 On 20 November 2009, the Common Market Protocol was concluded and entered into force on 1st July, 2001. The Protocol is also available at: http://www.eac.int. Accessed on 10th September, 2014.

16 See also Kennedy G.; " The Legality of the Appellate Division and the Human Rights Jurisdiction of the East African Court of Justice of the East African Court of Justice of the East African Community" *in African Nazarene University Law Journal*, vol. No. 3, part 1, of 2015, pp.41-64.

17 See the decision in the case of *the East African Centre for Trade Policy and Law v. The Secretary General of the East African Community*, Application No.9 of 2012.

In relation to human rights protection, the *East African Centre for Trade Policy and Law*'s (cited above) point out that the controversial amendment effected on the EAC Treaty also contravenes Article 6 which urges EAC Partner States to observe good governance and democracy as well as to recognise, protect and promote human and people's rights in accordance with the provisions of the ACHPR.[18] Although the EACJ has limited jurisdiction, the EAC Treaty makes reference to "other jurisdiction" which include; appellate, human rights or "such other" jurisdiction as may be determined by the Council.[19] Generally, the phrase "such other" as used under article 27(2) of the Treaty is ambiguous and operate as a pigeon hole, whereby the EACJ may accommodate any kind of cases provided that it involves a violation of certain provisions of the Treaty.

More significantly, for the EACJ to exercise "such other" jurisdiction as stipulated under article 27(2) of the Treaty, Partner States through the Council must adopt a special Protocol to that effect *i.e.* extending the EACJ mandate. Currently, no Protocol has been adopted by the Council to provide for the extended jurisdiction of the Court, a position which undermines the effective implementation of the EAC objectives. In the case of *Hon. Sitenda Sebalu v. The Secretary General of the East African Community,*[20] the EACJ noted that:

> *The issue of extended jurisdiction of the EACJ did not come as an afterthought. It was acknowledged as an important complement of the Court rights at the inception of the Community, the Court being recognized as a vital component of good governance which the Community Partner States undertook to abide by Article 27(2) of the Treaty clearly demonstrates.*

The Court added further that:

> *The delay in extending the jurisdiction of the Court not only holds back and frustrates the conclusion of the Protocol but also jeopardises the achievement of the objectives and implementation of the Treaty and amounts to an infringement of Article 8(1) (c) of the Treaty and contravenes the principles of good governance as stipulated by Article 6 of the Treaty.*[21]

From the case of *Hon. Sitenda*, it can be inferred that the functioning of the EACJ is hampered by legal challenges. One of the serious legal challenges is the existing limitation over its jurisdiction to hear human rights cases. The EAC Treaty makes it clear that human rights jurisdiction shall be vested in the hands of the EACJ upon conclusion of a Protocol to operationalise such extended jurisdiction.[22]

2.2 Advisory Competence of the East African Court of Justice

Essentially, an advisory mandate entails the powers of the court or tribunal to render legal opinion to an individual or institution which has requested the same. At international level, the International Court of Justice (ICJ) is among the courts with powers to give advisory opinion.[23] In exercising its advisory powers, the ICJ may give advisory opinion to anybody like the UN General Assembly (GA) and the Security Council, if requested to do so.[24] For example, the GA requested the ICJ to opine on the question whether the unilateral declaration of independence by the provisional institutions of self-Government of Kosovo violated any international law.[25] In its advisory opinion, the ICJ was of the view that, the declaration of independence of Kosovo did not violate any rule of international law.[26]

Like the ICJ, the advisory powers of the EACJ are stipulated under the EAC Treaty. Currently, the EACJ is empowered to give advisory opinion to the EAC Summit, the Council or to the Partner States. The advisory mandate of the EACJ is provided under article 36 of the EAC Treaty which stipulates that:

> *The Summit, the Council or Partner State may request the EACJ to give an advisory opinion regarding a question of law arising from the Treaty which affects the Community.*

Again, rule 75(1) of the EACJ Rules of Procedure[27] provides categorically that:

> *A request for an advisory opinion under Article 36 of the Treaty shall be lodged in the Appellate Division and shall contain an exact statement of the question upon which an opinion is required and shall be accompanied by all relevant documents likely to be of assistance to the Division.*

It should be borne in mind that the advisory powers are vested in the Appellate Division of the EACJ (and not the First Instance Division). However, it is argued in this article that the presumption behind requesting for advisory opinion stems from the existing contentious application of two or more provisions of the EAC Treaty.

Since it became operational, the EACJ has not been often requested to exercise its advisory powers conferred upon by the EAC Treaty. However, in the exercise of such powers, in 2008 the Council of Ministers of the EAC requested the EACJ to give its advisory opinion on the application of the provisions of the EAC Treaty.[28] In this notable request, the EAC was requested to give its opinion on the application of the Principle of Variable Geometry[29] vis-à-vis the requirement for consensus[30] in decision-making.

18 *Ibid.* See also the African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986), OAU Doc.CAB/LEG/67/3/Rev.5.
19 See Article 27(2) of the EAC Treaty.
20 See EACJ Reference No.1 of 2010.
21 *Ibid.*
22 Article 27(2) EAC Treaty, Ibid.
23 Article 65(1) of the Statute of the International Court of Justice, 1945.
24 Article 96(1) of the UN Charter, 1945.
25 See advisory opinion of the ICJ dated 22nd July, 2010. Available at http://www.icj-cij.org/docket/files/141/16010.pdf. Accessed on 2nd May, 2020. pp. 1-15.
26 *Ibid,* p.14.
27 Of 2003.
28 See *In the Matter of Request by the Council of Ministers of the East African Community, for an advisory opinion, advisory opinion of the Court*, Application No.1 of 2008, First Instance Division. According to Rule 75(1) of the East African Court of Justice Rules of Procedure 2013, a request for an advisory opinion under article 36 of the Treaty shall be lodged in the Appellate Division and shall contain an exact statement of the question upon which an opinion is required and shall be accompanied by all relevant documents likely to be of assistance to the Division.
29 Article 7(1) (e) of the EAC Treaty provides for Variable Geometry as one of the operational principles of the Community: "The Principle of Variable Geometry which allows progression in cooperation among groups within the Community for wider integration schemes in various fields at a different speeds." See also pp.93-95 in this study.
30 See Article 12(30 of the EAC Treaty which stipulates: "The decision of the Summit shall be by consensus." Similarly, Article 15(4) of the Treaty states: "Subject to the Protocol on decision-making, the decision of the Council shall be by consensus." Although the procedure for consensus in decision-making is time consuming, in most cases it allows for full involvement through solid reasons as to why a particular decision should be taken which is not the case under majority rule as a method of making-decision.

In addition, the EAC treaty lays down the procedure for making-decision regarding the affairs of the Community. Accordingly, the EAC Summit and the Council are obliged to reach their decision by consensus on any matters regarding the affairs of the Community.[31] Therefore, the Council of Ministers were of the views that the two principles were not in harmony and so requested the Court to render its opinion. In its advisory capacity, the EACJ observed that:

> *The principle of Variable Geometry can comfortably apply, and was intended, to guide the integration process and find no reason or possible for it to conflict with the requirement for consensus in decision making.*[32]

The Court noted further that:

> *Variable Geometry is, therefore, intended, and actually allows, those Partner States who cannot implement a particular decision simultaneously or immediately to implement it at a suitable certain future time or simply at a different speed while at the same time allowing those who are able to implement immediately to do so*.[33]

Revisiting this contentious matter as contended by the Council of Ministers in relation to the application of the Principle of Variable Geometry and decision-making by consensus, this article disagrees with the opinion provided by the Court in Application No. 1 of 2008. The reason for the departure is that, the two concepts (variable geometry and decision-making by consensus) cannot be invoked at the same time. This is because, the EAC treaty allows Partner States to dictate their [own] speed in the integration process. Thus, it is difficult to exercise decision-making by consensus if Partner States are allowed to dictate own speed in the integration process.

Moreover, the two principles cannot be invoked harmoniously in a situation where a certain group among the Partner States is engaged in activities that are separate from the Community-sanctioned activities without consensus. Conversely, the principle of Variable Geometry and Consensus in decision-making as featured under the EAC treaty can be harmoniously relied upon by a state party or parties where all Partner States agree on a certain issue or move regardless of whether a certain group is not ready at a particular stage. In my submission, favourable speed in progression in activities of the EAC can only be achieved through broad consultation and consensus.

2.3 Access to Justice before the EACJ

The concept *"access to justice"* can be defined as exclusive rights of individuals to access the formal national justice machinery. It is also defined to mean ability of individuals in a particular society to seek remedies before institutions responsible for administration of justice. Individual access to justice depends on many factors, some of these factors are: affordable legal representation, existence of well-defined judicial system, peoples' awareness of their rights and corruption free judicial system, to mention a few.[34]

31 *Ibid.*
32 See Application No.1 of 2008, *Op. cit*. p.34.
33 *Ibid*. p 35

34 See also Stevens J., "Access to Justice in Sub-Saharan Africa: the Role of Traditional and Information Justice System", Astron Printers, London, 2000.

Generally, access to the EACJ is governed and regulated by article 30(1) of the EAC Treaty which reads thus:

> *Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.*

On the basis of this provision, it is evident that any "person" (natural or artificial) can have a direct access to the EACJ provided that the rights for seeking redress are covered under the treaty. In fact, the EAC Treaty has a unique feature regarding the requirement of exhausting local remedy. In contrast with other human rights treaties, the EAC Treaty does not require an individual to exhaust local remedy before accessing the EACJ.

Indeed, a person may access the EACJ without filing his or her case before the national Court for the same cause of action. In other words, one can directly file a case before the EACJ without first filing such a case before one's national courts. This is an exception to the general rule articulated in a number of human rights treaties which require a victim of human rights violation to exhaust domestic remedies before filing his complaint in a human rights court.[35]

35 Unlike the EAC Treaty, Article 26 of the European Convention on Human Rights and Article 56(5) of the African Charter on Human and People's Rights provides for the requirement of exhaustion of local remedy before one accesses it. The rule underlying exhaustion of local remedy has been a discussion in many international courts. In the case of *Switzerland Vs the United States of America* (1959) ICJ 6, General list No.34, the ICJ stated that: "The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law, the rule has been generally observed in cases in which state has adopted the cause of its national whose rights are claimed to have been disregarded in another state in violation of international law. Before resort may be heard by an international Court in such situation, it has been considered necessary that the state where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own legal system.

Article 1 of the EAC Treaty defines a "person" to include a natural person and legal person. Thus, even CSOs and NGOs can file a complaint before the EACJ in relation to acts of the Partner States, or institution of the Community or directives which contravene the provisions of the EAC. Indeed, access to the EACJ is open to not only natural or legal person but also to any Partner State which is of the considered opinion that another Partner State or an institution of the Community has failed to fulfil its obligations under the EAC Treaty or has violated provision(s) of the EAC Treaty. Therefore, under such circumstances, a Partner State may file a complaint and seek redress from the EACJ.[36] With regard to individual's access to the EACJ, the EAC Treaty allows such an individual to appear personally before the Court or be represented by an agent or advocate.[37]

In addition, the EAC Treaty also allows the Secretary General of the EAC to access the EACJ.[38] It should be borne in mind that, the Secretary General of the Community, as the principal executive

36 See Article 28 of the EAC Treaty.
37 See Rule 2(2) and Rule 17(1) of the East African Court of Justice Rules of Procedure 2013. According to this rule such an advocate should be entitled to appear before superior Court of any of the Partner States. For example, in Tanzania, the Court of Appeal is a Superior Court, the Supreme Court of Kenya and Uganda are also considered as Superior Courts in their countries. Therefore, an advocate qualifying to appear in these Courts can also have qualification to represent an individual litigant before the EACJ.
38 See Article 29 (1) of the EAC Treaty which reads, "When the Secretary General considers that a Partner State has failed to fulfil an obligation under this Treaty or has infringed a provision of this Treaty, the Secretary General shall submit his or her findings to the Partner State concerned for that Partner State to submit its observations on the findings."

officer of the Community,[39] has a duty to ensure that the provisions of the EAC treaty are observed by partner states. As observed earlier, the EAC is regulated by fundamental principles. Notably, one of the EAC principles makes reference to promotion and protection of human and people's rights in accordance with the provisions of the ACHPR.[40]

Moreover, access to the EACJ is also open to the national courts or tribunals of the partner states.[41] The Court or Tribunal may access the EACJ by requesting a preliminary ruling from the EACJ where the question is raised in the national court or tribunal on what should be the proper interpretation of a particular provision of the EAC Treaty or validity of the regulations, Protocol, directives, decisions or actions of the Community.[42] However, no state among the partner states has ever tested the powers of the EACJ under such circumstances, as per article 24(8) of the EAC Treaty.

3.0 Rules of Procedure of the EACJ

The proceedings under the EACJ are regulated by the EACJ Rules of Procedure of 2013 ("the Rules"). These rules were issued by the EACJ pursuant to the powers conferred upon it under article 42 of the EAC treaty.[43] The EAC Treaty generally empowers the EACJ to make and unmake its own rules to regulate proceedings. In this regard, article 42 stipulates that: "The Court shall make rules of the Court which shall, subject to the provisions of the Treaty, regulate the detailed conduct of the business of the Court."

39 See Article 67(1) & (3) of the EAC Treaty.
40 See Article 6(d) of the EAC Treaty.
41 See Article 34 of the EAC Treaty
42 *Ibid*.
43 See the EAC Treaty. Op. cit.

The process of making the EACJ rules involved consultations of a number of stakeholders, including members from the judicial systems of the East African Partner States.[44] In its development, the EACJ has had several reviews and amendments of the rules to accommodate amendments of the EAC Treaty and restructuring of the EACJ into the first instance division (FID) and the appellate division (AD).[45] The current EACJ Rules were amended in March 2013 and came into force on 11 April 2013 (the East African Gazette No.7 of 11 April, 2013).[46]

3.1 The Liberal Approach under the EACJ Rules

One of the unique features of the EACJ Rules is that, it contains significant provisions which emphasise on achieving substantive justice without due regard to procedural technicalities as provided for in the rules.[47] For example, rule 1(2) of the EACJ Rules allows the Court to depart from strict application of the EACJ Rules when it appears necessary to do so in the interest of justice. In other words, there are circumstances in which the EACJ will not consider the Court rules in the spirit of justice.[48]

Moreover, the cardinal principle that procedural technicalities should not defeat justice is reflected in many provisions under the EACJ Rules. A good example is the wording of rules 48, 49 and 50 which allow a party to the proceedings to amend pleadings filed before the Court so as to realise substantive justice. Under these rules, any party in the proceedings is allowed to either apply for leave[49] or without leave of the Court to amend the filed pleadings. In the circumstance where pleadings are not closed, a party may amend such pleadings without obtaining the leave of the Court.[50]

Equally, when one party in the proceedings wish to add or substitute another party in the case, consent to amend must be obtained from all parties involved, including a person to be added.[51] In my submission, allowing for the amendment of pleadings without seeking the court's leave is a liberal approach towards dispensation of justice. Similarly, the Court's liberal approach may also be ascertained under rule 4 of the EACJ Rules of Procedure which reads thus:

> *A Division of the Court may, for sufficient reason, extend the time limited by these Rules or by any decision of itself for the doing of any act authorised or required by these Rules, whether before or after the expiration of such time and whether before or after the doing of the act, and any reference in these Rules to any such time shall be construed as a reference to such time as so extended.*

44 See the East African Court of Justice, Tenth Year Report of November, 2011
45 The two Divisions of the Court were reconstituted under article 23(2) of the EAC Treaty following the 2006 amendment of the Treaty.
46 See also the EACJ Rules of Procedure, 2013.
47 See, for instance, Rule 1(2) of the Rules which specifically stipulates that: "[N]othing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent **abuse** of the process of the Court." This rule is couched in a manner that is similar to certain provisions of the constitutions of the Partner States. For example, article 107A (e) of the Constitution of the United Republic of Tanzania, articles 22(3)(d) and 159(2) (d) of the Constitution of the Republic of Kenya, 2010, categorically stipulate that "the Court should administer justice without undue regard to technicalities."
48 *Ibid.*
49 Rule 48 (c) of the Rules. Please see also Rule 49(10 and 50(1), *Ibid.*
50 Rule 48(a) of the Rules.
51 Rule 48(b) of the Rules. *Ibid.*

The jurisprudence behind rule 4 of the EACJ Rules is that, the EACJ is empowered to depart from time limit fixed by the rules, provided that a party applying for the extension of time establishes a good and sufficient reasons. However, the issue as to what constitutes a "sufficient reason" is at the discretion of the Court to decide. In some cases, this issue has been settled by national courts of some Partner States. In Uganda, for example, Mulenge, JSC referring to rule 5 of the Uganda Supreme Court Rules, which is similar to rule 4 of the EACJ Rules and held that:

> *"[T]he Court may, for sufficient reason, extend time… what constitute 'sufficient reason' is left to the Court unfettered discretion."*[52]

Notably, the provision of rule 4 of the EACJ Rules reflects the procedural rules of the then EACA Rules,[53] the Judicature (Court of Appeal) Rules,[54] the Judicature (Supreme Court) Rules[55] and Court of Appeal Rules of the United Republic of Tanzania.[56]

Furthermore, the requirement to administer substantive justice without being bound by procedural technicalities was re-emphasised by the EACJ in its celebrated decision in the case of the *Attorney General of Kenya v. Hon. Peter Anyang'nyong'o & 10 others*.[57] The EACJ stated that:

52 See the case of *Boney Katatumba v. Waheed Karim,* Civ. Application No.27 of 2007 (S.Ct.of Uganda). This case is also cited by J. Busingye, PJ of the EACJ in the *Attorney General of Kenya. v. Hon. Peter Anyang'nyong'o & 10 others*, Application No.4 of 2009, EACJ.
53 See Rule 9 of the East African Court of Appeal Rules.
54 See Rule 5
55 Cap.13 of the Laws of Uganda.
56 Rule 9 of the Court of Appeal Rules, 2009.
57 See footnote no.385.

> *In this connection, this Court (which is pre-eminently a Court of Justice), stands prepared to administer substantive justice without undue regard to technicalities of practice, process and procedure.*

In regard to technicalities in access to justice, initiatives have been taken by some of the partner states that national courts deal with cases justly. Tanzania being one of the partner states has recently enacted law which now requires the courts to deal with cases justly and to have regard to substantive justice.[58] Consistent with the foregoing, the national court in Tanzania in the case of *Yakobo Magoiga Gichere v. Peninah Yusuph*,[59] emphasized the requirement of the courts to hear cases without due regard to technicalities, the fact which will afford access to justice by potential litigants.

The issue of timely justice under the EACJ has also been considered by the EACJ Rules of Procedure. Indeed, timely justice delivery is one of the fundamental pillars in the rule of law and administration of justice. Rules 37 and 38 of the EACJ Rules are drafted in such a way that they place special emphasis on the Court to hear and determine cases timely. Rule 37(1) reads as follows:

> *Subject to the provisions of this Rule and Rules 40, 41 and 42, every pleading shall contain a concise statement of material facts upon which the party's claim or defence is based not the evidence by which those facts are to be proved.*

Therefore, the overriding purpose behind the requirement that all pleadings before the EACJ be in a concise form is to prevent the Court from wasting its time and resources in analysing facts pleaded which are irrelevant to reaching a decision on the case.[60] Under the rules,[61] the EACJ is encouraged to deal only with relevant facts. Similarly, the rules set a conditional precedent that all matters of facts should specifically be pleaded.[62] A party preparing pleadings is duty-bound to make his or her allegations clear to the opposite party and the Court respectively.[63] Under the rules, a party may through pleadings raise a Preliminary Objection in the FID, for example, by objecting to the pleadings filed by the applicant before the Court on the basis of violation of certain substantive and procedural laws of the Community.[64] The major emphasis is that, such Preliminary Objection should basically be raised on the point of law and should not be vague.[65]

3.2 Administrative provisions under the Rules of the EACJ

The EACJ Rules contain provisions relating to the general administration of the day-to-day functions of the Court. Rules to that effect are provided in various sections. For example, Rule 5-7 are some of the Rules which spell out the role and functions of the Registrar of the Court

58 See the Written Laws (Miscellaneous Amendment) (No.3) Act, 2018.
59 Civil Appeal No. 55 of 2017, Court of Appeal of Tanzania, at Mwanza (Unreported).
60 See Rule 37(1) of the EACJ Rules.
61 *Ibid.*
62 See Rule 38(1) and (2) of the Rules.
63 *Ibid.*
64 See Rule 41 (10 of the Rules.
65 *Ibid.*

Under the Rules, the Registrar is defined as the Registrar of the Court or other officer acting on his behalf.[66] This definition also covers the Deputy or Assistant Registrar of the Court appointed at a pleasure of the President of the Court.[67] One of the core functions of the Registrar of the Court is to receive and keep all documents filed before the Court and is generally responsible for all administrative matters including financial control of the Court. In addition, the Registrar also serves as a custodian of the Court seal and responsible for the day-to-day keeping of the records and publications of the Court.[68] Moreover, the Office of the Registrar of the EACJ is one of the key offices of the Court which plays a key and fundamental role in strengthening the operations of the EACJ in the administration of Justice.

Administratively, the EACJ is composed of the Registrar and other supporting staff who carry out day-to-day duties of the Court.[69] The Registrar of the Court is answerable to the Office of the President of the Court. In addition, rule 5 of the EACJ Rules[70] spells out the functions of the Registrar as follows:

1. *The Registrar shall be responsible for acceptance and custody of documents and for effecting services as provided.*
2. *The Registrar shall have custody of the seal of the Court and shall be responsible for the records and the publications of the Court.*
3. *The Registrar shall be responsible for all administrative work and in particular for the accounts and financial administration in accordance with the financial procedure of the Community.*

To avoid bureaucracy that can be counterproductive in the day-to-day functioning of the Court, the EACJ Rules allow a liberal approach on the part of the Registrar. For instance, the Registrar can delegate his functions to the Deputy or office of the Assistant Registrar whenever the need to do so arises.[71] This approach is aimed at ensuring continuity in the operations of the office of the Registrar when the Registrar is not available for justifiable reasons.

3.3 Right to Legal Representation under the EACJ

The right to legal representation is one of the basic fundamental rights to any party in a trial.[72] As an indicator of its significance, this right is covered under statutes establishing regional economic courts and the Constitutions of EAC Partner States.[73] Article 19 of the Statute of the Court of Justice, 2008 for instance allows Member States and the institutions of the Community to be represented by an agent, but other parties must be represented by a lawyer.

It is a principle of natural justice that, for a hearing to be fair, parties in a trial must be afforded with an opportunity to follow and understand the whole proceedings.[74] However, one of the reasons behind the right to legal representation is that, not every person can talk and express himself or herself before the court when his or

66 *Ibid.*
67 Rule 2 of the Rules.
68 Rule 5(2) *Ibid.*
69 See Article 45(1) and (2) of the EAC Treaty.
70 See Article 5(1), (2) and (3) of the East African Court of Justice Rules of Procedure, 2013.
71 Rule 5A (2) of the Rules.
72 See Peter, C.M., (1997) Human Rights in Tanzania: Cases and Materials, Köln: Rüdiger Köpppe. Chicago p.334.
73 See, for example, article 13(6) (a) of the Constitution of Tanzania, 1977. *Op.cit.*
74 *Ibid.*

her right is at jeopardy.[75] This person may need assistance from a person who is trained in law, thus can defend the right on his or her behalf.

Similarly, the right to legal representation has been over re-emphasised in many cases. One of the landmark cases that can be used for illustration purposes is the decision in the old case of *Pett v. Greyhound Racing Association Ltd*[76]in which it was held that:

> *It is not every man who has the ability to defend himself on his own ...He may be tongue-tied or nervous, confused or wanting in intelligence…We see it every day. A magistrate says to a man: you can ask any question you like. Where - upon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him.*

Indeed, bearing in mind the importance of legal representation, the EACJ Rules allow a party to any proceedings in the Court to appear in person or by an agent and may be represented by an advocate.[77] Furthermore, any person with legal disability may appear either by a guardian *ad litem* or next friend and also may enjoy the legal service of an advocate.[78]

3.4 Right to Change an Advocate

The EACJ Rules allow any party in the proceedings to change or withdraw instructions from his engaged advocate.[79] A party wishing to withdraw instruction from his or her legal counsel must essentially notify the Registrar and the adverse party in regard to his or her intention.[80] The said notification is required to be made within seven (7) days. Although, the EACJ Rules do not tie a party who wish to withdraw instruction from his advocate to state reason for such withdraw, prudence necessitate such a party to show why he wishes to withdraw instruction from his advocate.

On the other hand, under the EACJ Rules, there are certain situations where a party in the proceedings will not be permitted to change his or her advocate, save where he or she has sought and obtained the Court's leave.[81]One of these situations is when a party in the proceedings applies to change his or her advocate while the Court has already delivered its judgment or passed the decree.[82] Under such circumstances, a party who wish to change his advocate must apply for leave to the Court by way of notice praying to change his advocate or intend to appear in person.[83] Moreover, once such leave is granted, a party who intends to change his or her advocate shall lodge a notice of change of advocate before the registry of the Court.[84] In addition, change of an advocate under the Rules is an option of the party himself; the Court needs only to be notified through a statutory notice by a party opting to cease the service of his engaged advocate.

75 *Ibid.*
76 [1969]1QB 125, also cited in Peter, C.M. *Op. cit.* p.334.
77 See Rule 17(1) of the EACJ Rules. See also Rule 2 which defines an "advocate" to mean an advocate who is entitled to appear before the superior Court of any of the Partner States.
78 Rule 17(4) of the Rules. *Ibid.*
79 Rule 18(1) *Ibid.*
80 *Ibid.*
81 Rule 18(2) *Ibid.*
82 *Ibid.*
83 *Ibid.*
84 Rule 18(3) of the Court Rules. The "Registry" includes also sub-registry of the Court.

3.5 Institution of proceedings before the EACJ

The European Court of Justice (ECJ) consists of the Court of First Instance and the Court of Justice. The EACJ also comprises two divisions, *i.e*., the FID and the AD, the procedure for institution of proceedings before the ECJ varies from one division to the other.[85] In hearing cases, the Court of Justice forms Chambers consisting of three to five Judges. It also forms a Grand Chamber consisting of thirteen Judges presided over by a president.[86] This segment discusses in detail the procedures involved in the interlocutory applications, filing of reference and lodging of an appeal in both the FID and the AD of the EACJ.

3.6 Procedure before the First Instance Division of the EACJ

The EACJ Rule provide that any claim or allegation determined by the Court has to be initiated by filing a "Statement of Reference."[87] The EACJ Rules define a "Statement of Reference" as "a party's written statement seeking the Court's determination of a reference brought before it.[88] In the same vein, a Partner State, the Secretary General of the Community or any other person intending to initiate proceedings before the FID of the Court must lodge in the Court a Statement of Reference.[89]

On the other hand, if the allegations or a dispute before the FID of the Court involves employees of the Community and the Community itself such a dispute must not be instituted by lodging a "Statement of Reference." Instead, a dispute of such nature must be properly lodged by filing a "statement of claim."[90] Unlike the Statement of Reference, a "Statement of Claim" is defined as "a party's written statement seeking the Court's determination of a dispute between the Community and the employees."[91]

The two documents initiating proceedings going by different names[92] also have more material differences in terms of their contents.[93] Whereas a "statement of reference" requires an applicant to state the nature of evidence to be relied upon in the case, the "statement of claim" does not force an applicant to state the nature of evidence to be adduced during the hearing of his or her dispute.[94] Disclosing evidence under the "statement of reference" affords the EACJ and the adverse party an opportunity to understand the nature and trustworthiness of the evidence to be used in proving the case.[95] However, the rules do not make it a mandatory requirement for the statement of claim to divulge all the material evidence intended to rely upon during the hearing of a claim.

85 See Article 47 of the Statute of the Court of Justice, 2008 and Article 23(2) of the Treaty Establishing the EAC.
86 See also Article 16 of the Statute of the Court of Justice. *Ibid.*
87 See Rule 24(1) of the EACJ Court Rules.
88 See Rule 2 of the EACJ Court Rules.
89 *Ibid*. See also the case of *Modern Holdings (EA) Limited v. Kenya Ports Authority*, Reference No.1 of 2008 filed on 25 September, 2008, filed under Article 30 of the EAC Treaty and Rule 20 of the EACJ Court Rules.
90 Rule 25(1) *Ibid.*
91 See again rule 2. *Ibid.*
92 The different names referred to here are the "Statement of Reference" and "Statement of Claim."
93 Under rule 24(2) of the Court Rules, some of the contents of "Statement of Reference" include the full particulars of the applicant(s), full particulars of the respondent(s), a statement disclosing the cause of action or subject matter, relevant provision of the EAC Treaty or Rule under which the applicant is levelled, the nature of evidence to support the allegation and the type of remedy the applicant seek against the respondent. Similarly, rule 25(2) of the EACJ Court Rules requires a Statement of Claim to state among others, full particulars of both the applicant and the respondent, a very brief statement of facts and the law on which such a claim is based and the order sought.
94 See rules 24(2) and 25(2) Ibid.
95 On the other hand, this requirement will also afford the adverse party an opportunity to prepare relevant evidence to defend his or her case.

The procedure of initiating claim under the EACJ looks different from that in other regional economic courts. For example, the EACJ requires a case to be filed by a written application addressed to the Registrar of the Court. It is necessary for the application to disclose the particulars of the applicants and the respondents, the subject matter of the dispute and the orders sought. The applicant's application needs also to be accompanied by the measure of remedies the party is seeking.[96]

3.7 Response to the Reference and Written Statement of Defence

It is a trite rule that once the statement of reference has been lodged before the FID of the Court, the Registrar of the EACJ is required to issue a notification[97] informing the respondent that an applicant or claimant has instituted a reference or claim against him or her.[98] Moreover, rule 30(1) of the EACJ Rules directs the respondent to file a response within forty-five (45) days from the date of the receipt of the notification. The applicant must also within forty-five (45) days make a reply to the response by the respondent.[99]

As it was pointed out earlier, if a dispute involves the EAC employees and the Community such a dispute will be initiated by lodging a "statement of claim" followed by a notification to be served to the respondent in accordance with rule 26(1). The respondent must, therefore, be required to file a statement of defence.[100] Thus, the respondent can exercise the right to file a statement of defence within a fixed period of thirty (30) clear days.[101] Technically, the provision of rule 31(1) of the EACJ Rules is aimed at giving the respondent the right to be heard as one of the principles of natural justice.

The right to be heard as one of the principles of natural justice has been re-emphasised by many judicial bodies as a way of upholding human rights principles to the tenor. For example, in the case of the *High Court Judge i/c, High Court Arusha v. NIN Munuo Ng'uni*[102] the court stated that: "… the current trend and tempo of human rights demand that there should be a right to be heard even from such an *enterim* decision."[103] Courts in many jurisdictions also demand not only a person in a suit to be given a right to be heard but also that he or she should be given an adequate opportunity to be heard.[104]

Furthermore, the URT Constitution recognises the right to be heard by stipulating that: "When the right and duties of any person are being determined by the Court or any other agency, that person shall be entitled to a fair hearing and the right of appeal or other legal remedy against the decision of the Court or of the other agency concerned."[105] Therefore, the "*audi alteram partem*" principle is part of the URT Constitution.[106]

96 See article 21 of the Statute of the Court of Justice, 2008.
97 See rule 26(1) of the Rules.
98 The contents of "Notification" are described in Form 1 as made under Rule 26(1) of the Rules found in the second schedule of the EACJ Court Rules.
99 See rule 30(2) of the EACJ Court Rules.
100 Rule 31(1) *Ibid*.
101 *Ibid.*
102 Civil Appeal No.45/98 Court of Appeal of Tanzania at Arusha (Unreported).
103 *Ibid.*
104 *Ibid.*
105 See article 13(6) (a) of the Constitution of the United Republic of Tanzania of 1977.
106 The principle "*audi alteram Partem"* is stated in the *constitutions* of many EAC Partner States and emphasised by the Court of Appeal of Tanzania in many cases. These cases include *DPP .V. Sabim's Tesha* [1993] TLR 237, CAT at Arusha, *Jimmy Ngonya .v. NIC Ltd* [1994] TLR HC at Dar es Salaam, *Partaleo Lyakurwa.v. Leokadia Lyakurwa*, Civil Application No. 54/1998, CAT at Dar es Salaam (unreported) and many others.

3.8 Right to Join a Third Party in a Claim or Reference

The EACJ Rules allow any respondent in any reference or claim by way of notice to the Court to apply for leave to join another person who was not originally a party in a claim or reference lodged before the Court. The third party procedure stipulated under the EACJ Rules is a replica of the Civil Procedure Code (Act) of Tanzania.[107] The purpose of the third party procedure is to allow for contribution and indemnity in circumstances that he or she would be held liable in the case filed before the EACJ. Under this procedure the liability will be shifted to the joined third party.

Again, under the EACJ Rules, one of the conditions for a respondent to apply successfully for a leave to join a third party in a claim or reference is that, he or she must claim against such a third party any contribution or indemnity or any relief or remedy which is related or very much connected to the subject matter of the claim or reference.[108] Further, the respondent must establish and prove by providing evidence that the relief in the subject matter of claim or reference is substantially the same as that claimed by the applicant.[109]

Although the EACJ Rules directs that a third party's notice must state the nature and ground of the claim,[110] this requirement is not as broader as it is provided under the Indian Civil Procedure Act and the Civil Procedure Code.[111] In Tanzania, it is a trite law, among others, that a third party's notice must state the nature of the plaintiff's case against the defendant, the nature of the defendant's claim against the third party, relief claimed by the defendant against the third party and the period within which the third party may present his or her defence, and the legal effect in case of default to present his or her defence in time.[112]

3.9 Right to Apply for Interlocutory Order

For the purpose of this study, the researcher borrowed a definition of "interlocutory" from the Oxford Dictionary of Law which defines it as "a temporary remedy granted to a claimant by the court pending the trial of a case."[113] Generally, an interlocutory order may include power to order interim sale, detention, preservation and inspection of the subject matter in a claim or reference.[114] The purpose behind issuing interlocutory remedies is to prohibit the applicant from suffering irreparable injury in the absence of such a remedy.[115]

It is noteworthy that the EACJ Rules also provide for the interlocutory remedy. Under the Rules, an applicant for an interlocutory order may apply for such an intervention by filing a motion before the Court supported by his or her affidavit.[116] In the affidavit, the applicant should concisely state the grounds on which an interlocutory order is being sought. However, before the Court

107 See the Indian Civil Procedure Code of 1908 as amended from time to time. See also [Cap 33 RE 2002].
108 See rule 32(1) of the EACJ Rules. Op. cit.
109 *Ibid.*
110 Rule 32(3) *Ibid*.
111 [Cap 33 R.E 2002].
112 See Order I Rule 15(a)-(d) Civil Procedure Code Act. *Ibid*.
113 See Oxford Dictionary of Law (5th Ed), Oxford University Press.
114 *Ibid.*
115 Consider, for instance, if a subject matter of the case is perishable goods which cannot be preserved in the same status until the case has been disposed of. It is, therefore, prudent that under such circumstances and upon application by any party in the suit the Court grant an order for the interim sale of the goods.
116 Rule 21(1) of the EACJ Court Rules.

fixes the date for hearing of application for interlocutory order, the applicant should prove that the respondent or any other interested party were aware of the existence of this application.[117]

4.0 Remedies to Aggrieved Person by Decision of the First Instance Division

Essentially, a party aggrieved by the decision delivered by the FID of the EACJ may challenge such decision either by review or appeal. The next section under this chapter appraises the two remedies as provided for by both the EAC Treaty and the EACJ Rules.

4.1 Review

Review can be defined as an act of the Court to reconsider, look again or examine its judgment.[118]In legal practice, review is an act of re-examining a judgment by the Court which delivered the judgment, in most cases, by the same Magistrate or Judge.[119] In other words, in a review a Magistrate or Judge who has determined the case can reverse his or her earlier/prior order.[120]

Principally, the rules of procedure and case law in the EAC Partner States provide the grounds under which a Magistrate/Judge of a domestic court may be obliged to re-examine his or her delivered decision. In Tanzania, for example, the grounds for review are provided under Order XLII, Rule 1 of the Civil Procedure Code.[121] The same grounds were also stated in the case of *James Mapalala. v. British Broadcasting Corporation.*[122] These grounds for review include: First, it must clearly be shown that there are party/parties who became aggrieved by the decision to be reviewed.[123] Second, there is a discovery of new and important matter or evidence which a party was not aware of at the time the judgment or decree was made.[124] Third, there was an error apparent on the face of the record or any other sufficient reason.[125]

Basically, the review jurisdiction of the EACJ is regulated by both the EAC Treaty and the EACJ Rules. Article 35(3) of the EAC Treaty and rule 72(1) and (2) of the EACJ Rules covers the review jurisdiction of the Court and five grounds for application for review. One of the grounds for application of review is where the judgment to be reviewed is based upon discovery of some facts which were unknown to both parties and the court could not have discovered them at the time the judgment was made.[126]

Moreover, review by the EACJ can also be exercised if it is alleged that the judgment was made by mistake, fraud or error on the face of the record or because an injustice has been committed.[127] It is not clear that, the grounds for review under the EACJ Rules seem to be similar to those of the domestic courts of the EAC Partner States. In Tanzania, for example, the Civil Procedure Code and the Court of Appeal of Tanzania Rules provide reasons similar to those provided for in the EAC Treaty and under the EACJ Court Rules.

117 See Rule 21(1) and (2), *Ibid*.
118 See also Takwani. K.C. (2009) "Civil Procedure, Eastern Book Co. p.382
119 *Ibid.*
120 *Ibid.*
121 Cap 33 RE 2002.op.cit

122 Civil Appeal No.43/2001, Court of Appeal of Tanzania, at Dodoma (Unreported).
123 See Order XLII Rule 1 CPC. Op. cit.
124 Ibid.
125 See also article 35(3) EAC Treaty and rule 72(1) 0f the Court Rules. Op. cit.
126 See article 35(3) EAC Treaty and Rule 72(1) Court Rules.
127 *Ibid.* See also the Ruling of the EACJ delivered on 22nd June, 2007 in Application No.8 of 2007 between *Christopher Mtikila and the Attorney General of Tanzania and others* (arising from Reference No.2 of 2007 which among other issues interpreted Article 35(3) of the EAC Treaty, Rule 70 and 72(1) of the Court Rules and stated the five grounds for review by the EACJ.

4.2 Corrections of Judgment/Orders of the EACJ

The rules of procedure of the Court allow the court to make corrections to its judgments and orders delivered thereto.[128] The Court can invoke this power on its own motion or by being moved by any party interested in the reference or application, as the case may be, by way of an application before or after the judgment has been delivered.[129] The Rules of Procedure of the EACJ set three grounds which may prompt the court to correct its own judgment:[130]

(a) Clerical mistakes
(b) Arithmetical mistake and
(c) Any error arising in it from incidental slip or omission.

To adhere to the principle of the right to be heard, every party to the proceedings will be given the right to be heard before the Court makes any correction of its judgment or order. Once the judgment has been corrected, it will bind both parties and be enforced like other judgment of the EACJ.

4.3 Right to Appeal before the Appellate Division of the EACJ

Basically, the AD of the EACJ, among other powers, is mandated to entertain appeals from the FID of the Court. Article 35A of the EAC Treaty provides for the right to appeal before the AD of the EACJ on three grounds: on the point of law, lack of jurisdiction, and by reason of procedural irregularity.[131] Generally, any party aggrieved by the decision of the FID may seek redress to the AD by way of an appeal. Under the EACJ, an aggrieved party who intends to appeal against a decision of the FID must lodge a notice of appeal before the Registry of the AD within thirty (30) days.[132] Additionally, the appellant must ensure all copies of appeal are served to the respondent(s) and any other person(s) who have vested interests in the appeal within a period of fourteen (14) clear days from the date of issuing a notice of appeal to the Court.[133]

Moreover, it is a procedural requirement that any appeal to the AD must be lodged by a memorandum of appeal, the record of appeal, the prescribed fee and security for costs of the appeal.[134] Such an appeal is to be lodged within thirty days (30) from the date when a notice of appeal was lodged before any Registry.[135] Furthermore, rule 88(1) of the EACJ Rules provides for the contents of the record of appeal, which must be accompanied by the memorandum of appeal, to be lodged before the AD. Under this rule, the records of appeal must contain the following:

(a) *An index of all the documents in record with the numbers of the pages at which they appear (a checklist).*

128 Rule 70 (1) of the EACJ Court Rules.
129 See rule 70(2) *Ibid*.
130 See rule 70(1), *Ibid.* See also the application by *Christopher Mtikila v. the Attorney General of Tanzania and Others,* EACJ Application No. 8 of 2008.

131 See also rule 77 of the EACJ Court Rules.
132 See rule 78(2), *Ibid.*
133 See rule 79(1) of the Rules.
134 See rule 86(1) of the Rules. Please note that all these documents need to be lodged in quintuplicate.
135 See rule 86(1) of the Rules. Following the development and official launching of sub-registries of the Court in Dar es Salaam, Kampala, Nairobi, Kigali and Bujumbura, any party aggrieved by the decision of the FID appellant may lodge his or her appeal in one of these registries without travelling all the way to Arusha where the permanent seat of the Court is located. The same will soon be transferred to Arusha main registry. Again, the Memorandum of Appeal lodged in the registry should concisely state the grounds of appeal and specify points of appeal. See also rule 87(1) of the Rules.

(b) *A statement showing the address for serving the appellant and the address for service furnished by the respondent and, for any respondent who has furnished an address for service as required by Rule 80, his or her last known address and proof of being served with the notice of appeal.*

(c) *The pleadings.*

(d) *The affidavits read and all documents presented as evidence at the hearing, or, if such documents are not in the English language, their certified translations;*

(e) *The judgment or reasoned order.*

(g) *The decree or order.*

(f) *The notice of appeal.*

(h) *The record of proceedings.*

All the documents prepared by the appellant have to be in English language. This is because, English is the official language of the EACJ.[136] Thus, if an appellant is a French-speaking person (for example he or she hails from Rwanda or Burundi) and the documents in the record of appeal are in French, for them to be admissible they must be translated into English.

After the memorandum of appeal and record of appeal have been admitted to the Registry of the AD, the appellant must effect service of the memorandum of appeal and the said records of appeal to the respondents within seven (7) days after the documents have been lodged before the respective Registry.[137] Moreover, the AD of the EACJ may also order the appellant to effect service of the memorandum of appeal and the record of appeal to any person to the original proceedings, where the Court is of the opinion that, in the interest of justice such other person(s) must also be served with the said documents of appeal and appear before the court to defend his/her interest.[138]

In the light of the above procedural requirements, a respondent who intends to challenge the grounds of appeal and that the decision of the FID must not be reversed, he/she should file his or her statement of opposition stating his or her grounds and reasons for such opposition within thirty (30) clear days from the date he or she receives the memorandum of appeal from the appellant.

5.0 Some challenges in access to justices before the EACJ

Access to justice before the EACJ faces a number of challenges. Some of these challenges are as follow.

Firstly, lack of awareness on the existence of the EACJ. In many cases, the general public awareness on the existence of the EACJ is considered as one of the factors hindering access to the court. It is argued that, for smooth access to the court its existence must be known by the people in the EAC Partner States.

Secondly, language barrier. Apart from lack of general public awareness of the EACJ, the court also faces a challenge of bridging in the language gap. In the expanded EAC, there are English-speaking and French -speaking countries. Yet, English and Kiswahili languages are the official languages of the EACJ. It should be noted that difference in official languages among the Partner States hampers access to justice to the EACJ by members of the EAC Partner States. For example, while Burundi use Kirundi and French, Rwanda uses Kinyarwanda, French and English as their official languages. Unlike Burundi and Rwanda, the founding Partner States (Kenya, Tanzania and Uganda) use both Kiswahili and English as their official languages. Generally, Burundi, Rwanda and South Sudan face a serious challenge in accessing justice before the EACJ caused by language barrier.

Existence of mixed legal system among the partner states is another challenge in accessing justice before the EACJ. Despite the fact that the EACJ follow the common law legal system, the EAC Partner States belong to different legal systems having different judicial hierarchies. It is revealed in this article that differences in judicial systems hamper access to justice before the EACJ. Unlike Kenya, Tanzania and Uganda which belong to common law legal system, Burundi and Rwanda belong to civil law system originating from Belgian and German civil legal system. Although majority of lawyers in South Sudan were trained in under the civil law system, the country has adopted common law as its legal system.[139] Despite the fact that, Burundi and Rwanda acceded to the EAC treaty and become Partner States, the EAC legal system has not been changed to accommodate the two.

6.0 Conclusion

The article made a detailed discussion on access to justice before the EACJ addressing issues of establishment, structure, composition, role and mandate of the EACJ. The article also analysed the EACJ rules and procedures focussing for instance on certain rights such as the right to legal representation and the right to appeal. Challenges in access to justice before the EACJ was also discussed. Generally, it was observed that, the mandate of the EACJ is limited to interpretation and application of the EAC Treaty only. It was submitted that, limiting the jurisdiction of the EACJ to the interpretation of the EAC Treaty hinders the protection and promotion of human rights in the EAC. The article demonstrated further that, the EACJ differs from other sub-regional courts in many ways. One of the major differences is the question of lack of an express provision under the EAC treaty which imposes human rights jurisdiction on the EACJ. Comparatively, the article notes that the EECJ (under ECOWAS Treaty) is different from the EACJ as the ECCJ has jurisdiction to try human rights cases.

136 See article 46 of the EAC Treaty.
137 See rule 89(1) of the Rules.
138 See rule 89(2) of the Rules.
139 See Apach M.G and Geng.G.; An Overview of the Legal System of South Sudan www.nyulawglobal.org/globalex/South_Sudan1.html. Accessed on 7th September, 2020 at 23:15

LEGAL-ECONOMIC CHALLENGES OF ACCESSING THE US MARKET THROUGH AGOA: A REVIEW OF TANZANIA'S TRADE EXPERIENCE.

By Ms. Rehema Kaunda[1]

Abstract

The African Growth and Opportunity Act (AGOA), offers preferential access by Sub–Saharan African Countries into United State (US) markets. AGOA accords duty – free access for eligible products in the largest single market in the world. This article assesses the effectiveness of AGOA in enhancing Tanzania trade. Specifically, it seeks to analyse the extent to which AGOA contributes to the accessibility of US Markets by Tanzania Traders and business people, based on the country's trade experience. Using primary data obtained through surveys from relevant Tanzania government agencies and secondary data from trade organisations including the AGOA website, the article concludes that inherent structural constraints facing Tanzanian exporters, together with limited productive business environment, negatively affect the utility of the trade agreement. These limitations reduce significantly the ability of AGOA to enhance accessibility of the US market by Tanzanian traders and business people.

Key Words*:* International trade, AGOA, Accessibility the US Market.

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1.0 Introduction

The foundation of the WTO Agreements is the non – discrimination principle, under which there are two main principles. The first one is the Most-Favoured Nation (MFN) principle,[2] which prohibits the granting of any benefit, favour, privilege or immunity affecting customs duties, charges, rules and procedures to a particular country or group of countries, unless they are made available to all like products originating in all other Members of the WTO.[3] The second is the National Treatment[4] (NT) principle under which all Members of the WTO are prohibited under certain conditions from discriminating between imported products and domestic products. However, there are important exceptions to these principles. One of them being the exception provided under Article XXIV of the GATT 1994, whereby members are allowed to formulate customs union and Free Trade Areas.[5] Thus, for more than three decades, African Countries especially those in the Sub – Sahara African region have pursued regional integration as a strategy to accelerate industrialisation and growth,[6] on the basis of the belief that Preferential Trade Agreements (PTAs) can strengthen their efforts to manage trade relations and can facilitate the expansion of markets that will support their industrialization in return.[7]

Tanzania in particular, has also recognised the key potential role of international trade for sustainable development, and has thus entered into various bilateral and regional trade agreements following a dual path of multilateralism and regionalism. For example, PTAs which Tanzania is a member include, African Continent Free Trade Area (AFCFTA); East African Community (EAC), Southern African Development Community (SADC), African Growth Opportunity Act (AGOA), and Everything but Arms (EBA) to mention but just a few. However, the benefits are only mutually realizable if and when the trading partner's national laws and policies are harmonised and implemented effectively.

This article, therefore, examines the legal-economic challenges of accessing the US Market through AGOA by reviewing Tanzania's Trade Experience.

1.1 An Overview of Preferential Trade Agreements (PTAs)

Preferential Trade Agreements are important aspects of international cooperation for development, and they have unilateral dissemination and implementation of preferential trading agreements by developed countries in favour of exports of developing countries and territories.[8] The concept had its origin in the broader principle of special and differential treatment for developing countries. As part of the global policy responses to correcting the imbalances in global economic relations, special and differential treatment has to be provided to developing countries. PTAs are agreements which enable developed countries to treat developing countries more favourably than other WTO Members.[9] The question of PTAs for developing and Least – Developed

2 See GATT 1994, Art I and III.
3 Peter, V.B., (2008) The Law and the Policy of the World Trade Organization: Text, Cases and Materials 2nd Ed, Cambridge University Press, p. 321.
4 See GATT 1994, Art III.
5 See GATT 1994, Art XXIV.
6 Jean – Pierre, C and Jean – Christopher, M., *Beyond Market Access* in Jean – Pierre, C, D *et al,* Preferential Trade Agreement Policies for Development, A Handbook, the World Bank, Washington DC, 2011, p. 7.
7 *Ibid.*
8 See GATT 1994, Part IV.
9 WTO Secretariat, Understating the WTO, A Training Manual, 5th Ed, Geneva, 2015, p. 27.

Countries has engaged the attention of trade negotiators since 1947.[10] This treatment includes the elimination by developed countries of tariff barriers to exports from developing countries without requiring reciprocal treatment.[11]

AGOA, which is African Growth and Opportunity Act, is one of the examples of the PTAs. It is a non-reciprocal trade preference programme that provides duty-free treatment to the U.S. imports of certain products from eligible sub-Sahara African (SSA) countries. It offers preferential access to such products into US market.[12] In other words, AGOA serves as a cornerstone of the US trade relationship with the Sub –Sahara African region. In turn, beneficiary countries are required to commit themselves to improve their economic policy environment, participate more actively in the globalization process, promote political and economic stability and foster human and workers' rights in their countries.[13]

1.2 Forms of PTAs

PTAs are the form of Economic Integration whereby countries agree to the reduction but not elimination of tariffs. This means partner countries agree for reduction of tariffs in specific categories of products. Products, not covered by such an agreement may be subjected to the higher tariffs because of the principle of reciprocity. This kind of economic integration contains some elements of discrimination and it is good for WTO Members who are obligated to grant most - favoured nation status to each other. Under this rule, WTO member countries agree not to discriminate each other.[14] There are various forms of PTAs.

The *first* is Free Trade Area (FTA). This is the arrangement that member countries of a particular economic integration agree to remove tariffs between themselves. However, they continue to maintain their own external tariff systems on imports from the non - partner states. The most applicable rules are the rules of origin,[15] which are designed to prevent goods from being imported into the FTA member countries with the lowest tariff and then transhipped to the country with higher tariffs.

The *second* form of PTAs, is Customs Union, which occurs when a group of countries agrees to remove tariffs between themselves and set out a common external tariff on imports against the rest of the world.[16] In other words, a custom union is a trade agreement whereby countries preferentially grant tariff - free market access to imports from each other and agree to apply a common external tariff to imports from the rest of the world.[17] It is one of the most advanced forms of PTA. It requires considerable coordination among members. One can say that customs union is essentially a joint administration of a Common External Tariffs (CET) in an environment of zero internal tariff as well as an elimination of all non - tariffs barriers to cross - border trade among partner States.[18] The EAC represents such an arrangement. Although, this arrangement helps to avoid the problem of developing complicated rules of origin, it introduces a problem of policy coordination. However, under this arrangement all member countries must agree on tariff rates across many different import industries.[19] When a country joins a customs union, it agrees to surrender some of its national sovereignty over the formulation and implementation of trade policy.[20] The implication is that a customs union member considers the loss of some autonomy to be more than offset by the economic benefits of securing access to a larger and more harmonized regional market and of enhancing the depth and effectiveness of the ongoing regional integration process.[21]

Third is common market. This occurs when member countries agree to form a free trade in goods and services. They set common external tariffs among themselves and allow free movement of capital, and labour across partner countries. The clearest examples are the EAC[22] and the European Union. Under this arrangement, citizens can work in any member country and can invest throughout the union without restriction as the case under the Protocol for EAC Common Market.[23]

Fourth, Monetary Union, This is a form of an economic integration whereby members countries agree to establish a common currency among themselves. The whole process involves the formation of a central monetary authority that will determine monetary policy for the community. One example of an economic and monetary union is the United States. Each US State has its own government, which sets policies and laws for its own residents. However, each State cedes control, to some extent, over foreign policy, agricultural policy, welfare policy, and monetary policy to the federal government.[24]

Fifth is Economic Union. This is a kind of regional economic integration by which member countries agree to maintain free trade in goods and services, and sets out common external tariffs among themselves. There is free mobility of capital and labour. Example of this kind is the European Union's Common Agriculture Policy (CAP). This is an example of a type of fiscal coordination indicative of an economic union.

It can therefore be submitted that, the law governing WTO allows its Members to depart from the principle of non - discrimination, which is considered as a central theme of the formation of WTO in regulating trade under international level. It means that the same law which enshrined the principle of non - discrimination, is flexible enough to allow derogation from the principle. It allows contracting parties to WTO to form regional economic integration that

10 See Michalopoulos, Trade and Development in the GATT and WTO: The Role of Special and Differential Treatment for developing Countries, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.195.1951&rep=rep1&type=pdf (accessed on 22/09/2020).

11 See GATT 1994, Part IV.

12 The Trade and Development Act, 2000, s101, which established the AGOA to serve as the cornerstone of the US trade relationship with the Sub – Saharan Africa.

13 Nouve, K and Staatz, J., Has AGOA Increased Agricultural Exports from Sub – Saharan Africa to the United States?, Contributed Paper Presented at the International Conference, Agricultural Policy Reform and the WTO: Where are we Heading? Capri, Italy June 23-26, 2003. Available at, https://agoa.info/images/documents/2888/nouve_staatz_AGOA.pdf. (Accessed on 30/09/2020).

14 See GATT 1994, Art I.

15 Rules of Original are the criteria used to define where a product was made.

16 See, Art XXIV: 8 define customs unions and free trade areas. Art XXIV:8 (a) (i) states that a customs union is an entity in which duties and restrictions of commerce are eliminated with respect to substantially all the trade between the members of the union except those restrictions permitted under Art XI, XII, XIII, XIV, XV and XX. Art XXIV:8 (a)(ii) states that a customs union establishes common tariffs and other restrictions of commerce with respect to commerce with Members that are outside parties to the union. Art XXIV:8(b) provides the same requirements with respect to a free trade area except for the fact that there is no requirement equivalent to (ii) which applies to a customs union.

17 Jean – Pierre, C and Jean – Christopher, M.,*' Overview'* in Jean– Pierre, C, D *et al,* Preferential Trade Agreement Policies for Development, A Handbook, the World Bank Washington, DC 2011, p. 5- 6.

18 *See* EAC Development Strategy 2006-2010, p. 2.

19 Article XXIV:4 declares a general principle that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

20 Jean – Pierre, C and Jean – Christopher, M., (2011), p. 3- 6.

21 *Ibid*.

22 See the Protocol on the Establishment of East African Community Common Market was signed by the East African Heads of States at the Arusha International Conference Centre, Tanzania on 20th November 2009.

23 *Ibid.*

24 Jean – Pierre, C and Jean – Christopher, M (2011) p.3-6.

may take different forms such as customs union, common markets and monetary union.[25]

2.0 Tanzania in the Multilateral and Preferential Trade Agreements

Tanzania has been a member of the WTO since 1st January 1995. As a small scale country, Tanzania is grouped by the World Bank as a lower middle-income country.[26] It is as such entitled to all benefits that the WTO offers to its members including the right to use preferential and regional trade agreements, so as to improve its regional and international competitiveness and make Tanzania more attractive for market opportunities.

The permanency of PTAs is currently undoubted and has become ideal in global trade.[27]With regard to PTAs, Tanzania, as a member of the East African Community, undertakes trade liberalisation within customs union and applies the EAC Common External Tariff (CET). As a member of SADC, Tanzania also grants duty – free treatment to goods imported from all SADC Counties. Likewise, as a least developing country, Tanzania was a beneficiary of the Everything – But Arms initiative of the EU, the African Growth and Opportunity Act of the US and the Generalized System of the Preferences (GSP) of the WTO Members. The country has over the two decades removed trade barriers and increased trade relations so as to facilitate industrialisation, and open markets to global trade and regional market. Despite all such changes, the country is not active in accessing the global and intra – African regional markets. It has consequently and not benefitted much from the arrangements.

3.0 A Brief Historical Background of AGOA

The African Growth and Opportunity Act, 2000 (AGOA) is a United States Trade Act, enacted on 18 May 2000 and signed by the then US President Bill Clinton as Public Law 106 of the 200th Congress. The main objectives of AGOA are to stimulate economic growth, encourage economic integration and facilitate sub-Saharan African integration into the global economy. It was intended to significantly enhance market access to the US for qualifying Sub-Saharan African (SSA) countries.[28] Further, the substantial changes have been made to the original provision and lifespan of the Act. In this regard, AGOA II was signed on 6th August 2002 by President George Bush, while AGOA III was signed on 12th July 2004 and the preferential access was extended to 30th September, 2015. However, legislative amendments extended its expiry to 2015.A further extension and enhancement of the Act was made on 29th June 2015 by President Obama. As a result, the Act is due to expire in 2025. The AGOA empowers the President to grant duty – free and Quota – Free treatment to a wide range of export from qualified Sub – Saharan Africa Countries.[29]

The Act was conceived as a selective but progressive extension of the existing United States Generalized System of Preferences (GSP) for African Countries.[30] It is intended to cause an expansion of US trade and investment in the region, stimulate the regional economic growth, and deeper integration into the global economy.[31] The Act further provides for technical assistance aiming at helping countries to qualify for ascension.[32] The Act significantly simplifies market access[33] in the US for specified items from qualifying African Countries.[34] The simplified market access is achieved by removing tariffs on approximately 6800 items originating from Africa.[35] However, it is only countries of the Sub-Sahara African region meeting specific eligibility requirements which qualify to benefit from AGOA trade arrangements.[36]

According to the AGOA regulations, the U.S. President designates Sub-Saharan Africa country as beneficiaries on an annual basis. Once a country is so designated, it becomes eligible to receive duty-free treatment for certain articles that are "the growth, product or manufacture" of that country.[37] A country's eligibility for AGOA depends on three major requirements. They are, firstly, a country must have established, or made progress towards establishing a market-based economy, the rule of law, the elimination of trade barriers, economic policies that reduce poverty, systems to combat corruption, and protecting workers' rights; and secondly, a country must not be engaging in activities that undermine U.S national security; and thirdly, a country should not engage in gross violations of human rights or support for terrorism. For a country to become an AGOA beneficiary, the president must determine that the country fits these criteria.[38]

The Act empowers the President to provide duty – free treatment under GSP for any article imported from African[39]countries after the US Trade Representative and the US International Trade Commission have determined that the article is not import sensitive.[40] At its inception, the Act granted zero duty treatment for about 1800 items GSP list.[41] In addition, AGOA items include

25 GATT 1994, Art XXIV.

26 Tanzania was categorized a lower middle-income country by the World Bank effective July 1st, 2020, a development which was notably celebrated by authorities and a cross-section of Tanzanians. According to the World Bank, Tanzania is among seven countries that moved to a higher category. Available at https://www.worldbank.org/en/country/tanzania/overview(accessed on 17/09/2020).

27 Limao, N., *Preferential Vs Multilateral Trade Liberalization Evidence and Open Questions,* World Trade Review Journal, 2006,Vol. 5, No. 10, pp.155 -176.

28 See The Trade Development Act of 2000, s101, which established the AGOA. Available, at https://www.congress.gov/106/plaws/publ200/PLAW-106publ200.pdf (Accessed 0n 30/09/2020).

29 *Ibid.*

30 Jour, I. F., The *AGOA Extension and Enhancement Act of 2015, the AS-US AGOA Negotiations and the Future of GOA*, World Trade Review Journal, 2017, Vol. 16, No. 3, pp. 1-18. Available a t https://www.google.com/search?q=Pigman%2C+G.%2C+A.%2C+AGOA+and+trade+prospects+of+Sub+%E2%80%93+Saharan+Africa%2C+Commonwealth+Trade+Hot+Topics%2C+March+2016%2C&rlz=1C1CHBD_enTZ826TZ826&oq=Pigman%2C+G.%2C+A.%2C+AGOA+and+trade+prospects+of+Sub+%E2%80%93+Saharan+Africa%2C+Commonwealth+Trade+Hot+Topics%2C+March+2016%2C&aqs=chrome..69i57.11747j0j8&sourceid=chrome&ie=UTF-8 (accessed on 16/04/2020).

31 *Ibid.*

32 Cook, N. P, and Jones, J. C., *The African Growth and Opportunity Act (AGOA) and Export Diversification*, The Journal of International Trade and Economic Development, 2015, Vol. 24, N. 7, pp. 947-967, at p.948.

33 The African Investment Incentive Act of 2006 gave birth to the AGOA IV and extended the third country fabric provision for an additional five years and allows Lesser Developed Beneficiary Country Members of Sub – Saharan Africa to export certain textile articles to US market. This was further extended in August 2012 until 2015.

34 Williams, B. R., African Growth and Opportunity Act (AGOA); Background and Reauthorization, Current Politics and Economics of Africa 2014, Vol. 7, pp. 204.

35 Zappile, T. M., *Non - reciprocal Trade Agreements and Trade, Does the African Growth and Opportunity Act (AGOA) Increase Trade? ,* International Studies Perspectives, 2011, Vol, 12, pp. 46-67, at p. 47.

36 *Ibid.*

37 Vivian C. J., U.S. Trade and Investment Relationship with Sub-Saharan Africa: The African Growth and Opportunity Act, Congressional Research Service, 7-5700, February 4, 2010, p. 12.

38 Schneidman, W. and Lewis, Z.A., The African Growth and Opportunity Act: Looking Back, Looking Forward; Africa Growth Initiative Brookings Institution June 2012.

39 In addition, the Act empowers the president to remove any country from the AGOA list based on which Central African Republic and Eritrea, effective 1st January, 2005 and Mauritania on 1st January, 2006 and on 1st January 2009 was removed from the list.

40 Summary of AGOA available at http://agoa.gov/agoaeislation/index.asp (accessed on 27/02 2020).

41 Jour, I., F, (2017) p.8.

previously GPS excluded items such as footwear, luggage, handbags and watches.[42] Most agricultural products are included except dried garlic, certain canned and processed fruits, cotton, tobacco, sugar, peanuts, beef and some dairy products, as well as most manufactured products excluding certain iron and steel products.[43] Some items are given more concession. These include certain apparel, hand loomed, handmade and folklore articles, ethnics printed fabrics, textile and made up textile articles such as towels, sheets, blankets and floor coverings originating entirely in one or lesser developed AGOA beneficiary countries.[44]

In this regard, AGOA accords duty – free access for eligible products to the largest single market in the world. It also provides beneficiary countries with a significant competitive advantage over non – AGOA countries that must pay normal tariff rates to enter the United States. This is particularly true with respect to products that have high US tariff rates in many instances, as apparel, footwear and agricultural products.[45] Further, AGOA provides significant opportunities for companies and business organizations to build relationships with their US counterparts and security for both Sub – Saharan Africa exporters and potential US investors by ensuring AGOA benefits.[46]

4.0 Appraisal of Tanzania's Trade Experience with AGOA

Tanzania's main exports to the United States are textiles, apparel, agricultural products (agro processing), leather and handcrafts traded under the terms of the AGOA. Textiles and apparel have remained the single large component of AGOA export of Tanzania and comprises about 98 percent of the export in 2018.[47] Despite the opportunities presented by AGOA, Tanzania's apparel industry is struggling to hold its ground against Asian competition and runs a trade deficit with the United States.

In terms of trade balance, Tanzania typically has a substantial trade deficit. The trade balance fluctuates widely due to the fact that Tanzania main exports are commodities subject to the effects of world prices and weather. Therefore, it can be noted that Tanzanian exporters must diversify their product offering targeted at the US market under the AGOA preferential trade agreements and should harbor ambitious of growing their share of the market. In addition to that, Tanzania is yet to reap the benefits of AGOA due to its narrow product offering and the fact that its traditional exports are facing stiff competition from other Sub – Sahara African countries. Further, it is disgraceful that out of 6800 types of products that are allowed entry either duty free or quota free to the US under the AGOA arrangement, Tanzania exports only 12 products.[48] For instance, Tanzania's exports have shown steady growth since 2012. Exports increased by 67% between 2015 and 2018 from USD 28.5 million to USD 42.9 million. 98% of AGOA exports from Tanzania in 2018 were articles of apparel. There is scope to diversify Tanzania's AGOA export basket. In the EAC region, Kenya is leading in AGOA exports followed by Tanzania, Uganda and Rwanda.[49]

The Tanzanian Government in collaboration with the East Africa Trade and Investment Hub has developed National AGOA strategy as a guide to fast-track exports to US under AGOA. The main areas of focus from the Tanzania National AGOA strategy, 2016[50] include Textiles and garments, Agro processing, leather and Handicrafts. This strategy seeks to enable Tanzanian products, for which we can use existing production capacities or build new ones, with a view to using our domestic resource base and the AGOA market access opportunity to achieve a national ambition of setting in motion a sustainable, resource-based industrialization process. This is the objective of the Integrated Industrial Development Strategy.[51]

Therefore, Tanzania has relied heavily on the textile business as entry into the US market, but stiff competition and high cost of doing business has seen other countries, such as China and India, share of the US textile market. Evidently, AGOA has not adequately contributed to Tanzania's trade capacity in accessing the market for more products. Further, absence of complimentary policies to support the entry of domestic investors into the garments and textiles industry as a tool for the promotion of technology transfer, the long-term sustainability of investments in the industry and stimulation of backward linkages into the textiles industry led to the need for more emphasis on enhancing Tanzania's competitiveness. This is based on the fact that, AGOA stimulates economic growth through job creation and contribute to poverty reduction.

Although, the USAID East Africa Trade and Investment Hub report[52] shows that AGOA exports continue to grow with positive impact on US trade and Investment with Sub – Saharan Africa, many countries that qualify for the programme are still far from reaching their full potential in order to get the maximum benefit of the trade preferences offered. In reality, the US Market requires quality standards that must be strictly complied with, quantity and timely delivery and consistency of delivery throughout the year.[53] To meet these requirements, tremendous efforts need to be deployed in terms of organization, industrialization, investments and new culture of production. In addition, logistic, transport, transit and other administrative issues need to be improved.

The important point to note is that, the rules of origin under AGOA are quite rigid and restrictive. They as a result deprive producers of access to raw materials or intermediate product from low cost international sources; hence raise the cost of producing products for export to

42 See AGOA Information available at https://www. Agoa.info/about-agoa.html. (Accessed on 2′ 03/2020).
43 *Ibid.*
44 *Ibid.*
45 See Erkul, B., US – African Trade and Investment. Available at http://www.agoa.gov/ (accessed on 2′ 03/ 2020).
46 See the Southern Africa Global Competitiveness Hub. Available at http://www.satradehub.org/. (accessed on 2′03/ 2020).
47 However, in EAC region, Kenya has been the leading in AGOA exports following by Tanzania, Uganda and Rwanda.
48 See USAID East Africa Trade and Investment Hub, National AGOA Strategy for the United Republic of Tanzania, Ministry of Industry, Trade and Investment, Dar es Salaam, 2016.
49 AGOA Information, Country Profile Available at https://agoa.info/profiles/tanzania.html (accessed on 22/05/2020.
50 Tanzania's National AGOA Strategy seeks to put in place a framework for enabling institutional and individual stakeholders in trade-related public and private sectors to identify and fulfill their roles so that Tanzania can take full advantage of AGOA's preferential market access.
51 National AGOA Strategy for the United Republic of Tanzania, Ministry of Industry, Trade and Investment, Dar es Salaam, 2016.
52 *Ibid.*
53 The trade conditions under AGOA are not user friendly to most developing countries and Sub – Saharan Africa. This evident, for example, from the fact that out of 37 AGOA eligible countries in Sub – Saharan Africa, only two countries that is South Africa and Ghana, export a broad variety of products to the United States. See AGOA, Hearing before the Subcommittee on Africa of the Committee on International Relations House of Representatives. Available at http://www.commdocs.house.gov/committees/. (Accessed on 2′03/ 2020).

the US market. Under AGOA, Tanzania is required to source raw materials either locally from within Tanzania, from other AGOA eligible Sub – Saharan African countries, or from the US.[54] Undoubtedly, this is not feasible for Tanzania apparel producers. High quality fabric and yarn may be, for example, available but sourcing them to make apparels will at least double the unit cost of apparels and make them uncompetitive in terms of the US market. Cotton production in Tanzania is insufficient and the capacity to produce high quality and competitive fabric is lacking. The option of sourcing fabric from other AGOA eligible Sub – Saharan African countries is limited by the fact that the region does not meet the fabric requirements of its apparel sub – sector due to various supply constraints. Moreover, the fabric produced locally and regionally falls short of the standard in terms of variety and quality demanded by the US market.

In fact, the solution lies in sourcing fabric from the local cotton textile industries, or the region through collaborative and strategic regional cotton textile supply chains. For quality fabrics to be supplied locally and competitively, substantial capacity building in the lower parts of the cotton textile chain is required. Critical inputs into this capacity building include establishment of an apex stakeholder institution to coordinate the industry and provide necessary regulation, cost – reducing intervention at all points in the chain, incentives to stimulate investment, identification of market, accumulation of the necessary capital and skills.

54 See AGOA-Tanzania available at http://www.agoa.org/. (accessed on 2/03/2020).

5.0 Challenges

It can be stated that most of the AGOA eligible African Countries remain unable to take advantage of the broad market access provided by AGOA, and there is a number of reasons for this low export performance for Tanzania in particular as discussed hereunder:

5.1 Trade Policy Challenge

A good policy environment is a key requirement for trade development, and also help to ensure the gains from trade are distributed equitably. A large number of African countries are rich of natural resources, but have weak capacities in design of effective development policies in the area of trade and investments.[55] In the case where trade and investment policies have been developed, they are inconsistent with the overall national growth and development strategy. However, many countries like Tanzania need help to build their institutional capacity to address these policy challenges. It is worth noting that up to this point, Tanzania still uses the 2003 trade policy. Therefore, in order to participate effectively in AGOA and other Preferential Trade Agreements, as well as be able to exploit the opportunities created, the amendment of the national trade policy[56] is inevitable.

5.2 Institutional Weakness

Tanzania is faced with institutional weaknesses in fulfilling the obligations under AGOA and Preferential Trade Agreement. One of the main institutional weaknesses is lack of the legal and economic expertise among government trade officials and regulators that is necessary to translate PTA obligations into domestic regulatory regimes and establish effective enforcement mechanisms. The Ministry of Trade and Investment is also inadequately staffed, with few people having multi responsibilities not only for AGOA but also for multilateral trade relations and other normal routine ministerial duties. Most of them are not well trained in international trade law; making it difficult for them to understand the mechanisms for the implementation of AGOA in order to benefit from US market.

Other institutional weaknesses that impede effective implementation of AGOA in the country include inadequate or non-existent administrative structures for the implementation and administration of commitments; outdated management and communication mechanisms; limited access to information and communication technology and insufficient financial and intellectual resources for capacity building measures and the creation of new institutions.[57]

55 Sako, S, and Kararach , G., Capacity building for the promotion of trade and investment in Africa, Challenges and Strategies, The African Capacity Building Foundation, 2007. (Accessed on 16/04/2020).

56 See the Tanzania Trade Policy, 2003.

1.3 Stringent Rules of Origin

Rules of origin are the laws, regulations and administrative guidelines that the government use to determine an imported product's country of origin. This is not always an easy matter when the raw materials, manufactured and processed product can be provided in several different countries.[58] Rules of origin have many applications for example in setting duty rates including, anti–dumping and countervailing duties, granting tariff preferences, administering government procurement policies and applying safeguards. However, stringent rules of origin have been used much in recent years for restriction purposes. The rule of origin mostly used is in the context of anti – dumping investigation and sometimes quota eligibility, particularly for textiles and apparel products.

Tanzania has failed to access US markets for her apparel exports due to the fact that certain conditions and requirements were not fulfilled. In order to enjoy duty free entry into US, the rule of origin in this case require the two processing stages, namely, the processing of yarn into fabric weaving and fabric into apparel assembly which must take place in Tanzania. In addition to these requirements, there are a number of other customs requirements that need to be satisfied. These include showing that the country has an effective Visa system and enforcement procedures to prevent unlawful Trans – shipment and the use of counterfeit documents.[59] Preferential market access in this case is costly due to capacity constraints. Tanzania has no human and financial resources as well as the industrial capacity to satisfy some of the requirements.

The rules of origin in preferential market access for LDCs not only vary from one preferential scheme to another, but also tend to be quite stringent. Varying rules of origin depend on the export destination and stringent requirements reduce price advantages to LDCs that could have been created by preferential tariff margins, thus undermine the effectiveness of preferences. For instance, in AGOA, Tanzania is required

57 See also Chauffour, J.P and Kleimann, D, The Challenge of Implementing Preferential Trade Agreements in Developing Countries – Lessons for Rule Design, World Bank, Washington, D. C, 2013, p. 45.

58 See http://tcc.export.gov/tradeagreements (accessed on 2/03/2020).

59 See http://www.africaaction.org/. (Accessed on 2/03/2020).

to source raw materials either locally from within Tanzania, from other AGOA eligible Sub – Saharan African countries, or from the US.[60] Undoubtedly, this is not feasible for Tanzania apparel producers. High quality fabric and yarn may be, for example, available but sourcing them to make apparels will at least double the unit cost of apparels and make them uncompetitive in terms of the US market. Cotton production in Tanzania is insufficient and the capacity to produce high quality and competitive fabric is lacking. The option of sourcing fabric from other AGOA eligible Sub – Saharan African countries is limited by the fact that the region does not meet the fabric requirements of its apparel sub – sector due to various supply constraints. Moreover, the fabric produced locally and regionally falls short of the standard in terms of variety and quality demanded by the US market.

Therefore, the rules of origin need to be transparent, simplified and flexible and match the industrial capacity of the country of origin in order to provide effective market access for products originating from Sub – Saharan African Countries like Tanzania.[61]

1.4 Subsidies

The developing countries in Sub-Saharan Africa, including Tanzania have been the victims of bulk of subsidies given to farmers in developed countries, while imposing tariffs to their products in market place. This has led to decline of agriculture, decrease in Domestic Product, destruction of the domestic industries and also it is an obstacle for the developing countries in Sub - Saharan Africa to fight against poverty. Subsidized imports still act as a challenge to domestic industry. This is usually due to a number of reasons including export subsidies and /or lower cost in the country of origin. In order to implement the WTO Subsidies and Countervailing Measures Agreement (SCM), in 2004 the United Republic of Tanzania enacted the Anti-dumping and Countervailing Measures Act. This Act applied only to Mainland Tanzania.[62] The Tanzanian Act against dumping and subsidies provides the main legal framework governing countervailing measures in Tanzania. As article 24 of SCM Agreement provide for institutional requirements, section 4 of the Act establishes the advisory committee on subsidies and dumping. Such committee is vested with several responsibilities, such as, to advise the Ministry of Industry and Trade of urgent measures necessary for the protection of domestic industries from injury or threat caused by subsidies. The committee also Advices the Minister on policy issues related to subsidies and countervailing measures and recommends to the Minister the imposition of countervailing measures or any other convenient action to offset the effect of subsidies.

Despite having national legislation to address the issue of subsidies, Tanzania has never been able to use such piece of legislation to protect her local industries against threat of, or material injury caused by, subsidies. The absence of comprehensive national legislation and institutional frameworks which are the basic requirements for a Member country to be competent enough for trade remedy action(s).The rationale behind this is that when the domestic producers want to file for protection there must be national regulations which prescribes the conditions and proper process to follow, as well as a competent authority that can handle the case.

In US farmers are paid according to the amount of crop or livestock produced. Accordingly, they modified their production methods in order to maximize their production and thus increase their subsidy. This resulted in surplus products. Since the US could not use all its agricultural products it produced, it sold them cheaply to third world countries[63] including Sub-Saharan Africa. It also subsidised the exports when their price was higher than market prices in the rest of the world and it imposed tariffs on the import of products from other countries. According to the Organisation for Economic Co-operation and Development (OECD), developed countries provide a billion dollars a day to support their own agricultural sectors, a figure six times greater than all the assistance they send to developing countries.[64] Subsidies provided to cotton farmers in rich countries are 60 percent higher than the overall gross domestic product (GDP) of Tanzania.

1.5 Sanitary and Phytosanitary Measures

Many African countries failed to access markets due to high costs associated with meeting health and technical standards.[65] Sub – Saharan African countries face a serious challenge in meeting the sanitary and phytosanitary measures imposed by developed countries especially on agricultural imports.[66] These measures are technically complex and so difficult, as well as too costly to be met by African countries like Tanzania. African countries complain about their exports being routinely subject to arbitrary Sanitary and phytosanitary measures, unjustified technical regulations and standards as well as stringent rules of origin. There are several instances where barriers have been against African Export of fish and fish products in the market.[67] For instance, in order to import fish to the market, it frequently requires guarantees that the fish exports are derived from pest diseased – free areas, that minimum hygiene standards have been followed during processing, and that the fish is free of contamination.

In this case, Tanzania as an exporting country must have the capacity to meet these requirements, and undertake the necessary conformity checks in order to ensure compliance. Sometimes this may call for the need to train farmers, and therefore, it is a costly to the country. Despite AGOA having market access initiative for African Countries such as Tanzania, sanitary – related barriers persist. Tanzania Agricultural producers have often times complained about the strict measures requirements in the developed markets. Thus, the limited infrastructure to conduct tests and fulfill the requirement has added to the burden.[68]

60 See AGOA-Tanzania available at http://www.agoa.org/. (Accessed on 2/ 03/2020).

61 See Paragraph 47 of the Hong Kong Ministerial Declaration, (WT/MIN 05/DEC). Available at http://www.wto.org/. (Accessed on 2/ 03/2020).

62 Tanzanian Anti-dumping and Countervailing Measures of 2004, s. 2.

63 According to the United Nations Conference for Trade and Development (UNCTAD), the world's 48 poorest nations are failing to benefit from free trade and globalization and instead face worsening poverty.

64 Official WTO Document as cited in Table 2 and throughout this report are available at http//:docsonline.wto.org/ under simple search using the specific "document symbol" WT/DS267/1.

65 See http://www.imf.org/external/pubs/. (accessed on 20/ 04/2019).

66 WTO LDC GROUP; Ref: WTO/LDC/Issues. Available at http://www.wto.org/. (accessed on 20/ 04/2019).

67 *Ibid.*

68 See http://www.imf.org/external/pubs/. (accessed on 20/ 04/2019).

1.6 Inadequate Infrastructure

Tanzania is unlikely to fulfill its commitments on AGOA, without endangering important development goals. The implementation of AGOA requires substantial investments in infrastructure and human resources development. Infrastructure development in areas of power, transport (road networks particularly feeder roads, railways networks and ports), storage facilities including (airport and cold storage facilities) and other support services such as telecommunications, financial services and other technical support service are required to be put in place so as to facilitate market accessibility within the regional and at the global level. For example, in AGOA, there is high transportation cost between Tanzania and US in terms of time and handling; thus, there is a need to establish direct flight to and from US. With very limited domestic resources, Tanzania needs external assistance to be able to implement preferential trade agreements without creating other development challenges. Generally, lack of trade facilitation measures also limits the national ability to compete in the intra–Africa regional Market.[69]

1.7 Other Challenges

Other challenges in accessing the US market include: low and irregular quality and standards of products from small exporters who lack adequate production skill;[70] unpredictability of AGOA programme that had not attracted significant long term investments; lack of affordable loans to SMEs due to high security requirements and interest rates which hinder expansion of production; lack of strong networking between US buyers and Tanzania business and lack of cold storage facilities and warehouses of perishable goods particularly in airports, ports and railway stations and high costs of doing business with the US in terms of high costs of transportation from long distance mostly due to small consignments from smaller exporters.

6.0 Conclusion

It can therefore be concluded that given the challenges that Tanzanian exporters face under the AGOA trade arrangements, AGOA has not been successful enough in enhancing ability for Tanzania to access the US and the Intra-African regional Markets. There are many conditions that must be complied with if this is to happen. These conditions include favourable macroeconomic environment, a diversity export base and adequate infrastructure, enactment of enabling policies and laws that stimulate the productive capacities so as to enhance trade competition of the country in the local, regional and international markets. In addition, there must be provision of the necessary infrastructure and institutional support to the exporters in order to ensure that exports meet the technical standards in the market of export. This shall also include improvement of the business environment by removing unnecessary high transaction costs from regulatory requirements including multiple taxes, fees, charges and levies.

It can thus, finally be concluded that exporters can improve their trade under the AGOA trade pact if the Tanzania liaises with relevant stakeholders through credit facilities and other capacity development programmes to improve the technical know-how of Tanzanian exporters. This will in turn improve their ability to fully exploit preferences granted under AGOA.

6.0 Recommendations

On the bases of the findings of this study, the following recommendations are made:

Firstly, despite the existence of scanty laws and policies touching on trade issues in Tanzania, there is no comprehensive National Legal Framework on international trade in the country. The few laws which are relevant to International trade in the country currently are those laws which regulate unfair trade practices, including the Anti – Dumping and Countervailing Measures Act, the Fair Competition Act and its Regulations and the National Trade Policy of 2003. The Policy aimed at raising efficiency and widening linkages in domestic production and building a diversified competitive export sector as the means of stimulating higher rates of growth and development. Further, specific objectives is to stimulate a process of trade development as the means of triggering higher performance and capacity to withstand intensified competition within the domestic market through improving physical market infrastructures and stimulating dissemination of market information so as to increase access to the market.[71]

However, until to date Tanzania national trade policy of 2003 has not been reviewed and amended to address ineffectiveness in the international trade and implementation of PTAs in particular, and limited accessibility of intra – African regional Market by Tanzania.[72]

All the same, and in the absence a specific legal framework governing international trade in the country, the study recommends for legal reforms for the creation of a clear and comprehensive law to regulate international trade in the country.

Secondly, market access alone is not enough for many African countries including Tanzania, if it is based on conditions that do not correspond with the industrial capacity of the countries involved. Thus, Tanzania must enhance the capacity of the private sector through exchange programmes in areas including specialised product development; establishment of the export revolving fund; establishment and operation of accredited laboratories; and awareness and training programmes on Sanitary and phytosanitary issues.

Thirdly, Tanzania government is required to take advantage of the various trade initiatives, more investment in infrastructure and trade capacity building. Targeted aids to enhance Tanzanian exports volume and diversification in the long run must be emphasized so as to lower the production and export costs. There is also a need for infrastructure development in areas of airport storage facilities, cold storage facilities, and roads networks particularly feeder roads, establishment and rehabilitation of railway networks and ports.

Thirdly, Tanzanian government is required to create a strong link between raw materials including agricultural and

69 Mabuza, C and Plessis, D.L., Free Trade and Competition Policy in Africa. Available at http://www.essa.org/. (accessed on 20/04/2019).

70 Countries like Bangladesh, Kenya and Mauritius have been successful in AGOA export performance due to specialized productions.

71 See the Tanzania National Trade Policy of 2003, Para, 3.3.

72 The policy also provides that, the time framework for the implementation should be 5 years from 2003 – 2007. In addition, the efficacy and the most articulate trade policy lies in the implementation of specific programmes and projects within a specific time. See Tanzania National Trade Policy 2003, Para 6.

industrial sectors as well as expansion of their export base from primary products, processed and semi – processed agricultural products. This can be achieved by providing incentives to the private sectors on the production and export of processed goods. Moreover, increased regional trading arrangements can enable African countries to acquire a better trade share in the global market which in turn will strengthen their bargaining power in the multilateral arrangement as a regional block. Further, through the promotion of intra – African trade, African countries can reduce the costs and trade barriers their products face in the global markets.

Finally, in order to effectively facilitate implementation of AGOA, Tanzania government is required to diversify its export base and improve their supply side capacity of which, the country should press more comprehensive technical and financial assistance through the aid for trade programmes. To achieve this, there is a need of establishment of export revolving fund. The fund should also be supported by contributions from the exporters.

EMPLOYEE'S RIGHT OF RESIGNATION DURING THE PENDENCY OF DISCIPLINARY ACTION UNDER NIGERIAN LABOUR JURISPRUDENCE

By David Tarh-Akong Eyongndi[1]
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Abstract

Under common law and statutes, an employee, has the right to resign from employment subject to the terms and condition of the contract just as the employer, in a master servant employment, retain the right to terminate the employment. The article counterbalances the dictate of public policy which requires an offender to be punished and not left to abdicate from punishment with the constitutional guarantee, rights of freedom of contract, prohibition of forced labour and presumption of innocence. The article argues that the latter, preponderate over the former. It analyses modes of determination of employment contract and discusses the dichotomy between termination and dismissal from employment. It notes that Nigerian courts have upheld the employee's right to resign and the employer's to terminate employment contract. It makes vital recommendations on how to balance the contending interests involved in the case of an employee choosing to resign during the pendency of disciplinary action.

Keywords: Contract of Employment, Termination, Resignation and Nigerian Law

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1. Introduction

The basis for the existence of employer-employee relationship is the existence of a contract of employment.[3] The contract of employment is important in itself because it specifies the rights and obligations of the parties and it forms the basis for enforcement of any right.[4] It is an agreement whether written or oral, express or implied whereby one person known as the employee agrees to perform work or render service (s) to another known as the employer in exchange of wages.[5] The contract of employment has been, and continues to be, the main vehicle through which employees gain access to the rights and benefits associated with employment in the area of labour law and social security.[6] If no contract of employment exists, a person who works cannot be properly categorized as an employee.[7] Such a contract exists where there is offer, acceptance, consideration, *consensus ad idem,* and legal capacity.[8] Inherent in an employment contract are certain rights one of which is the freedom of the employee to resign from the employ of the employer at any time and this takes effect whether or not the employer accepts it.[9]This right is what Lord Atkin identified in the case of *Nokes v. Doncaster Amalgamated Collieries Ltd*[10] as the difference between a servant and a slave.[11] Ordinarily, exercise of the right of resignation by an employee should not be a subject of controversy where the employee follows the stipulated means of effectuating this right as stipulated in the contract of employment. However, where the employee resigns contrary to the tenor of the employment contract, though wrongful, nevertheless, the employment contract is deemed determined. The rationale for this is that just as an unwilling employer cannot be compelled to retain a willing employee, an unwilling employee cannot be compelled to remain in the employment of a willing employer because of the principle of freedom of contract.[12] To do otherwise, will amount to forced labour which is prohibited by section 34(1) (c) of the 1999 Constitution of the Federal Republic of Nigeria[13] and section 73(1) of the Labour Act.[14] Likewise, the employer's right to determine the employment of an employee especially in employment contract without statutory flavour, with or without stating any reason has been judicially affirmed by courts in Nigeria even the Supreme Court in the cases of *I. D.C. v. Ajibola*[15] and *Mobil Oil Nig. Ltd v. Abraham Akinfosile.*[16] It is only logical that the same right be enjoyed by the employee in the same circumstance.

Moreover, implicit in the contract of employment, is the employer's power to discipline an employee for misconduct which right must be exercised in accordance with laid down procedure which must be in consonance with natural justice.[17] However, it is possible that when an employee is undergoing disciplinary process by an employer especially for gross misconduct, such an employee may want to exercise his right of resignation which is not only capable of scuttling the disciplinary process but also serve as an escape route from punishment. This, if effectuated, is contrary to public policy although, an employee facing disciplinary action particularly of a criminal nature, like any other accused person, is presumed innocent until the contrary is proven.[18] Thus, such an employee remains a suspect. Thus, how desirable is it to allow an employee to exercise his right of resignation especially to improperly terminate the employment contract in order to abdicate from the consequence of such disciplinary action? Should the right of resignation be curtailed in certain instances particularly where disciplinary action bothers on gross misconduct such as dishonesty, stealing or fraud? Should an employee's right of presumption of innocence be exploited to terminate disciplinary action or both the right and the proceedings should subsist concurrently until the guilt or innocence is proven? Preservation of public policy as against individual's right which should be given preference or can both be mutually preserved. These questions form the crux of this article

This article is divided into six parts. Part one contains the general introduction. Part two discusses means of determining contract of employment. Part three examines the difference between termination and dismissal in contract of employment. Part four examines the difference between motive and cause of termination of an employment relationship. Part five discusses the employee's right of resignation from employment, the issue of presumption of innocence and public policy consideration with regard to not allowing persons exploit their rights to subvert the course of justice as well as the concept of involuntary resignation. It also highlights the remedies for wrongful resignation from employment. Part six contains the conclusion and recommendations.

2. Means of Determination of Contract of Employment Under Nigerian Labour Law

When parties create an employment contract, they could do so either for a specified period/fixed term as was held in *Ahuronye v. University College, Ibadan*[19] or for a life time as was held in the case of *Salt v. Power Plant Co*.[20] This section of the article discusses means through which a valid and subsisting contract of employment could be legitimately discontinued. Section 9 (7) and (8) of the Labour Act provides certain means through which a contract of employment

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Agomo, C. K., *Nigerian Employment and Labour Relations Law and Practice,* Lagos, Concept Publications Limited, 2011, P. 68.

4 *Iyere v. Bendel Feed and Flour Mill Ltd.* (2008) 12 CLRN 1.

5 See section 91(1) Labour Act, 1974, Cap. L1 LFN, 2010. See also Okoro, B. C., *Law of Employment in Nigeria,* Lagos, Concept Publications Limited, 2011, P. 29; *Shena Securities Company Ltd. v. Afropak Nig. Ltd.* [2008] LPELR-3052 SC; *Essien v. National Assembly, Federal Republic of Nig. & Anor.* [2015] 59 N.L.L.R.768.

6 Oji, A. E., and Amucheazi, O. D., *Employment and Labour Law in Nigeria,* Lagos, Mbeyi and Associates (Nig.) Ltd., 2015, P. 12.

7 Bell, C. A., *Employment Law,* 2nd Ed., London, Sweet & Maxwell, 2006, P. 27.

8 Emiola, A., 2008 *Nigerian Labour Law,* 4th Ed., Ogbomosho, Emiola Publishers, Pp. 43-44.

9 Chianu, E., 2006 *Employment Law,* (Reprint) Akure, Bemicov Publishers (Nig.) Ltd., P. 311.

10 [1940] A.C. 1014.

11 Emiola, A., 2008 *Nigerian Labour Law,* 4th Ed., Ogbomosho, Emiola Publishers, P. 128.

12 *Ekhator v. Alliance Autos Nigeria Limited & Anor.* [2015] 59 N.L.L.R. (205) 416; *Shell Petroleum Development Co. v. Nwaka* [2003] 6 NWLR (Pt. 815) 184.

13 Section 34 (1) 1999 Constitution of the Federal Republic of Nigeria, Cap. C38, LFN, 2010.

14 Section 73(1) Labour Act, 1974, Cap. L1, LFN, 2010.

15 [1976] 2 SC 115 at 199-120.

16 [1996] 6 NWLR (Pt. 569) 217.

17 *Andrew Venn v. Access Bank Plc. & Ors.* [2015] 57 N.L.L.R. (Pt. 195) 171, at 212, Paras. E-G; *Adeniyi v. Governing Council of Yaba College of Technology* [1993] 6 NWLR (Pt. 300) 526; *Maikyo v. Itodo* [2007] 7 NWLR (Pt. 1034) 443; *Arinze v. First Bank of Nigeria Ltd.* [2004] 5 NWLR (Pt. 888) 663; *Yusuf v. Union Bank of Nigeria Ltd.* [1996] 6 NWLR (Pt. 457) 632.

18 Section 36(5) 1999 *Constitution of the Federal Republic of Nigeria*, Cap. C38, LFN, 2010.

19 [1959] WRNLR 232.

20 [1963] 3 All ER 322. See also *Wallis v. Day* (1873) 2 M & W 273. In this case, a contract to serve for life at a weekly salary was held to be perfectly legal.

could be brought to an end.[21]It is apposite to state that some of these means may overlap in operation. The means include the following:

a. By Operation of Law: An employment contract can be brought to an end through the operation of law. In this instance, it does not require the will of the parties but it is predicated on the occurrence of a supervening event which makes continuation of the contract impracticable. In such a case, the contract of employment is said to be determined by operation of law because the law regard such a contract as determined.[22] Common instances of such subsequent legal events which would determine a subsisting contract of employment includes bankruptcy of the employer, dissolution of partnership, assignment in personal contracts, and compulsory liquidation of a company. However, voluntary liquidation will not attract the same consequence as the employee might still be entitled to damages *in lieu* of notice, assuming no notice had been given.[23]

Furthermore, other factors that would amount to determination by operation of law are redundancy[24]and frustration of the employment contract.[25]Redundancy refers to the employers and employees relationship whereby the employer closes down the business for economic reasons or where the workers engaged exceed the need of the employer's business.[26] When this happens, the employer would resort to termination of the contract of employment of workers, as the case may be.[27] In other words, the employments are terminated even though the employees are otherwise fit and ready to remain in the service of the employer but for these economic reasons.[28] For redundancy to determine the contract of employment, the employer must notify the employees or their association the cause (s) of the redundancy and the extent.[29] Thus, self-induced redundancy would not be countenanced.[30] The right to determine due to redundancy could be fettered by statute or agreement between the parties.[31] Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from what was undertaken by the contract.[32] Professor Uvieghara[33] asserts that a contract of employment will be brought to an end by frustration where changes in the circumstances of the employment either render further performance of the contract impossible or where the obligations undertaken by the parties under the contract have become radically different.[34] The following are frustrating events, death of either party, prolonged illness of an employee[35], outbreak of war, change in the law or conviction and or imprisonment of an employee.[36]Giving frustration judicial recognition as an employment determining factor, the National Industrial Court (NIC) in the case of *Oladigbolu v. Union Registrars Limited*[37]held that frustration would occur where it is established to the satisfaction of the court that due to a subsequent change in circumstances which was clearly not in contemplation of the parties, the contract has become impossible to perform.[38]

b. By Effluxion of Time: A fixed term contract is one which must run for a fixed period, and one, which cannot thus be terminated earlier, except for a gross breach by either parties.[39]Where a contract is for a fixed period, following the lapse of time, the contract is deemed determined.[40]Lapse of time would be operative where termination date set in the contract has passed, enough time has lapsed to imply that employment relationship has ended. The legal implication of determination of contract of employment by effluxion of time is that none of the parties can successfully bring up an action on the ground that the agreement had been breached if any of the parties decides not to be bound by the contract after the effluxion of time.[41] The NIC upheld the determination of contract of employment by effluxion of time when it held in the case of *Kenneth Akubueze & 4 Ors. v. Daryce International Ltd* that where a contract of employment is for a fixed term or duration, the contract comes to an end by effluxion of time.

c. By Agreement: Contracts are created by the agreement of the parties and can be unmade by agreement. Thus, the law is *eodem modo quo oritur, eodem modo dissolvitur.*[42]The parties to an employment contract can by mutual agreement bring the contract to an end at any time either in accordance with the terms and conditions of the contract or otherwise. This is so even if the contract is meant for a specific period of time.[43] In doing this, the parties may mutually agree to waive their rights, privileges or obligations which have accrued under the contract and bring it to an end.[44] A classic example where this means of determination have been judicially discussed is the case of *College of Medicine of University of Lagos & Anor. V. Dr. S. A. Adegbite*

d. By Performance: where an employment contract is made for the purpose of performing a particular assignment, once the assignment is performed, the contract comes to an end. A typical example of this is where an employee works until retirement age. At that time, the employment contract is considered to have been performed and automatically comes to an end.[45] In the case of *Cutter v. Powell*[46] the law stated that where there is a contract to do an entire job for a specific sum of money lump sum, once the work is completed, remuneration accrues. This is one of the means of termination of employment contract every employee would look forward to.

21 Okoro, B. C., 2011 *Law of Employment in Nigeria,* Lagos, Concepts Publication Ltd., P. 201.
22 Oji, A. E., and Amucheazi, O. D., (No. 4) *Op. cit.* P. 341.
23 See *Noakes v. Doncaster Amalgamated Collieries Ltd.* [1940] AC 1044.
24 Section 20, Labour Act, 1974, Cap. L1, LFN 2010; *Food, Beverage and Tobacco SSA v. Premier Breweries Ltd.* (1989-90) NICLR, 56 at 68.
25 Sagay, I. E., *Nigerian Law of Contract,* 2nd Ed., Ibadan, Spectrum Books Limited, 2007 (Reprint), Pp. 565-569.
26 Anyim C. Francis, "Redundancy and its Socio-Psychological Effects on Employees" Vol. 4 No. 1,*American International Journal of Social Science*, 2015, P. 45. Available Online at <www.aijssnet.com> Accessed 5th February, 2018.
27 Eyongndi, D. T. "Analysis of Nexus between Redundancy and Industrial Democracy in Labour Relations" Vol. 20. No. 1, *The Nigerian Law Journal,* 2017, P. 263.
28 Israel N. Worugji, 'The Challenges of Economic Terminations of Contract of Employment in Nigeria' (2011) 5(2)Labour Law Review Journal, 50.
29 *Obaleye v Dunlop Nigerian Industries Ltd* (1975) 5 ECSLR 445.
30 Srivastava, S. C., *Industrial Relations and Labour Laws, 5th Ed.* New Delhi, Vikas Publishing House PVT Ltd., 2010, 538.
31 *Guinness Nigeria Ltd. v. Agoma* [1992] 7 NWLR (Pt. 265) 728.
32 *Davis Constructors Ltd. v. Fareham Urban Development Council* [1956] A. C. 696; *Taylor v. Caldwell* [1863] 3 B & S. 826.
33 Uvieghara, E. E., *Labour Law in Nigeria,* Lagos, Malthouse Press Ltd., 2011, P. 47.
34 *Paul Wilson & Co. v. Partenreederei Hannah Blumenthal* [1980] 1 AC 854, 909.
35 *Cuckson v. Stones* [1858] 1 E & E 248; *Carr v. Hadrill* [1875] 39 JP 246.
37 [2015] 58 N.L.L.R. (Pt. 202) 626 at 672, Paras. A-D.
38 *Diamond Bank Ltd. v. Ugochukwu* [2008] 1 NWLR (Pt. 1067) 1 at 28.
39 *Swiss-Nigerian Wood Industry Ltd. v. Bogo* (1971) 1 WLR, 337.
40 Oji, A. E., and Amucheazi, O. D., (No. 4) *Op. cit.* P. 340.
41 *Adegbite v. Lagos College of Medicine* (1970) NCLR 346.
42 Yerokun, O., 2004 *Modern Law of Contract,* 2nd Ed., Ibadan, Higher Ground Printers & Suppliers, P. 294.
43 Uvieghara, E. E., (No. 31) *Op. cit.* P. 46.
44 *Agbai & 5 Ors. v. Okagbue* [1991] 7 NWLR (Pt. 204) 391.
45 Uvieghara, E. E., (No. 31) *Op. cit.* P. 46.
46 (1795) 6 T. R. 320.

e. **By Dismissal:** This is determination of an employment contract without notice, which is recognized and justifiable on the grounds of conduct, competence of the employee or disobedience to lawfully and reasonable orders of the employer. This mode of determination is usually resorted to only by the employer.[47] This is done usually after thorough investigation and availing the affected employee an opportunity to state his defence.[48] This is because where there is a breach of fair hearing in the process that led to the dismissal of an employee, the court would declare the dismissal unlawful and the employee would be awarded damages for breach of contract of employment.[49] Misconducts that will attract dismissal of an employee includes absenteeism without permission as was held in the case of *Udegbunam v. Federal Capital Development Authority*[50], incompetence of the employee in the discharge of his duties and not mere mistake as was in the case of *Garabedian v. Jamakani,*[51]dishonesty or infidelity of an employee,[52] negligence[53] etc.

f. By Novation: This is a tripartite agreement whereby a contract between two parties is rescinded in consideration of a new contract being entered into on the same terms between one of the parties and a third party.[54] For novation to determine a contract of employment, there must be an alteration of the fundamental term (s) of the contract, or the contract is completely replaced by another.[55] Agbaje JSC (as he then was) in the case of *George Ashibuogwu v. Attorney General of Bendel State & Ors*[56] Stated that the law succinctly provides that for novation to occur, there must be not only a substitution but also an intention which he called *animus novandi.*[57]Thus, the new contract must comply with all the requirements of the original contract such as capacity, offer, acceptance, and consideration.

g. By Notice: Professor Emiola[58]opined that it is now settled law that unless a contract is determined by operation of law, or by effluxion of time, some form of notice is certainly required.[59]Under the contract of employment, there is no doubt that either parties thereof has a common law right to bring the contract to an end by giving notice of his intention to do so to the other party.[60]This common law right has been given statutory impetus.[61] This is seen in the provisions of section 11(1) and (2) of the Labour Act.[62]The necessity for formal notice was highlighted by Taylor C.J. in the case of *O. A. Martins v. Braithwaite (Insurance Brokers) & Co. Ltd.*[63]which is to inform the party of the others intention of disengagement. Notice in this context is "such notice as brought home to the mind of a reasonably intelligent and careful reader such knowledge as fairly and in a business sense amounted to notice (with regard to) a contract."[64] It is the formal information by one party to the other that the contract is to be brought to an end at a specified date.[65] The legal implication of giving a notice of determination or retirement by the employee is that the employee, remains in the employ of the employer until the expiration of the notice as was held in the case of *Rufus Femi Amokeodo v. Inspector General of Police.*[66]In the case of *University of Benin v. Andrew Erinmwionren*[67] the court held that it is well settled law that where there is a contract of service, there is an implied term that the contract of employment can be terminated by notice.[68] For such a notice to be effective, where the terms of the contract stipulates the length of time and form, the person giving the notice must strictly comply else, any determination contrary to what was provided would amount to breach of the contract.[69] This was the decision of the Court of Appeal in the case of *Al-Bishak v. National Productivity Centre & Anor.*[70]

Thus, the length of notice to be given must be in accordance with the terms of the contract.[71] However, where no length of time is provided for, the common law notion of reasonable notice would become applicable as was the case in *Hill v. C. A. Parsons & Co. Ltd*.[72]What would amount to reasonable notice is to be gathered from the circumstance of individual case and one case may not suitably serve as a precedent for another.[73] The court may take into consideration such things like the position occupied by the employee, the period of payment of wages, the custom of the particular trade, etc. It is also very vital that not only the required length of time is complied with, it is essential in law that the stated form of the notice be strictly complied with as was held by the Supreme Court in the case of *Oyekoya v. G. B. Olivant Nigeria Ltd.*[74]The Supreme Court held that where the notice is specified to be 30 days, a month notice will not suffice as there is a difference between the two.[75] The notice where it is in writing, it must be specific and unequivocal.[76] It is apposite to note that times begins to run when the notice is served on the other party.[77] Where an agent of the party to whom the notice is directed receives it, the receipt is valid. It is not legally essential for the receiving party to accept the notice for it to become effected once the party giving the notice has fulfilled all conditions precedent to giving the notice and the notice comply with the agreed length of time, form and mode of delivery.[78] In the case of *Amadi v. African Publishing & Printing Co.*[79]it was held that:

A notice need not be in writing nor need it take any particular form. An intention to terminate the contract at the end of the proper period of notice conveyed in such a way as carries an understanding of such intention to the other party is

47 Oji, A. E., and Amucheazi, O. D., (No. 4) *Op. cit.* P. 343.
48 *Maja v. Stocco* (1968) NMLR 372.
49 *Jumbo v. P.E.F.M.B.* [2005] 14 NWLR (Pt. 945) 443.
50 [2003] 10 NWLR (Pt. 829) 487.
51 (1961) 1 All NLR 177 at 188.
52 *Abukugbo v. African Timber & Plywood Ltd.* (1965) ALR Comm. 425.
53 *Usen v. B.W.A. Ltd.* (1965) 1 All NLR, 244.
54 Woodley, M., *Osborn's Concise Law Dictionary,* 11th Ed., London, Sweet & Maxwell, 2009, P. 288. See also Curzon, L. B., and Richards, P. H., 2007 *The Longman Dictionary of Law,* 7th Ed., Edinburg, Pearson Education Ltd., p. 404.
55 *Olaniyonu v. British-American Insurance Co. Ltd.* [1974] 1 All NLR 239, 244.
56 [1988] 1 NWLR (Pt. 69) 138 at 159.
57 Emiola, A., (No. 9) *Op. cit.* P. 129.
58 *Ibid.* P. 142.
59 *P. O. Ewarami v. African Continental Bank Ltd.* [1978] All NLR 114; *Re African Association* (1910) 1 K.B. 396, 399. *Hill v. C. A. Parsons Ltd.* [1971] 3 All ER 1345.
60 *Ibid.* P. 54.
61 Okoro, B. C., (No. 19) *Op. cit.* P. 202.
62 Section 11(1) and (2) Labour Act, 1974, Cap. L1, LFN, 2010. See also Section 11(5) and (6) of the same Act.
63 (1972) CCHCJ/72, 52.
64 *Greenwood v. Leather Shoe Co.* (1900) 1 Ch. D. 421, 436.
65 Emiola, A., (No. 9) *Op. cit.* P. 143.
66 [1999] 6 NWLR (Pt. 607) 469. See also *Ibama v. Shell Petroleum Development Co. of Nigeria* [2005] 17 NWLR (Pt. 954) 364.
67 [2001] 17 NWLR (Pt. 743) 548 at 563, Para. F.
68 Oji, A. E., and Amucheazi, O. D., (No. 4) *Op. cit.* P. 335.
69 *Obot v. Central Bank of Nigeria* (1993) 9 SCNJ 368; *Western Nigeria Development Corporation v. Abimbola* (1966) 1 All NLR 159; *Onalaja v. African Petroleum Ltd.* [1991] 7 NWLR (Pt. 206) 691.
70 [2015] 57 N.L.L.R. (Pt. 192) 1 at Pp. 59-60; *Olarewaju v. Afribank Plc.* (2001) FWLR (Pt. 72) 2008, *Lisu v. Salad* [2011] LPELR-3919 CA; *Suberu v. A. C. B. & Ors.* [2002] LPELR-12207 CA.
71 *Sona Breweries Plc. v. Sir Shina Peters & Anor.* [2005] 1 NWLR (Pt. 908) 478 at 489.
72 (1972) 1 S.C. 305.
73 *Abukogbo v. African Timber & Wood Co. Ltd.* (1966) 2 All NLR, 377; *A. C. B. v. Ufondu* [1997] 10 NWLR (Pt. 523) 169; *Daniels v. Shell B. P.* (1962) 1 All NLR, 19.
74 (1969) 1 All NLR 80.
75 See *Precious v. Reedie* (1924) 2 KB 147; *Akumechiel v. B. C. C. Ltd.* [1997] 1 NWLR (Pt. 484) 695; *Adeyemo v. Oyo State Public Service Commission* (1979) O.Y.S.H.C., 83.
76 Emiola, A., (No. 9) *Op. cit.* P. 144.
77 *Clark v. Coronel Ltd.* (1972) 1 T.R. 208.
78 Emiola, A., (No. 9) *Op. cit.* P. 145.
79 (1967) NCLR 63.

probably all that law requires.[80]

Generally, where notice can be given to determine an employment contract, payment *in lieu* of notice would suffice. Oji and Amucheazi[81] posits that "payment *in lieu*" means dispensing with the period during which the notice is supposed to run and expire, by paying a monetary sum, agreeably commensurate with that period." This assertion finds support in the decision of the National Industrial Court as per Adejumo J (PNIC) in the case of *Amina Hassan v. Airtel Networks Limited & Anor*[82] wherein the court relied on the meaning of the phrase as defined in page 852 of Oxford Advance Learner's Dictionary, seventh edition. This accord with the general rule that under common law, there is no obligation to the master to provide work to the servant as long as the employee receives salary.[83] Usually, in practice, the contract of employment gives either party the option of determining the contract either by giving a specified length of notice or payment *in lieu* of notice. The Supreme Court in the case of *Chukwumah v. Shell Petroleum*[84]held that where the giving of notice or payment *in lieu* of notice is provided for in a contract, the parties are at liberty to choose anyone that is convenient and where payment *in lieu* is chosen, it is not enough that in the letter communicating the determination, the party merely offer without more, to pay salary *in lieu of notice*, the payment must be contemporaneous with the offer.

80 *Prof. T. M. Yesufu v. Governor of Edo State & Ors.* (2001) 26 WRN 121, 133.
81 Oji, A. E., and Amucheazi, O. D., (No. 4) *Op. cit.* P. 338.
82 [2015] 58 NLLR (Pt. 201) 443 at 464, Paras. B-D.
83 *Collier v. Sunday Referee Publishing Co.* (1941) 2 K.B. 647 at 650.
84 [1993] LPELR-864 SC at 28.

3. The Dichotomy between Termination and Dismissal from Employment

Although both termination and dismissal brings an employment contract to an end,[85] the two cannot be used interchangeably. One should therefore take precaution to avoid indiscriminate use of these words.[86] The difference lies in the consequences an employee faces as a result of either termination or dismissal. At common law, dismissal refers to all cases where an employee is relieved of his duties by a positive, unilateral act of his employer excluding effluxion of time.[87] The effect of dismissal on a dismissed employed have been pungently stated by Nigerian Courts.[88] In the case of *J. A. Irem v. Obubra District Council*[89]the Supreme Court as per Ademola FJF, held that dismissal carries an infamy and deprives one benefit, which termination, does not.[90] In the case of *Jumbo v. Petroleum Equalization Fund Management Board*[91]after reiterating the fact that both termination and dismissal brings an employment contract to an end, the Supreme Court as per Oguntade JSC (as he then was) highlights the dichotomy between termination and dismissal thus:

Termination or dismissal or dismissal of an employee by the employer translate into bringing the employment to an end. Under a termination of appointment, the employee is enabled to receive the terminal benefits under the contract of employment. The right to terminate or bring an employment to an end is mutual in that either party may exercise it. Dismissal on the other hand is punitive and, depending on the contract of employment, very often entails a loss of terminal benefits. It carries an unflattering opprobrium to the employee.[92]

85 *Olaniyan & Ors. v.University of Lagos & Anor.* [1985] 2 NWLR (Pt. 9) 599.
86 *Jumbo v. Petroleum Equalization Fund Management Board* [2005] 14 NWLR (Pt. 945) 443
87 Chianu, E., (No. 7) *Op. cit.* P. 289.
88 Emiola, A., (No. 9) *Op. cit.* Pp. 161-168.
89 (1960) 5 FSC 24.
90 See *Abomeli v. N.R.C.* [1995] 1 NWLR (Pt. 372) 51.
91 [2005] 14 NWLR (Pt. 945) 443 at 467, Paras. A-B.

The above dichotomy was also highlighted in the cases of *Calabar Cement Co. Ltd. v. Daniel*[93]and *Adeko v. Ijebu-Ode District Council.*[94]Usually, for an employee to resort to dismissal of an employee, the employee must have been found guilty of gross misconduct.[95] Gross misconduct is at the discretion of the court to determine what it is and is not as was held in the case of *N. N. B. Plc. v. Osunde*[96]and it is a question of fact alone which is not governed by any rigid standard of law.[97] Thus, a single isolated act of sufficient gravity can justify dismissal.[98]However, while an employer reserves the right to summarily dismiss an errant employee, it must be done in accordance with the principles of natural justice, particularly in employment of statutory flavour where failure to do so, will not only result into wrongful dismal availing the wrongfully dismissed employee damages but also reinstatement.[99] In the case of *Obiekwe v. MTN Nigeria Communications Limited*[100]the National Industrial Court reiterated the settled position of the effect of dismissal that it is trite that an employee who is dismissed for gross misconduct is not entitled to his salary or any other entitlement. He is also not entitled to damages for breach of contract and living wages.[101] In fact, herein lies the main distinguishing feature of dismissal from termination of employment.

92 *Charles Udegbunam v. Federal Capital Development Authority* [2003] 10 NWLR (Pt. 829) 487.
93 [1991] 4 NWLR (Pt. 188) 750 at 759, Paras. E-G.
94 (1962) 1 SCNLR 349.
95 *Moeller v. Monier Construction Co. Nigeria Ltd.* (1961) 2 All NLR 167; *Johan Nunnink v. Constain Blansevoort Dredging Ltd.* (1960) L.L.R. 90.
96 [1998] 9 NWLR (Pt. 546) 477.
97 *Clouston& Co. Ltd. v. Corry* (1906) AC 122 at 129.
98 *Nigerian Arab Bank Ltd. v. Shaibu*[1991] 4 NWLR (Pt. 186) 450.
99 *Adedeji v. Police Service Commission* (1967) 1 All NLR 67; *Garba& Ors. v.University of Maiduguri* (1986) 1 All NLR, 124.
100 [2014] 43 N.L.L.R. (Pt. 136) 414 at 466-467, Paras. F-A.

4. Motive and Cause of Determination of Contract of Employment

This section of the article clarifies the confusion erroneously made between motive of determination of employment and cause for such determination. It is trite law that an employer in a master-servant employment relationship, who has the power to hire, also has the power to fire the employee for any reason or no reason at all.[102] Professor Emiola[103] rightly cautioned that motive should not be confused with the cause. He explained that motive is the inner impulse and account for the intention with which an action is done. It is the subjective urge for an action. On the other hand, cause or in a layman's word, 'reason' is the rational justification for doing or omitting to do an act.[104]Generally, where an employment contract is determined, an employee cannot seek to impugn the employer's decision based on the motive. The rationale for this was stated by the Supreme Court in the case of *Chukwuma v. Shell Petroleum Development Corporation,*[105]to the effect that the motive for doing an act does not necessarily determine the legality of the

101 *Suleiman v. Master Stroke Packages Ltd.* Suit No. NIC/LA/08/2011.
102 *Obu v. Nigerian Petroleum Corporation* (2003) 4 MJSC at 137; *Osisanya v. Afribank Plc.* (2012) 2 NILR 214. See alsoAborisade, F., *Determination of Contract of Employment: IN NIGERIA, SOUTH FRICA AND ZIMBABWE,* Ibadan, Humanitas Consult Ltd., 2015, P. 146.
103 Emiola, A., (No. 9) *Op. cit.* Pp. 139.
104 *Ibid.*
105 [1993] 4 NWLR (Pt. 289) 512 at 558, Paras. E-F.

act. Thus, if there is a right to do an act, the fact that the motive is for doing the act is bad will not affect its validity or legality. Similarly, where there is no right, or the thing is illegal, the purity of the motive or the magnanimity of the act done will not alter the legal consequence.[106] This point of law was reiterated in the case of *Calabar Cement Co. Ltd. v. Daniel*[107] where the Court of Appeal as per Katsina-Alu JCA (as he then was) held that "it is settled law that the motive which compels an employer to terminate lawfully a contract of employment is not relevant"[108]

One can therefore argue that since motive is immaterial in the determination of employment, it is consequently not the business of the court to inquire into. Similarly, although the traditional view is that an employer in a master-servant relationship is not duty bound to state the reason for determining the employment, and could do so for good or bad reason, there is a paradigm shift from this archaic view. However, where he does state a reason, the law has moved beyond rendering such a reason unchallengeable. The National Industrial Court in the case of *Petroleum and Natural Gas Senior Staff Association of Nigeria v. Schlumberger Anadrill Nigeria Limited*[109] reinvented the law in a commendable manner when it held that:

The respondent also argued that it has the right to terminate the employment of any of its employee (sic) for reason or no reason at all. While we do not have any problem with this at all, the point may be made that globally it is no longer fashionable in industrial relations law and practice to terminate an employment relationship without adducing any reason for such termination. The problem we however have here is, when a reason is given for the termination, whether the affected staff cannot contest the reason. It is our opinion that when an employer terminates an employment and gives reason for such termination, the employee has a right to contest the reason.[110]

5. Delineating Employee's Right of Resignation in Nigeria

This section of the article examines the employee's right of resignation with reference to its exercise during the pendency of disciplinary measures and issues that evolve in it. In the case of *Benson v. Onitiri,*[111] Ademola CJF (as he then was) stated the law succinctly that every employee has the right to resign his employment unless there is a reason or reasons to show that the holder of the office cannot. This common law right cannot be fettered. Thus, the notice of resignation becomes effective neither from the date of the letter, nor from the date of any purported acceptance, but from the date on which the letter was received by the employer or his agent.[112] This was the decision of the National Industrial Court in the case of *West African Examinations Council v. Oshionebo.*[113]

The effectiveness of the resignation once the notice has been received is not contingent on the acceptance of the resignation by the employer. This is because there is absolute power to resign and no discretion to refuse to accept the notice by the employer and such acceptance as was held in the case of *Obed Enikuomehin v. University of Lagos & 4 Ors*[114] is inconsequential.[115] Thus, once the notice of resignation has been received by the opposite party, it cannot be unilaterally withdrawn. This point was underscored in the case of *Riordan v. War Office*[116] where Lord Diplock J. stated that "once notice is given, it cannot be unilaterally withdrawn except there is an express provision for such withdrawal." It therefore means that where a notice of resignation is in transit but before it is receipt, the employee who issued it can unilaterally withdraw it since it has not come to the actual knowledge of the employer by receipt of it.[117] Since it is inconsequential for the opposite party to signify his acceptance of resignation notice, it is argued that the date of receipt of the notice is the date of acceptance by operation of law, however, the date the notice of resignation becomes effective is the date stated in the notice.

Thus, the effect of giving notice of resignation is to indicate the employee's intention to terminate the employer-employee relationship and all the consequences that flows from it. This point was accentuated by the NIC in the case of *Udeagha Egbe v. Union Bank Plc. & Anor*[118] where it was held that it is the law of common place that the tendering of a resignation letter is a clear indication that an employee intends to determine the contract of employment between him and his employer.

From the above, it is clear that resignation is predicated on the subsistence of employer-employee relationship. Thus, the issue which arises is, whether an employee should be allowed to exercise the right of resignation to scuttle the possibility of punishment where an employee is under disciplinary action arising from criminality or gross misconduct; or whether the bringing to an end of the contract of employment on the basis of which disciplinary action was commenced against an employee should also terminate the inquiry of the allegation of criminal nature facing the employee. The position of the law in Nigeria gleaning from available judicial authorities is unsettled with regard to the above issues. This article review some of the decisions and inductively makes some arguments in a bid to balance the contending interests involved in the questions raised.

It is apposite to bear in mind the *caveat* of the Supreme Court in the case of *Benson v. Onitiri*[119] where the right of resignation was said to be curtailable by the existence of *a reason or reasons to show that the holder of the office cannot.* In the case of *Oluwasanmi v. Ondo State Civil Service Commission,*[120] the appellant gave notice of voluntary retirement from the employment, but the respondent rejected the notice. Consequently, the appellant resumed work but was subsequently dismissed. The Court of Appeal found

106 *Taiwo v. Kingsway Stores Ltd.* (1950) 19 NLR. 122.
107 [1991] 4 NWLR (Pt. 188) 750 at 759, Paras. E-G.
108 *Olaniyan v. Unilag* [1985] 2 NWLR (Pt. 9) 599 at 602 and 504.
109 Suit No. NIC/9/2004.
110 *Mix and Bake Flour Mills Industries Ltd. (Crown Flour Mills Ltd.)* v. *Beverage & Tobacco Senior Staff Association,* Suit No. NIC/LA/02/2010. Judgment delivered on the 16th day of June, 2010; *Nasco Foods Nigeria Limited v. Food Beverage & Tobacco Senior Staff Association* Suit No. NIC/6/2003. Judgment delivered on the 16th day of July, 2007.
111 (1960) NSCC 52; (1960) SCNLR 177
112 *Osun v. P.A.N. Ltd.* [2001] 13 NWLR (Pt. 731) 627.
113 [2015] 55 N.L.L.R. (Pt. 187) 165 at 191, Paras. A-B.
114 [2014] 43 N.L.L.R. (Pt. 137) 586 at 631, Paras. G-G.
115 *Adefemi v. Abegubde*[2004] 15 NWLR (Pt. 895) 1 at 28, Para. F.
116 (1959) 3 All ER 552.
117 *Brindle v. HW Smith Cabin Ltd.* [1973] 1 All ER 130.
118 [2015] 58 N.L.L.R. (Pt.200) 192 at Pp. 296-297, Paras. H-A.
119 (1960) NSCC 52; (1960) SCNLR 177
120 Unreported Appeal No. CA/B/115/87.

the dismissal to be unlawful, and held that the employer could not rely on the appellant's notice of retirement which they had hitherto rejected to absolve liability in damages to him. Commenting on this decision, Professor Chianu[121] asserts that:

This decision shows that where an employer's rejection of his employee's resignation is unjustified, the court can declare it unlawful. It is evident that where an employer is unable to prove that his employee has a question to answer or that term of his contract makes his resignation irregular, his rejection would be unlawful.

Moreover, in the case of *Ondo State Housing Corporation & Anor v. Michael Ade Shittu,*[122]the respondent complained of being witch-hunted and consequently gave notice of voluntary retirement from the employment of the appellants. The appellant responded by rejecting his letter of resignation on the ground that there was an ongoing audit investigation in the Estate Division of the appellant headed by the respondent which has indicted the respondent and it left much to be desired if he were to be allowed to just bolt out of his employment. Hence, he was directed to resume work forthwith pending the determination of the audit investigation. The respondent immediately wrote the appellant unequivocally rejecting their rejection of his resignation after his initial payment of one month salary *in lieu* of notice coupled with the issuance of an official receipt. Hence, he refused and or rejected to resume work and the one month salary paid *in lieu* of notice was not returned to him even after the appellants' rejection of his resignation. He was subsequently tried in the court of law for the offence of forgery and other offences but was discharged and acquitted. Upon his acquittal, he sought to be reinstated into the employment of the appellants but they refused and he briefed his counsel to institute legal proceedings against the appellants. His claim for reinstatement and arrears of salaries was demised but he was awarded damages for wrongful suspension. Hence, the appellant appealed to the Court of Appeal. The court in dismissing the appeal held that an employee has the right to resign his employment and further that where an employer rejects the resignation of the employee, the employer does so illegally and cannot claim any benefit against the employee based on his illegal rejection but only the employee can make a claim on the rejection.

Equally, the failure of the respondent to resume work as evidenced by his reply to the appellant's rejection, makes his resignation effective and he could therefore not claim reinstatement as he was no longer an employee of the appellant after giving of his notice of voluntary resignation. Moreover, the appellants' action of holding unto the money paid *in lieu* of notice despite their rejection, was indicative of their constructive acceptance instead. This decision with due respect, is laden with patent inconsistencies. The Court of Appeal failed to take cognizance of the caution placed by the Supreme Court on the employee's exercise of his right to resignation which is *if there is any reason or reasons to show that the holder of the office cannot resign.* The rejection letter clearly made a very serious case against the respondent which had to do with financial impropriety which was the basis for the rejection and which, arguably, qualifies as a reason to show that the holder of the office cannot resign as held by Ademola FCJ (as he then was) in the case of *Benson v. Onitiri.*[123]

The withholding of the one-month salary paid *in lieu* of notice despite the failure to resume work, should have been seen as positive steps against the appellant demonstrating the retention of the respondent in their employ entitling him to his arrears of salary and reinstatement after his discharge and acquittal for the offence of forgery. The Court technically allowed the appellants to benefit from their own wrong.

In *Alan Femi Lana v. The University of Ibadan*[124] the appellant, who was an employee in the respondent University, presented himself for promotion and in his curricular vitae, he gave information of two of his articles which had been accepted for publication in international journals. However, the falsity of his claim was discovered and the matter was referred to the disciplinary committee. Although the charge against the appellant i.e. (act of dishonesty and academic fraud) which was found to be true could result to his dismissal, the committee magnanimously recommended that he be denied promotion for the next three years from that time. The appellant appealed to the Council for reconsideration. While the appeal was to be determined, he voluntarily resigned. In the letter of resignation forwarded to the Vice Chancellor, he appealed that the condition spelt out in his contract of service for resignation be dispensed with. Without getting a reply, he paid three month salary *in lieu* of notice and left the respondent in search of employment but to no avail. He returned to the Respondent to meet the Vice Chancellor's reply which refused to waive the special condition for exercise of the right of resignation which he had infringed and invited him to the Senior Staff Disciplinary Committee. He severally failed and or refused to honour the several invitations, but finally honoured one and claimed to have ceased from being an employee of the respondent. Consequently, he was dismissed by the University Council based on fresh evidence sequel on the Committees' findings and recommendation. He filed a suit at the High Court contending that his resignation was valid and dismissal was unlawful and claimed for damages for libel. The claim was dismissed, and he appealed to the Court of Appeal.

The Court of Appeal held that, by the terms of the appellant's contract of service, he cannot terminate the contract by paying three months' salary *in lieu* of notice and the acceptance by the Cashier or Bursar of the University of such Money cannot therefore constitute a valid resignation. The distinguishing factor between this case and *Shittu's Case*[125]is obvious, in that in this case, there was a laid down procedure to be followed in the exercise of the right of resignation and failure to strictly comply with the procedure, is an aberration of a condition precedent which makes the exercise of the right null and void and of no effect whatsoever.[126] While in the Shittu's case, there was no such condition precedent, there was an allegation of financial impropriety. However, in both cases, Ademola FCJ's exceptional circumstance for refusal of the exercise of the right to resignation existed.

It is apposite to note that these cases deal

121 Chianu, E., (No. 7) *Op. cit.* P. 313.
122 [1994] 1 NWLR (Pt. 321) 476.
123 (1960) NSCC 52; (1960) SCNLR 177.
124 [1987] 4 NWLR (Pt. 64) 245.
125 [1994] 1 NWLR (Pt. 321) 476.
126 *Edet & Anor. v. Amah & Ors.* [2014] 43 N.L.L.R. (Pt. 136) 362.

with employment laden with statutory flavour in which there is statutory security and the abhorrent principle that regulates master-servant relation. And in this respect an employer can terminate the employment of the employee for good or bad reason or no reason at all, and where the termination does not follow laid down procedure, what an aggrieved employee is entitled to is mere damages for wrongful termination.. Conversely, the tempting and seemingly logical argument that since the employer can terminate the employment wrongfully (but with the consequence of paying damages), the employee should also be able to resign even if it is wrongfully and incur liability in damages for his wrongful resignation..

However, the above analogy presents a problem in a master-servant relationship, the problem is whether an employee notice of resignation which is regular or irregular like that of employer's termination will not bring to an end the employer-employee relationship despite incurring liability in damages for breach of contract. The probability of answering this question in the affirmative is buttressed by the cardinal principle of labour law that an unwilling employee cannot be compelled to stay in the employ of a willing employer and *vice versa*. Although this is the position of the law where any person is alleged to have committed an offence, he is presumed innocent until the contrary is proven.[127] It is contended that the presumption of innocence should be made absolute or sacrosanct in the interest of public policy. Thus, in a master-servant employment relationship, where an employee is facing disciplinary action particularly those that bother on criminality or capable of being injurious to the society at large, e.g. dishonesty, fraud, infidelity, forgery etc., his right to resign should be kept at abeyance, to enable the determination of the proceedings.

This is to ensure that employees particularly those in sensitive private sector employment whose acts or omissions are capable of affecting the public (for instance, employees in the financial sector, medical, hospitality, entertainment etc.) suspected of infraction, do not exploit the right of resignation to evade punishment. Since crimes do not have limitation period for their prosecution, the employer can report the ex-employee to the appropriate authority for investigation and possible prosecution even after the extinction of the employer-employee relationship.[128] However, the course of justice would be better served if the allegation is investigated and trashed timeously and the resignation of the employee could negatively impact the subsequent proceedings.

6. Conclusion and Recommendations

Extrapolating from the above analysis, this article discussed succinctly the employees' right of resignation from his employment and the employer's right to terminate the employment of the employee in a master servant relationship for any reason, bad or good or no reason at all. The NIC has brought about a paradigm shift in this to the effect that globally, it is no longer fashionable to terminate an employee's employment for any reason or no reason at all and where there is a reason, the employee is entitled to contest it. However, as commendable as this decision is, the earlier position by virtue of judicial precedent, still holds-ways. There is a difference between termination and dismissal. Although both brings to end the employment contract, the later disentitle the employee from all entitlements and carries infamy while the former does not. More or so, the article discussed the difference between motive for termination and cause for termination pointing out that at all times material, motive is inconsequential but cause could be contested. It was also seen that the right to resignation particularly within the ambit of employment with statutory flavour has to be effected in compliance with the laid down procedure. A resignation will be out rightly ineffective for failure to comply with the procedure as such failure would qualify as a reason the holder of the office cannot resign.

However, in a master-servant relation, the case is dicey as the rules with regard to termination are purely contractual and subjected therefore to general contractual remedy in the event of infraction. Thus, in the interest of overriding public interest (public policy), it is argued that, the right of presumption of innocence be sequestrated where an employee is alleged to have committed a misconduct that is capable of negatively impacting the society and his right of resignation be kept at abeyance while the disciplinary action is expeditiously carried out.

From the findings above, it is recommended that the caution of Ademola CJF (as he then was) in the case of *Benson v. Onitiri*[129] be given statutory effect by amending the Labour Act to statutorily provide that an employee whether in the public or private sector, facing disciplinary action right's to resignation can be kept at abeyance pending the determination of the allegation. In order to avoid abuse, the amendment should provide a period of time not exceeding three months within which such an allegation must be determined which is in most cases, the period for which notice of resignation is required. If this is done, it would be mutually beneficial to the society at large and the employee concerned. It is also recommended that since it is no longer globally fashionable to terminate for any reason or no reason and where an reason is given, the employee has a right to contest the same, such position should be given judicial approval by the appellate courts to safeguard employment bearing in mind the high rate of underemployment and unemployment in Nigeria.

127 Section 36(5) of the 1999 Constitution of the Federal Republic of Nigeria, Cap. C38, LFN, 2010.

128 This is a general rule. There are certain offences which have a specified period within which they must be prosecuted e.g. defilement must be prosecuted within 3 months.

129 (1960) NSCC 52; (1960) SCNLR 177

THE FEARS AND DOMINANCE OF FOREIGN INVESTORS AND HOST STATES IN THE LIGHT OF INTERNATIONAL LAW

By Dr. Pulluru Satyanarayana LL.M., PhD[1]

'To attract companies like yours… we have felled mountains, razed jungles, filled swamps, moved rivers, relocated towns… all to make it easier for you and your business here.' –Philippines.

Abstract

Foreign investments are important for the development of the host country. It gives employment, roads, buildings and other infrastructure thereby the living standards and the per capita income of the people will grow. Foreign investors will invest in other countries to get more returns. However, they feel that international agreements and bilateral agreements between them are not giving to the maximum extent to what they are expecting. This examines the reasons for their fears and dominance of each other with regard to foreign investments. The article has found that the laws which were made and applicable are inadequate, ineffective and multiplicity of judicial tribunals are leading to the delivery of conflicting judgments. This article advocates that a universal law has to be made and world investment court has to be established to address the challenges of both foreign investors and host countries.

***Key Words*: Foreign investment, Host States, International Laws.**

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1.0 Introduction

Every country is competing to get foreign investment with the other country. Tanzania is one of them. Tanzania investment centre (TIC) announced that it had registered 89 new major projects valued at 1,057.37 million USD (2.4 trillion TSH) between January and April 2018 and it will create more employment opportunities.[2]

According to World Investment Report, 2018, the largest receiver of Foreign Direct Investment (FDI) of $476 billion is Asia. For Latin America and Caribbean it has been increased to 8%, which has been reached to $151 billion. In case of Africa, it has decreased by 21 per cent from 2016 reaching $42 billion, whereas flows to least developed countries slide by 17 percent, to $23 billion.[3] China is the largest receiver of FDI in developing nations and the second largest one in the world after USA.[4]

The Food and Agricultural Organization (FAO) forecasts that the investment in developing countries agriculture have to be increased by 50 percent to feed the world population which is expected to cross 9 billion in 2050. The investment should be more intense for Zero Hunger target of eradication of hunger in a sustainable manner.[5]

In 2017, around 65 countries made 126 investment policies in which 84 percent were favourable to investors. These policies have liberalized the procedures for industries like transport, energy and manufacturing by providing incentives. At the same time, most of the countries are putting investment restrictions regarding national security, foreign ownership of land and natural resources.[6]

The number of investor-State dispute settlement (ISDS) cases were 855 by 2017 including 65 new cases. The investors won 60 percent of those cases on merits.[7]

Since 1980 China, Hong Kong (China), Mexico, Brazil, Singapore, Russian Federation, Chile and India have been receiving 75 percent of FDI.[8] The first batch of East Asian Countries liberalized investment regime in 1960 are Hong Kong (China), Singapore and Malaysia. The second batch consists of China and India in 1980 and African countries in 1990.[9]

The foreign investment is defined as, "A transfer of funds or materials from one country (called the capital exporting country) to another country (called the host country) in return for a direct or indirect participation in the earnings of that enterprise."[10] World Bank defined the foreign direct investment as, "the net inflows of investment to acquire

2 Katre Mbashiru, "Dar registers 2.4 Trl/- new mega investment projects." *Daily News*, May, 8th, 2018, https: www.dailynews.co.tz. (accessed May 10, 2018).

3 Key Message to United Nations Conference on Trade and Development (UNCTAD) World Investment Report, 2018, Investment and New Industrial policies, p.xi, United Nations Publications, wir2018_en_.pdf.

4 United Nations Conference on Trade and Development (UNCTAD) World Investment Report, 2018, Investment and New Industrial policies, p.4, United Nations Publications, wir2018_en_.pdf.

5 Jesper Karisson, Challenges and opportunities of foreign investment in developing country agriculture for sustainable development, *Food and Agricultural Organization of the United Nations,* Rome 2014, www.fao.org. (Accessed on May 10, 2018).

6 Key Message to *United Nations Conference on Trade and Development (UNCTAD) World Investment Report, 2018*, Investment and New Industrial policies, p.xiii, United Nations Publications, wir2018_en_.pdf.

7 United Nations Conference on Trade and Development (UNCTAD) World Investment Report, 2018, Investment and New Industrial policies, p.xiii, United Nations Publications, wir2018_en_.pdf.

8 Dirk Willem te Velde. *Foreign Direct Investment and Development An historical perspective,* Background paper for 'World Economic and Social Survey for 2006, 6.Overseas Development Institute, Commissioned by UNCTAD. 850. pdf.

9 Velde (note 8 above) p.10.

10 Article 2(I) of II SD Model International Agreement on Investment for Sustainable Development, 2005.

a management interest (10 percent or more of voting stock) in an enterprise operating in an economy other than that of the investor. It is the sum of equity capital, reinvestment of earnings, other long-term capital, and short-term capital as shown in the balance of payment."

The positive argument in FDI is that it will increase economic growth and production. The negative argument in the FDI is that it will destroy local capabilities and exploiting natural resources without adequate compensation to the host country.[11]

This article analyses two different fundamental approaches to foreign investment according to a host country view and foreign investor perspective. It draws on the concept of International Law as providing a framework for building just institution.. It argues that both fears and dominance should be reconceptualised and that a responsible understanding of National interest, human rights, sovereignty, environment, sustainable development and international cooperation should lead to a change in the relationship between states and foreign investors in the trading and investment arena.

2.0 Historical Background

The European Companies like the British and Dutch East India companies in the name of business looted the property of Asia and Africa. The British and Spanish empires mercilessly killed the natives of Americas, Australia, Africa and Asia in the name of colonization[12]and seized their lands for the purpose of mining and other ways of resource extraction.[13]

The British, Dutch, Portuguese and other European countries made investment for their colonial expansion in most parts of the world. The imperial powers helped them to protect their investment with arms and ammunition and military. They also made laws, which are favourable to them.[14]

Hugo Grotius propounded that foreigners are treated equally with the natives.[15]Emmerich de Vattel in his 'Law of Nations' (1758) written that the State has right to put forth certain rules and regulations to manage the entry of the foreigners into their state.[16] Once entered, the foreigners are subjected to the laws of the state and at the same time, the state is having obligations to protect the foreigners and their property, which has become one of the provisions of International law.[17]

The countries have broken the shackles of colonialism and freed themselves from the clutches of colonialist's economic dominance. These independent states including the Eastern European communist states embraced socialism and started nationalization of their economies.[18] In the process of becoming independent with nationalist fervour started entering the global market for imports and exports.[19]

President Reagan of the United States and Prime Minister Thatcher of the United Kingdom pushed for the liberalisation of foreign investment regimes in the ambience of free market economies.[20] The fast development of the small states like Japan, Hong Kong, Taiwan and Singapore with foreign investments in terms of removal of poverty, job creation, educational achievements and rising of living standards has made a path for the developing countries and they opened their doors for foreign investments.[21] The developing countries like China and India followed them by liberalizing their economies.[22]

In the year 1952, the United Nations General Assembly passed a resolution on Permanent Sovereignty over Natural Resources.[23] The UN also appointed Commission on Permanent Sovereignty over Natural resources to review the management of nations over its resources. In the year 1962, the General Assembly passed another resolution, which states that the people and nations have permanent sovereignty over its natural wealth and resources for the welfare of them and development of their states.[24]

After the breaking up of Soviet Union into smaller states, the cold war between western democracies and eastern communist states ended. It resulted in stopping of aid to the friendly nations. The wars in Iraq, Afghanistan and other gulf countries lead to recession. The developed countries stopped giving aid to the developing countries. The developing countries are in dire need of funds. This made the developing countries liberalized their policies for foreign investment.

The World Bank and International monetary fund encouraged foreign investment in the developing states with an intention that it brings technical expertise, enhancing work force skills, increasing productivity, generating business for local firms, and creating better-paying jobs.[25] Thereby enhance the competition between local firms and foreign firms and force the local firms to upgrade the productivity or perish.[26]

The developing states started signing the treaties, which guarantees the protection of foreign investment. World Bank also created the Multilateral Investment Guarantee Agency (MIGA) to promote investment in developing countries by providing guarantees to foreign investment.

The liberalization brought investments to the countries where the situations are conducive to them. If the situations turned bad for them, they started taking back their investments, which caused economic crisis in Russia, Mexico, Malaysia and Argentina. The free movement of capital in the economic liberalism has brought these woes to them. They started rethinking about that change and imposed capital controls. For example, Malaysia and Argentina resorted to capital controls to deal with the economic crisis.[27]

The flow of investment to developing countries has given birth to the Multi-National Corporations (MNCs). The MNCs in Brazil, China and India reached

11 Velde (note 8 above) p.2.
12 Adams Jones, (2006) *Genocides of Indigenous Peoples* in Genocide: A Comprehensive Introduction, Routledge, London, 2006, p. 68.
13 Maybury L.David., (2002) *Genocide against Indigenous People* in Alexander L. Hinton, Annihilating Difference: The Anthropology of Genocide, University of California Press, Berkeley, p.248.
14 Colonialism, New World Encyclopedia, www.newworldencyclopedia.org (accessed August 7, 2018).
15 Andrew N and Luis P, (2009) Law and Practice of Investment Treaties, Kluwer Law International, Netherlands,p. 4.
16 *Ibid.*
17 *Ibid.*
18 Newcombe (note 15 above) p.18.
19 Sornarajah M., (2010) The International Law on Foreign Investment, third edition, Cambridge University Press, Cambridge, p.33.
20 *Ibid,* p.34.
21 Kalim Siddiqui., *Flows of Foreign Capital into Developing Countries: A Critical Review*, Journal of International Business and Economics, 2014, Vol.2, No.1, p.30.
22 Sornarajah (note 19 above) p.34.
23 GA Res. 626 (VII), (1952) YBUN at 387.
24 GA Res 1803, 14 Dec 1962
25 How Developing Countries Can Get the Most Out of Direct Investment, October 25, 2017. www.worldbank.org (accessed August 8, 2018).
26 Chapter for Encyclopedia of International Economics and Global Trade, September 2017.
27 Sornarajah (note 19 above) p.26.

to the capacity to invest overseas. The MNCs have been spreading its tentacles over the large failing companies of North America and Europe. They bought them and became important investors in America and Europe. There was a significant change in these erstwhile capital exporting countries which earlier were claimants have been metamorphoses to respondents and claims were brought against these countries by the MNCs on the basis of laws which they themselves had created for protection of their investors.[28]

The new type of MNCs which emerged are China and India state owned oil corporations. They are entering into the arena of investments by seeking the merging of existing MNCs, which sometime faced opposition from developed states. The Chinese State owned China National Offshore Oil Corporation (CNOOC) wanted to buy American oil Company UNICOL but the USA opposed the deal on the ground of National Security.[29]

There were some more mergers. For example, China Petroleum and Chemical Corporation (SINOPEC) finalized its deal to buy Tanganyika Oil of Toronto which has exploration and production assets in Syria. The SINOPEC offer was higher than the Indian Oil and Natural Gas Corporation (ONGC)'s offer. Earlier, the ONGC beat SINOPEC over the control of Russia's Imperial Energy with a US$25bn bid.[30]

The developing nations are facing challenges from investors. The investors are facing challenges from developing nations that spread to developed nations. Therefore, the developing nations and developed nations are taking protective measures against the investors.

3.0 International Investment Agreements

According to the Vienna Convention on the law of treaties, 1969, the treaties are one of the sources of International Law. The international agreements are part of treaties made among or between the states.[31] The states are not bound by treaties unless ratified by those states.[32] The investment treaties at international level are in the form of bilateral treaties, regional treaties, interregional treaties and multilateral treaties.[33]

3.1 Multilateral Investment Treaties

The developing and developed countries are liberalizing to attract FDI for getting technology and capital. There is still a gap of framework for FDI at Multilateral level. The home countries are encouraging FDI into developing countries using guarantee funds, match making and taking other relevant measures.[34] The significant multilateral treaties, which are drafted and are not adopted due to various reasons and the treaties which are in existence are discussed hereunder.

28 Sornarajah (note 19 above) p.28.
29 *Bogus Fears Send the Chinese Packing,* The Economist, last modified August 2, 2005. www.economist.com (accessed August 9, 2018).
30 "China's Sinopec to buy Tanganyika oil," accessed August 10, 2018. http://www.ft.com (accessed August 7, 2018).
31 Article 2(1) (a) of Vienna Convention on the law of treaties, 1969, No.18232.
32 Article 2(1) (b) of Vienna Convention.
33 International Investment Agreements. www.investmentpolicyhub.unctad.org (accessed August 7, 2018).
34 Velde (note 8 above) p.25.

3.1.1 International Trade Organization (ITO)

After the World War II, in the year1948 the draft charter was presented at Havana for the establishment of International Trade Organization for economic cooperation along with World Bank and International Monetary Fund. Articles 11 and 12 of ITO Charter discusses about the foreign direct investment. It was not adopted because the US Congress refused to ratify it.[35]

3.1.2 Convention on the Settlement of Investment Disputes (ICSID Convention)

ICSID Convention is a multilateral treaty which was developed on the idea of Aron Broches, the then General Counsel of World Bank, in the year 1965. It has provided the rules and procedures for conciliation and arbitration of investment disputes between investors and governments. It has created a centre called International Centre for Settlement of Investment Disputes in the year 1966, in which foreign investors, host countries and home countries submit investment disputes to Arbitrator. It also deals with the cases falling under Arbitration rules of United Nations Conference on International Trade Law (UNICITRAL).[36]The awards of ICSID have to be enforced by all parties to the convention like enforcement of a final judgment of the State's own court.[37]

3.1.3 Organisation for Economic Cooperation and Development (OECD)

In the year 1961, Big Capital exporting Countries led by US formed OECD and was in favour of liberalized investment regime. The OECD enacted two codes, one is Code of Liberalization of Capital Movement and the second one is Code of Liberalization of Current Invisible Operations to pursue member countries to liberalize the restrictions on the Trans-border movement of Capital. It did not include rights and duties of foreign investors. It attempted to bring Multilateral Convention on the protection of foreign property, but it was not adopted.[38]

In 1990s US called OECD to launch a comprehensive binding investment treaty known as Multilateral Agreement on Investment (MAI) which supported investment liberalization. The developing states and part of developed states could not agree regarding the rules on foreign investment protection. Non-US countries, NGO's, trade unions opposed MAI, since it is against the interest of poverty eradication, environment and human rights protection.[39]

3.1.4 Abs-Shawcross Convention

In the year 1957, the European business people and lawyers with the support of International Chamber of Commerce formulated a draft convention called International Convention for the Mutual Protection of Private Property Rights in Foreign Countries for the protection of private foreign investment and it

35 J.E.S. Fawcet., The Havana Charter, *Yearbook of World Affairs,* 5, 1949, p.320.
36 Rudolf D, and Christoph S., 2008 Principles of International Investment Law ,New York, Oxford University Press, pp.18-21. See also: ICSID Convention-World Bank Group, http://icsid.worldbank.org (accessed August 12, 2018).
37 Article 54(1) of the ICSID Convention.
38 OECD Codes of Liberalization of Capital Movement and of Current Invisible Operations, www.oecd.org (accessed August 12, 2018).
39 Kavaljit Singh, "Multilateral Investment Agreements in the WTO-issues and illusions." *Asia Pacific Research Network,* 2003, p.13, Manila, multi_invest_agree_july03_e.pdf.

was revised in the year 1959 as Draft Convention on Investment abroad. As it is totally favourable to the capital-exporting countries, it was not adopted.[40]

3.1.5 The United Nations Centre on Transnational Corporations (UNCTC)

In the year 1970, the Economic and Social Council of the United Nations (ECOSOC) established United Nations Commission on Transnational Corporations and UNCTC to undertake a study on investment issues on the pressure of developing countries in the UN. It led to the drafting of United Nations Code of Conduct on Transnational Corporations to mitigate abuse of corporate power and establish guidelines for corporate behaviour in the host countries. This code was an integral part of New International Economic Order (NEO), which deals with the concerns of developing world. The US and other capital exporting countries opposed this code. As a result, the UNCTC ended in the year 1992.[41]

3.1.6 International Chamber of Commerce (ICC)

The ICC came into existence in the year 1919 to cater for the needs of World business by promoting trade and investment and to protect open market for goods and services. The ICC deals with the three basic activities. They are establishment of rules; dispute resolution; and policy advocacy.[42] The ICC Arbitration is a dispute resolution procedure that leads to a binding decision from a neutral arbitral tribunal and can be enforceable under domestic arbitration law and International treaties such as New York Convention, 1958.[43]

3.1.7 Energy Charter Treaty (ECT)

The Energy Charter Treaty (ECT) is a legally binding multilateral instrument which created a framework for cross-border cooperation in the energy sector including foreign direct investment. The object of the ECT is in reducing non-commercial risks connected with the energy-sector investments. It came into force on 16 April 1998. It was based on European Energy Charter of 1991.[44]

3.1.8 United Nations Convention on International Trade Law (UNCITRAL)

UNCITRAL develops frameworks for the facilitation of international trade and investment law. It specializes in commercial law. The UNCITRAL Model Laws provide models to the lawmakers of different states, who can adopt as part of their domestic legislation. The UNCITRAL Arbitration Rules may be selected by parties, either as a part of their contract, or after a dispute arises, to guide them to resolve dispute/disputes between themselves. In other words, the Model Law meant for States, whereas the Arbitration Rules meant for potential (or actual) parties to a dispute.[45]

40 "Draft Convention on Investment Abroad (Abs-Shawcross draft convention)," *International Investment Instruments: A Compendium,* www.unctad.org/137/voulume5.pdf.

41 Kavaljit (note 8 above) p.11.

42 International Chamber of Commerce (ICC), http://www.investopedia.com (accessed August 12, 2018).

43 International Court of Arbitration-Arbitration Rules Mediation Rules, *International Chamber of Commerce (ICC),* France, last modified 2016, www.iccwbo.org (accessed August 12, 2018).

44 "The Energy Charter Treaty and Related Documents- A Legal Framework for International Energy Cooperation." last modified September, 2004. www.ena.It.pdf (accessed August 14, 2018).

45 UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006, *United Nations*, Vienna, 2008. www.uncitral.org (accessed August 15, 2018).

3.1.9 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

The New York convention provides a legal framework to different states for the recognition and enforcement of foreign and non-domestic arbitral awards. The parties to the convention recognize arbitral awards made in any State other than the State in which recognition and enforcement sought and enforces them unless otherwise the grounds of refusal mentioned in the convention. [46]

3.1.10 World Trade Organization and Investments

The WTO main aim is not only liberalizing international trade but also deals with the investment, affects such trade.

The Singapore Ministerial Conference of the WTO of 1996 wanted to bring about comprehensive instrument on investment. It failed because of opposition from developing states but established a working group to examine the relationship between trade and investment.[47]

The Doha Declaration of ministerial meeting also tried to consider the development of investment instrument. The developing countries expressed that the instrument on investment should contain the provisions relating to the actions taken to control the harmful activities against the development of host developing states. It should also abide by all domestic laws and regulations in their operational activities and the home countries have to take responsibility for the investor behaviour in a host country.[48]

The Multilateral investment agreements still exist even though they are not used much. The multilateral agreements, which are in existence, are:

- The WTO Agreement on Trade Related Investment Measures (TRIMs) deals with performance requirements associated with foreign investment;
- The Agreement on Subsidies and Countervailing Measures (ACMs); and
- The General Agreement of Trade in Services (GATS) deals with foreign investment in service sector.[49]

Apart from that, WTO established a working group in the year 1996, which conducts analytical work on the relationship between trade and investment.

The Foreign investors having financial resources lobbied pressure to make multilateral treaties in their favour. Their attempts became futile because of the sharp disagreement from the developing countries, NGOs and to some extent developed countries.

3.2 Regional Treaties

The regional treaties, which take into consideration foreign investment, are The North American Free trade Agreement (NAFTA), Association of Southeast Asian Nations (ASEAN), and Mercosur Agreement. Another regional agreement is the Free Trade Agreement of the Americas that is among the North, South and Central America, which has become extinct because of the economic crisis of 2008.

46 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, *United Nations,* New York, 2015. www.uncitral.org (accessed August 12, 2018).

47 Singapore WTO Ministerial 1996: Ministerial Declaration, WT/MIN/ 96/DEC, last modified December 18, 1996. www.wto.org (accessed August 17, 2018).

48 Martin Khor., The Singapore Issues in WTO:Evolution and Implications for Developing Countries Third World Network, Malaysia, 2007, p.33.

49 Velde (note 8 above) p.23.

3.2.1 The North American Free Trade Agreement (NAFTA)

NAFTA is the world largest free trade agreement between Canada, Mexico and the US. Its main purpose is to increase business investment and help North America to be more competitive in the global market place. This treaty accommodates a solid investor-state dispute settlement procedure. It gives right to investor to initiate arbitration against the host state. NAFTA has decided many arbitration cases.[50]

3.2.2 Association of Southeast Asian Nations (ASEAN)

The ASEAN consists of ten Southeast Asian states. It has reduced intraregional tariffs to attract foreign investment by creating free trade area. The ASEAN treaty on the Protection and Promotion of Foreign Investment accommodates endorsed investments protected by the treaty. The previous ASEAN treaties have now been supplanted with another treaty called the ASEAN Comprehensive Treaty on Investments.[51]

3.2.3 Mercosur Agreement

It is a regional agreement covering most of the states of South America. It is officially called officially called Southern Common Market. It grants protection of foreign investment of the member states.[52]

50 Kimberly Amadeo., History of NAFTA and Its Purpose, last modified February 16, 2018, http://www.thebalance.com (accessed August 18, 2018).

51 Chung-in Moon.., ASEAN International Organization,http://www.britannica.com (accessed August 17, 2018).

52 Claire Felter and Danielle Renwick., Mercosur: South America's Fractious Trade Block, last modified December 26,2017. http://www.cfr.org (accessed August 19, 2018).

3.3 Bilateral Investment Treaties (BITs)

The bilateral investment treaties (BITs) increased from 500 in 1990 to around 2,400 in 2005. The developed countries made BITs with the investment associates of developing countries. Some countries are interested in making BITs and some are not but most of the developed countries prefer them.[53]The total bilateral investment treaties made until now are 2952, out of them 2358 are in force.[54]

The BIT originated from the Europe. The first bilateral investment treaty concluded between the Federal Republic of Germany and Pakistan on November 25, 1959.[55]

In the bilateral investment treaties more intellectual property rights are incorporated and enforced than in multilateral treaties.[56] The BITs are also made by those countries like China and Vietnam who are ideologically antagonist towards investment and are ready to acknowledge the investment safeguards and willing to settle the disputes through International Arbitration.[57]Basing on this treaty the Chinese foreign investor has filed a case against Peru on the grounds of Jurisdiction and Competence.[58] China would show that its treaties are fluctuated according to the changed conditions.[59] These treaties related to specific subject matters as opposed to the standards of international law.

53 Salacuse, J. and Sullivian., *Do BITs really work: An evaluation of bilateral investment treaties and their grand bargain,* Harvard Journal of International Law, 2005, Vol 46, No.1. pp. 67-130.

54 International Investment Agreements. www.investmentpolicyhub.unctad.org (accessed August 17, 2018).

55 Dolzer, R and Stevens, M., 1995 Bilateral Investment Treaties, Martinus Nijhoff Publishers, London, , p.1.

56 P.Drahos, *BITs and BIPs: Bilateralism in Intellectual Property*, Journal of World Intellectual Property, 2002. No.4, p.792.

57 Dolzer (note 55 above) p.4.

58 *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6 (2009).

59 Norah G, and Shah., W., (2009) Chinese Investment Treaties: Policy and Practice, Oxford University Press, p.12.

The BITs are made between capital-exporting countries and capital importing countries, which are generally unequal partners. For the developing countries, it is very difficult to have expertise legal department to understand the intricacies of the terminology used in the treaties. They sign it with the expectation of getting foreign investments to their countries even some times at the expense of their sovereignty.[60]To remove the imbalance Norway brought a type of investment treaty which sought to bring about equilibrium between investor and host state. The agreement was opposed by developed countries.

The International Court of Justice observed in *ELSI* case[61] that it is the duty of the investor to exhaust local remedies before resorting to international arbitration in cases of treaties of Friendship, Commerce and Navigation (FCN) subject to the time limit for exhaustion. The *Calvo* doctrine recognizes disputes relating to foreign investments which were decided by the domestic courts.[62] Although the US earlier, opposed the *Calvo* doctrine, she now supports the doctrine in so far as it relates to national treatment and indirect expropriation.[63]To avoid the requirement of exhaustion of local remedies rule, investors are now resorting to the BITs. By this, investors rights are protected by international courts and can claim damages from the host States for the breach of BIT. In this respect BITs insulate them from the jurisdiction of Domestic Courts.[64]

60 Ingrid Detter, *The Problem of Unequal Treaties,* The International and Comparative Law Quarterly, 1966, Vol.15, No.4, p.1069.

61 *Elettronica Sicula. S.p.a. (ELSI) United States of America v. Italy,* July 20, 1989, http://www.icj-cij.org (accessed August 21, 2018).

62 Article 2(2)((c) of the Charter of Economic Rights and Duties of the States, 1974 (The General Assembly Resolution 3281 (XXIX).

63 Christopher F. Duggan, Don Wallace, Jr., Noah D. Rubins and BorzuSabahi., Investor-State Arbitration, Oxford University Press, New York, 2008, p. 488.

4.0 Foreign Investors' Fears and Dominance

The foreign investors who have surplus resources generally wanted to invest where they are likely to get more profits. The foreign investment is one of the opportunities to make profits. The foreign investor fears are on the dominance of host country and the host country fears are the dominance of foreign investor and vice versa.

4.1 Investor Powers

Some investors individually have more economic resources than those of sovereign states. Their collective resources can manipulate many things including creation of principles of law, writings of highly qualified publicists and sometimes influencing the decisions of arbitration. They can also lobby for loans, aids, and grants by developed countries including IMF and World Bank.

4.2 Partiality of Local Tribunals and Courts

The foreign investor fears are that they will not get justice from the local tribunals and courts if there is a dispute between the foreign investor and Host State regarding investment issues. They thus want the foreign investment disputes to be settled in neutral forums.

64 Barton Legum, *The Innovation of Investor-State Arbitration under NAFTA,* Harvard International Law Journal, 2002, Vol. 43, p. 531.

4.3 Nationalisation

One of the fears of foreign investors is nationalization. Generally, the developing countries, when their total economy is in the hands of foreign investors, the political leaders resort to nationalisation. The nationalization is employed as a weapon as was done by President Mugabe of Zimbabwe. Similarly, it was adopted by Iran, and resulted into driving out US companies from Iran. This led to *Anglo-Iranian oil company case*[65]and establishment of Iran-United States Claims Tribunal in the year 1981. This tribunal was the first of its kind to handle investment claims. The awards of this tribunal have widely been used as precedent by investment treaty tribunals.[66]

4.4 Changing Laws/ Agreements

The investor fears that after pouring lot of money in the investment and when it is ready to receive the fruits of it, the Government may change laws, which will cut short the returns to the minimum level as earlier expected. The petroleum prices soared up in between 2000 and 2008. Bolivia, Ecuador, Venezuela, Zambia and developed countries like Canada and UK started enhancing the taxes to get awesome offer of benefits.[67] They also cancelled contracts of mining development. The host country like Zambia asked to re-discuss the terms of the contracts and come up with new agreements according to the changed laws.[68]

5.0 Host States Fears and Dominance

All people for their own ends freely dispose of their natural wealth and resources without prejudice to any obligation arising out of international economic co-operation, based upon the principle of mutual benefit, and International law. In no case people deprived of their own means of subsistence.[69]

In the present arena of globalization, the poor local economies are flooded with the external capital. One side of the coin is that the foreign investment plays a significant role in the local development. The other side of the coin is that, it will have adverse effect on the local natural resource-dependant activities.

Foreign owned corporations thought to be a threat to sovereignty of the host state. They influence the host state's policies and as a result, they assist to continue inequalities between the states.[70]

5.1 Overthrowing the Government

The foreign investors are having money power to influence the politics of host country, when the existing regime goes against their investment. There are no hard rules regarding that except lobbying through bribery. In one case involving Kenya, the tribunal held that the agreement between the foreign investor and host country was obtained through bribery, which is against public policy of Kenya and England. Therefore, the tribunal rejected the contracts obtained by corruption.[71] They have also overthrown the government of Chile former President Salvador Allende in a *coup d etat* by the support of home state US, when he tried to nationalize copper industry.[72] In another case, they aided the government of Sudan in committing genocide crimes and crimes against humanity around certain oil fields. The motive behind was to clear the civilian population in order to secure areas for exploration in Sudan.[73]

5.2 Compensation Equal to Exploitation of Resources

The another fear host countries are worried about the foreign investor who has promised that it will provide employment, pay taxes, give royalty and give compensation equalling to the resources exploited are not complied with properly. An African Union study shows that about US$50 billion in illicit financial flows leave the continent every year without getting fair share of the revenue from the extractive industries, because of poor contractual arrangements, ill-conceived legal, policy and institutional frameworks, absence of transparency in revenue sharing and disregard for land and community rights.[74]

5. 3 Withdrawal of investment

The foreign investors invest in host country when the interest rates in their home countries are lower and having large amount of surplus capital.[75] The host country opens its doors for the foreign investors to invest. Many capital-exporting countries invested in the host country and the host country feels that now the country is moving towards development. Due to changed circumstances externally or internally then they will withdraw investments from the host country, which happened in Malaysia and Venezuela. The other reasons are higher interest rates in their home countries and demand for capital in many countries.[76]

The US and Canada after seeing the NAFTA arbitrations moved towards sovereign centred approach. They made modern treaties, which will both protect the investor interest and state interest. They made treaties in such a way that the states can claim exemption of liability under the pretext of protecting public interest, exercising regulatory powers and national security.[77]

6.0 Judicial Forums

Before 1968, the BIT had provisions to settle the dispute between state-to-state in the arbitral tribunal or ICJ. In the year 1968, Article 11 of the BIT between Indonesia and Netherland first time incorporated the clauses for investor-state arbitration.[78]

The known treaty based investor-state arbitration cases are 855. In which 297 cases are pending and 548 cases are settled. In the concluded cases 36.5 percent, cases decided in favour of the host state and 27.9 percent cases were decided in the favour of investor.[79]The

65 *The United Kingdom v. Iran* [1952], ICJ 93.
66 Christopher S. G and Christopher R. D, *Iran-United States Claims Tribunal Precedent in Investor-State Arbitration*, Journal of International Arbitration, 2006, Vol. 23, No.07-15, p. 521.
67 See, for example, the Bolivia legislated Hydro carbon Law (3058) in May 2005 and a subsequent Supreme Decree (May 2006) asking the investment companies to pay 50 percent more taxes and Royalties and sign new contracts according to the changed law. Aisha Ally Sinda, *MDAs legal regime in Tanzania: A comparative analysis*, Citizen (Dar es Salaam, Tanzania) Aug. 29, 2018.
68 *Ibid.*
69 Article 1 (2) of International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).
70 Jennifer A. Z., Multinationals and Corporate Social Responsibility Limitations and Opportunities in International Law, Cambridge University Press, UK, 2006, pp. 9-10.
71 *World Duty Free Company Limited (WDF) v. Republic of Kenya*, ICSID Case No. ARB/00/7,IIC 277 (2006).
72 Salvador Allende (president of Chile), Encyclopaedia Britannica, http://www.brittanica.com (accessed August 16, 2018).
73 *The Presbyterian Church of Sudan, et al v. Talisman Energy, Inc. And Republic of the Sudan*, 07-0016 (2nd Circuirt.2009).
74 Eric Chinje, Will meeting result in new thinking on extractive industries?, Citizen (Dar es Salaam), Aug. 20, 2018.
75 Siddiqui (note 21 above), p.32.
76 *Ibid*
77 Bergman, M.S , *Bilateral Investment Treaties: An Examination of the Evolution and Significance of the US Prototype Treaty*" New York University Journal of International Law and Politcs, 1983, Vol.16, No.1, p.1.
78 *Indonesia- Netherland BIT (1968)*,United Nations –Treaty Series, 1971, No.11386, p. 22 , investmentpolicyhub.unctad.org (accessed August 21, 2018).
79 "Investment Dispute-Settlement," last modified December 31, 2017. Investmentpolicyhub.unctad.org (accessed August 22,

resolution of investor state disputes settled by the following courts:

a) Domestic Courts of Host State;
b) Arbitration according to the International Centre for Settlement of Investment Disputes (ICSID) Arbitration rules or the ICSID Additional facility rules;
c) *Adhoc* Arbitration tribunals according to the UNICITRAL Arbitration rules;
d) Arbitration according to the rules of International Chamber of Commerce;
e) Arbitration according to the rules of *Cour Commune de justiceet d' Arbitrage* (CCJA);
f) The settlement procedure as agreed earlier by the investor and host State;
g) Cairo Regional Centre for International Arbitration (CRCICA);
h) London court of International Arbitration (LCIA);
i) Moscow Chamber of Commerce and Industry (MCCI);
j) Stockholm Chamber of Commerce (SCC);
k) Permanent Court of Arbitration (PCA); and
l) International Court of Justice (ICJ).

7.0 Cases Relating to Investment Disputes

The earlier case regarding investment is between USA and Guatemala in which a contract made between the investor of USA and Guatemala State for extraction of chicles at the rate of five dollars gold for quintal. Later on, Guatemala enacted Legislative Decree No.1544 that disapproved the contract for the extraction of 75,000 quintals of chicle (used in chewing gum) on the ground that the technique used to extract the chicle destroyed trees. The case decided in favour of the investor and was awarded general damages.[80] A state held responsible for expropriation of alien property and compensation was to be paid for that. [81] The court held that a state is bound to give the same legal protection to foreign investment and foreign nationals, either for natural or legal persons, when it admits them to its territory.[82]

The foreign investor treated at par with domestic organization under the domestic law.[83]The Asia Pacific Economic Cooperation (APEC) non-.binding principles of 1994 also emphasised that no discrimination shown between domestic investor and foreign investor. It also stated that the foreign investor has to abide by economic laws and regulations of the host country. The foreign investors investing in host state are establishing hazardous factories in host states thereby causing danger to lives and health of the people of host countries. It amounts to environmental degradation and human rights violations.[84]The host state Canada was liable for interference on the environmental ground. It was held that such interference amount to indirect expropriation. The compensation was paid compensation through settlement.[85] It was followed in other cases including *Metaclad*, in which the tribunal held that interference by the Mexico on the ground of hazardous landfill in Mexican Municipality amounts to indirect nationalisation and expropriation of investment of foreign investor according to the Article 1110 of NAFTA and are liable to pay compensation under Article 1105 of NAFTA.[86] The US Courts are also entertaining cases against the investors from the victims of host countries under Alien Tort Claims Act. A good example is afforded by *Wiwa v. Shell petroleum Dev. Co*.[87] In this case, the shell oil company caused environmental pollution in the area of Ogoni tribe, Nigeria causing deaths of the people. Compensation was accordingly awarded. In some other cases of environmental and human rights violations, the investor was not held liable on technical grounds, even though the investor mining activities were polluting the rivers in Indonesia.[88] Torture of any person is the violation of the law of Nations as it violates United Nations declarations.[89]

The operations conducted by Sri Lanka state destructed investment of the foreign investor to suppress the civil war amounted to a violation of BIT and Sri Lanka was held liable to pay compensation.[90] The parent company of England owed a duty of care in a tort injuring a worker in respect of asbestos-related disease by a subsidiary company located in South Africa.[91]Costa Rica workers sued American company for sterility and medical problems, caused by exposure to pesticide banned in USA. The case settled outside court.[92] The killing of trade union leader by paramilitaries at their mining facilities, the claim could lie against the corporation.[93]Case concerned an oil spill off French coast, the court held parent company liable.[94]

The other cases concerning human rights violations by the investor are hereby given. The court held that torture violates the law of nations, as it is violation of UNDHR, declares on the protection of all persons from torture.[95]Drug experimentation without consent held to be violation of the law of nations.[96]The plaintiff filed suit against defendant on the ground that Talisman aided Government of Sudan in the commission of genocide crimes and crimes against humanity around certain oil fields in order to gain access to oil by displacing population living in the areas around the oil field.[97]

The cases decided against the investors for polluting natural resources where the BHP sued in tort for polluting Ok Tedi River and adjacent land. Parties settled outside the court.[98]A case filed against Free port under Alien Tort Statute for polluting rivers by operating of open pit copper, gold, and Silver in Timika, Indonesia. The court dismissed it.[99]

80 *Guatemala v. USA*, U.N. Reports of International Arbitration Awards, Vol.II, 1079 (1930).
81 Chorzow Factory Case, *Germany v. Poland*, Ser.A no. 9(PCIJ. 1927).
82 *Barcelona Traction, Light and Power Company ltd, Belgium v. Spain*, [1970] ICJ.3.
83 *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1 (2007).
84 Human rights violations and environmental degradation by Union Carbide Limited in Bhopal gas tragedy causing deaths of about 3,787 and non-fatal injuries of about 558,125 people in India; Unicol in Myanmar where Unocol violated human rights violation against Karen ethnic group of South Burma causing murders, forced labour, rapes while laying pipeline to Thailand. The US Supreme Court in *Doe v. Unocal* upheld the right of foreigners toseek compensation for Human rights violations under the provisions of 1789 Alien Tort Statute; Human rights and Environmental violations against the people of Niger Delta, Nigeria from 1994 by Multinational oil corporations like Chevron and Mobil of US, Elf of France and Agip of Italy.
85 *Ethyl Corporation v. Government of Canada*, NAFTA (1998).
86 *Metaclad Corporation v. Mexico*, ICSID Case no. ARB (AF)/97/1 (NAFTA), Award.
87 2009 WL 1560197 (2D Cir. June 3,2009)
88 *Beanal v. Freeport Mc MoRan, Inc*., 197 F. 3d 161 (5th Cir.1999).
89 *Filartiga v. Pena-Irala*, 630 F.2d 876, 1980, US App. (2nd Cir. Ny. June 30, 1980).
90 *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3. 1990)
91 *Lubbe v. Cape Plc* [2000] UKHL 41, 4 All ER 268.
92 *Dow Chemicals Co. v. Castro Alfaro* 786 SW 2d 674 (SC Texas 1990).
93 *Estate of Rodriquez v. Drummond Co* 256 F Supp 2d 1250 (WD A1 2003).
94 In the matter of oil spill by the *Amoco Cadiz* [1984] 2 Lloyds Law Reports 304, (ND III 1984).
95 *Filartiga v. Pena-Irala*, 630 F.2d 876, US App (2nd Cir. Ny. June 30, 1980).
96 *Abdullahi v. Pfizer*, No.01 CIV 8118, 2002, US District Court, New York.
97 *Presbyterian Church of Sudan, et al. v. Talisman Energy Inc. And Republic of Sudan*. US Court of Appeals, (2nd Cir.2009).
98 *Dagi v. BHP* [1995] 1 VR 428, Supreme Court of Victoria.
99 *Benal v. Freeport-Mc Moran Inc*. 197 F.3d 161. US Court of Appeals. (5th Circuit.1999).

2018).

The state can modify power requirements of future;[100] interfere in the insolvency proceedings of the investor;[101]revocation of exclusive rights for mining activities;[102]and sale of company to another without including tax assessment levied on the investor.[103]

The States not allowed revoking the concessions[104] and subsidies promised to investor.[105] The claim arising out of the alleged destruction of claimant's investment during a military operation conducted by Sri Lanka security forces, the court awarded compensation to investor on 27 June of 1990.[106]Failing to give required land to a Malaysian Investment Company by Chilean government, which invested $17 million for development of a satellite city on the land earmarked for agriculture use. The company filed a case for breach of BIT. The tribunal awarded damages based on expenditure made by claimants.[107]

8.0 Analysis of the Issues of Foreign Investment

Many international treaties like ITO, OECD, Abs-Shawcross convention, UNCTC so on which are drafted on investments have not come into force because of lack of consensus between investors, host states and home states. Only few are left to decide disputes are ICSID, ICC, ECT, UNICITRAL and WTO's TRIMS which are not fully catering to the needs of investors and host states.

The foreign investors and host states fears and dominance was discussed which elicit both are not believing each other.

Different judicial forums like ICSID, UNICITRAL, ICC and Domestic Courts of host state etc., have jurisdiction to try and dispose of investment disputes. It leads to contradictory judgements and destroys the concept of 'Precedent'.

The consequences of foreign investments are human rights violations, environmental pollution, deforestation, compensation for expropriation or nationalization, health hazards and other issues which are reflected in the cases dealt.

These different issues are creating the stumbling blocks in the harmonious relations of both host states and foreign investors which are not good for either.

9.0 Conclusion and Recommendation

As the economy is growing internationally, new challenges are cropping up. To solve them the general International law is not sufficient. The specialization has to grow and more in-depth study made so that the foreign investor and host states face the challenges easily. Whatever may be the fears and dominance of foreign investor or host country? They should trust each other and maintain a balance between them for mutual growth and sustainable development of host country. In the global economy, the investor state relations governed by BITs, Regional treaties but so far no multilateral treaty formed. The problem is that these BITs do not set precedents and do not refine legal norms, even though the provisions of BITs are capable of forming multilateral treaties. It makes the investor and state not to have uniform and predictable judgments thereby they can change accordingly. It also fails to develop arbitral jurisprudence, which can facilitate the investor and state to prevent abuse of powers against each other.

Under these circumstances it is recommended for the formation of 'World Investment Law' and establishment of 'World Investment Court' to sort out the fears and dominance of both of them.

100 *Blusun v. Italy* (ICSID Case No.130/2014).
101 *CEAC v. Montenegro* (ICSID Case No. 132/2014).
102 *EuroGas and Belmont v. Slovakia* (ICSID Case No.137/2014).
103 *Alghanim v. Jordan* (ICSID Case No.158/2013).
104 *Bear Creek Mining v. Peru* (ICSID Case No.128/2014), the Supreme Decree 032 revoked where the claimants' concessions to operate the Santa Ana mining project in Peru.
105 *Eiser and Energia Solar v. Spain* (ICSID Case No.165/2013), where the subsidies for renewable energy producers removed and tax imposed on power generators.
106 *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka* (ICSID Case No. ARB/87/3).
107 *MTD Equity Sdn. Bhd and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/07) 2004.

ICT: A TOOL TO IMPROVE COURT RECORDS AND INFORMATION RESOURCES SHARING TO ENHANCE JUSTICE ACCESSIBILITY IN TANZANIA

By Juma Ally Mshana[1]

Abstract

This article contributes on the way access to justice can be enhanced through the uses of ICT in court records and information resources sharing. It starts with the introduction of justice accessibility, what is it and why it is important to the citizens. The article further describes the adoption of ICT in Judiciary of Tanzania (JoT), impacts of court records and information sharing towards justice accessibility in Tanzania. Finally, the author describes the way ICT can be used to enhance justice accessibility by improving court records and information sharing. The study is a result of desk review of literature globally regarding justice accessibility and how ICT contributes on the matter by reducing impediments caused by court records and information resources sharing. There is a lot to be done to improve justice accessibility through ICT, but the article confines on the application of ICT in court records and information resources sharing to enhance access to justice.

Keywords: Court Records, Information Resources, Justice Accessibility

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1.0 Introduction

Access to justice is a right and an expectation for every citizen of any country. Inaccessibility to court and legal services cannot be an acceptance response to the needs of citizens.[2] All people, regardless of financial or other barriers, should have reasonable access to justice.[3] Sustainable Development Goal (SDG) commits the international community to promote the rule of law to ensure equal access to justice for all by 2030 at both national and international levels.[4]

Access to justice is difficult due to the unique challenges to service provision that exist in some areas.[5] The impediments are rooted in the geographical, demographic, and social and cultural characteristics that define rural and remoteness, and in the varied combinations of these elements that determine the legal and social service needs of individual communities. Access to justice is associated with economic growth and investment as well as equity and social justice. It has been said that the opposite of poverty is justice.[6] This is because limited access to justice disempowers individuals and communities from claiming their rights and defending themselves from injustice.

2 COSCA (2018) Courts Need to Provide Access to Justice in Rural America [Online] available from < https://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/Policy-Paper-1-28-2019.ashx > accessed on April 1, 2020

3 CFCJ (2015) Rural & Remote Access to Justice A Literature Review [Online] available from < https://boldnessproject.ruralandremoteaccesstojustice.com/wp-content/uploads/2016/01/Rural-Remote-Lit-Review_newcoverpage.pdf > accessed on April 1, 2020

4 Marcus, (2018) Achieving equal access to justice for all by 2030 available from <https://www.odi.org/sites/odi.org.uk/files/resource-documents/12307.pdf> accessed on April 1, 2020

5 CFCJ (2015) Rural & Remote Access to Justice A Literature Review [Online] available from < https://boldnessproject.ruralandremoteaccesstojustice.com/wp-content/uploads/2016/01/Rural-Remote-Lit-Review_newcoverpage.pdf > accessed on April 1, 2020

6 Stevenson, B. (2014) *Just Mercy: A Story of Justice and Redemption*. New York: Spiegel & Grau

Like any other country, people of the United Republic of Tanzania, regardless of financial or other barriers, should have reasonable access to justice. Access to justice is simply the ability to seek and obtain a remedy through a formal or informal justice system and or institution.[7] This is a right. It emanates from human rights standards that require equality for all before the law and the right to be treated fairly by any tribunal among others.[8] Access to justice is fundamental to establishing and maintaining the rule of law. It enables people to have their voices heard and to exercise their legal rights, whether those rights derive from constitutions, statutes, the common law or international instruments. Access to justice is an indispensable factor in promoting empowerment, in securing access to equal human dignity and achieving social and economic development.[9] The Constitution of the United Republic of Tanzania guarantees equality and equal protection before the law as provided under Article 13(1). The role of dispensing justice is that of the judiciary.[10] The judiciary is charged with the responsibility of interpreting laws and adjudicating over disputes. The Judiciary of Tanzania (JoT) is responsible for provision of justice accessibility in Tanzania regardless of the place. On the preface of the five years strategic Plan of the JoT (2015-2020), Hon. Mohamed Chande Othman, the former Chief Justice of Tanzania said, *"The trust of the Judiciary for the next five years is to ensure Citizen centric service delivery"*.

7 Ministry Constitutional and Legal Affairs (MoCLA) National Human Rights Action Plan 2013-2017 p18

8 *Ibid*

9 Beqiraj, Julinda and McNamara, Lawrence (2014) International Accessto Justice: Barriersand Solutions [online] available from https://www.biicl.org/documents/485_iba_report_060215.pdf accessed on February 14, 2020

10 Shivji, Issa et al (2004) Constitutional and Legal System of Tanzania:A Civics Source Book Mkuki na Nyota p221

Also, the key result area (KRA) no. 3 of the said Strategic Plan is to make sure that there is equitable access to justice for all. The vision of the JoT is *"Timely and Accessible Justice for all"*. To ensure timely and justice accessibility for all, the JoT needs to improve the way court records are kept as well as the way information resources are shared to the citizens.

It is accepted that the justice system and the effective rule of law represent significant mechanisms in ongoing social, political and economic developmental landscapes, therefore such mechanisms reflect the interests of the citizens of the state and provide an avenue through which these interests can be protected. To that end, it follows that access to justice should be equal; that the poor should not be excluded on the basis of poverty; that women should not be silenced by the voices of men; that the young should be protected by adults when necessary; and that there should be equity between the provision of justice in rural and urban areas.

If the judiciary will not keep the records properly and make them available and accessed when they are needed, it will cause access to justice be hard. Records must be available to all citizens regardless their status and location. Not only that, but also information regarding the justice systems must be shared at the right time and place. Once this is done correctly, then access to justice will be possible if other factors impeding justice accessibility will also be solved. This will be possibly done if there will be an application of the technology that will cut off all impediments regarding justice accessibility caused by poor record keeping and information sharing. This article contributes on the way access to justice can be enhanced through the uses of ICT in court records and information resources sharing.

2.0 Adoption and application of ICT in JoT

The Judiciary of Tanzania is driven by its vision of timely, quality and accessible justice for all. Before 2015, the Judiciary was facing several operational challenges, making it difficult to attain its vision. It suffered from inadequate qualified personnel to meet increasing workload/case backlog, poor record keeping, and low application of ICT and untimely dissemination of case-related information.[11] Furthermore, there were delays in the determination of cases due to cumbersome procedures and poor case management. On the infrastructure, the Judiciary suffered from inadequate modern equipment and physical infrastructure and facilities, lack of a specialized physical and electronic library, weak performance and management information systems within the institution[12].

There have been efforts to improve on ICT use in the Judiciary with a view to enhancing efficiency. The ongoing reforms in the JoT confirm to the fact that ICT will play a key role in delivery of Justice. The JoT has laid emphasis on the use of ICT across the processes that the Judiciary is involved in. In the past five years as per JoT Strategic Plan (2015-2020), the ICT was used to improve the systems that were in place such as Human Resource Management Systems, Financial Management Systems as well as Court Case Management Systems among others[13]. The JoT started with the system that enabled Judicial Officers to view statistics known as JSDS1.0 and meanwhile there is the second version (JSDS2.0) that enables clients even to know the status of the case and any other attributes attached to the case. The system also enables advocates to register case online, do payment online and other activities that before the establishment of the system required to visit court physically to accomplish. The system is expected to be improved to connect other stakeholders such as PO- RALG and CRDB bank for online payment[14].

Not only that but also the JoT has established digital platform including video conference facilities to all High Court Zones in Tanzania Mainland that enables to proceedings of cases to be conducted remotely. The Judiciary of Tanzania uses of digital platforms such as Audio Conference Calls, Court Video Link and any other approved digital platform for certain criminal and civil proceedings as a way of ensuring the continuation of delivery of justice despite the existence of a threat posed by certain emergencies and outbreak of epidemic or pandemic such as the COVID-19. With the use of such digital platforms , health and safety concerns in courthouses, chambers and courtrooms are addressed.[15] According to the *Jarida la Mahakama ya Tanzania (April-June, 2020 page 13)* a total number of 5,000 cases were heard within two months through the use of video conference in all High Court Zones. This promotes the vision of the JoT which is *Timely and Accessible Justice for all.*

In the financial year 2018/2019 the JoT was preparing a project to install LAN to almost 29 courts building in Tanzania Mainland.[16] The project aims to strength the uses of ICT in JoT to improve both internal and external communication. Meanwhile, there are 21 courts that are already connected to the national communication backbone through Tanzania Telecommunication Company Limited (TTCL). Again, there are 12 sets of mobile recording systems that are installed to four divisions of the High Court.[17]

Cases and their associated payments are increasingly using modern technology, for example, e-case management (e-filling e-payment and e-notification). Within the context of using modern technology, complaints are communicated through WhatsApp and SMS[18]

3.0 Impacts of poor court records in justice accessibility

Records management is seen as an integral part of the management of court business, not as a separate skill or discipline. Day-to-day guidance on the management of court records, the use of forms, and other matters must be provided. Records are fundamental to the efficient and effective operation of the legal system of a country and even more crucial to the administration of law than to any other function of the public sector.[19] If legal records are not created, kept, maintained and made accessible, citizens may have difficulties when enquiring about their cases. In addition, the judiciary system may also fail to bring justice in criminal and civil actions if evidence is not presented and recorded in a reliable, authentic and timely manner. Many scholars argue that many

11 JoT (2019) Court Users' Satisfaction Follow up Survey
12 *Ibid*
13 The JoT 5 Years Strategic Plan (2015/16- 2019/20) p. 13
14 JoT (2019) Taarifa ya Mwaka
15 JoT (2020) Digital Judicial Service Provision Guidance Kit
16 JoT (2019) *Taarifa ya Mwaka*
17 *Ibid*
18 JoT (2019) Court Users' Satisfaction Follow up Survey
19 Motsaathebe, L and Mnjama, N. (2009).*Managing court records: a survey of record- keeping practices in selected countries*. Mousaion 27(2) 132-153.

countries around the world follow the Common law system in their judiciary systems. They also state that in Common law systems, judges and magistrates base their decisions on decisions taken in earlier cases on similar topics, known as precedents. Thus, courts need to manage their records effectively so that records can be available when they are needed.

Court records need to be created, kept, maintained, protected and secured so that they can be available when they are needed.[20]Arguably, the provision of a complete, accurate and accessible court records in a timely manner fulfils the judiciary's basic mandates.

The availability, completeness and accuracy of court records play a crucial role in the administration of justice.[21] It is in such respect argued that in order for a case to proceed, the initiating document which includes the summons should be available. Failure to provide or to locate such documents means that the case cannot proceed; hence the delays will be encountered in determining the case. Lack of evidence in the form of records can lead to failure of the judiciary system to bring justice to the citizens and this leads to loss of faith in the administration of justice.[22] Accurate and readily accessible records of judicial rulings reduce the potential for the illicit manipulation of records which lead to corruption.[23] If court staff cannot locate the case papers relating to a certain trial, an appeal against conviction may be delayed and justice may not be done to a citizen who may have been wrongly convicted.

Poor records management undermines legal and judicial system. Decisions are made without full information about cases. Unavailability of records hinders service delivery and becomes a problem in the administration of justice especially for the victims who laid charges against their perpetrators.

It is important for a court to create, maintain, secure and protect its records so that they can be available at the right place and the right time when they are needed. If automated registers are well kept, the clerk can now provide the information with a few taps of the keyboard. He or she does not need to go searching through the pages of the court docket books. Accessing information that is kept through ICT facilities is much easier and faster than when paper based used. A well computerised register database that contains all the important information regarding each action, cause or matter filed in the court, including parties' particulars, the nature and significant of the claim, the document filed and the outcome of hearings and more. Having all these data in electronic format open up a number of options to enhance the efficiency of the court. The use of ICT improves court records which results to justice accessibility enhancement.

Most of the cases begin at the lowest level of the court, that is, magistrate court before they can proceed to the higher court where appeal is made. Without these records an appeal cannot proceed and justice for the person who laid an appeal will delay. For example, when a person who has been sentenced to a prison term and is seeking to appeal and the prison authorities are unable to make follow up on behalf of the prisoner due to lack of fuel or transport, the court may also delay in the issuing court records due to lack of equipment and or poor record keeping.[24] If the court will not be able to provide proper record due to its poor record system that means justice to that sentenced person will not be accessed. Not only the sentenced person, but also during proceedings, the record should be well kept because they will be used to make decision on that particular case, and later on the decision can be used on another similar cases as the precedents as is appropriate.

Therefore, poor court records inhibit the accessibility of justice to all citizens regardless of their status, educated or not, rural or urban living etc. Any judiciary should improve the way it keeps its record to ensure justice accessibility and administration of justice.

4.0 Impacts of information resources sharing in justice accessibility

The definition of information is news or knowledge received or given. For example; what's given to someone who asks for background about something is information. Information will have a reinforcing/ transforming effect on human beings on receiving it. A great deal for change can be seen in the human perspectives on getting the information, as it increases the ability of personal knowledge for the beneficiary. Information is vital to an individual or organization for the decision making. Good information is essential for effective operation and decision making at all courts in any judiciary.

Information resource is an element of infrastructure that enables the transaction of certain selected significant and relevant data, prepared so as to provide content and information services that can be used directly by the user.[25] There are many different types of information resources, including: websites, encyclopedia, YouTube, people, books, databases, newspapers, magazines, TV, radio, etc.

Clients of the court need information for different purpose concerning either the status of case or decision made by the court. Availability of the information is very essential as the part of the justice administration. If the information is not available at the right time, people will lose trust to the court or judicial system. This will cause an impediment to the accessibility of justice.

If the judiciary will not share the information as the source of justice, automatically accessibility of justice to the citizens will be jeopardized. To ensure that the information is available to all citizens including rural areas and without being based on education needs technology must be employed. It is only technology that can reach to all groups of people without bias since most of people if not all above 18 years of age use ICT including mobile phone.

The more widespread method for provision of electronic information is the use of internet websites. Four core elements have been proven to be very useful in analysing and comparing the electronic exchange of information between courts and other parties through the internet. These elements are: the organisation of the web service provision, access to information (graphics,

20 Judicial Council of Carlifonia (2011). The trial court records: administrative office of the courts

21 Motsaathebe, L and Mnjama, N. (2009).*Managing court records: a survey of record- keeping practices in selected countries*. Mousaion 27(2) 132-153.

22 Thurston, Anne. (2005). *Fostering trust and transparency through information systems: reliable official recordkeeping systems provides evidence that is crucial to accountable, transparent democracies*. ACARM, Summer, issue 36

23 *Ibid.*

24 Asina Omari (2018) Challenges of Strengthening Access to Justice in Tanzania, available from <https://www.tanlap.or.tz/sites/default/files/Adv.Asina%20Omari%20article_0.pdf> accessed on April 9, 2020

25 IGI Global (2020) what is information resources, available from <https://www.igi-global.com/dictionary/libraries-and-innovative-thinking-in-the-digital-age/14466> accessed on April 23, 2020.

structure etc.), users (people, parties, lawyers, experts and other frequent users) and contents.[26]Parties or citizens need information about court procedures or about their cases, once information is obtained/ or accessed easily and timely, then justice accessibility will be enhanced. But if the information is difficult to be obtained from the court, automatically justice accessibility is inhibited. There is no way court records can be accessed easily if they are kept manually. Court records are needed to be accessed timely when wanted to enhance justice accessibility.

5.0 ICT as a tool to improve court records and information sharing to enhance justice accessibility

5.1 Utilization of ICT in the Judicial System for Enhanced Accessibility

The utilization of ICT in the judicial system or other establishment must be a ground-breaking asset on the off chance that it is utilized or applied in a way that advances its goals. In the judiciary, it must be applied in a way that improves efficiency in the delivery of services. This implies that ICT should be able to make the court services more accessible, increase accountability and transparency and also ensure timely delivery of judgments among many other objectives of the judiciary. This will at that point finish in improved access to justice as every one of individuals who require court service can get at it.. Moreover, this will improve the nature of equity as judges have better access to legitimate materials while the general population can gain admittance to decisions in time.

The fast development of ICT opens up new possibilities to drastically improve the administration of justice that aim at provision of justice for all. The availability of web services, the use of digital filing, the electronic exchange of legal documents through email, the possibility of online rules and case law are only some examples that are prompting judicial administrations around the world to rethink their modern-day functions and activities. ICT can be used to revamp efficiency, access, timeliness, transparency and accountability, as a consequence, assisting judiciaries to furnish adequate services.

New chances are rising for the integration and automation of court processes and practices. In addition, the use of the internet can provide the opportunity to open the judiciary to the public, providing both general and specific information on its activities, thereby additionally increasing justice accessibility.

Many countries around the world are facing the problem of poor management of court records. Court records are neglected, less protected and unsecured.[27]Misplacement, loss and theft of court records normally lead to delays and case backlogs. This is why ICT was introduced in many countries to overcome the problem.

In some African countries including Tanzania the use of ICT in the judiciary system has been introduced to manage court records and information sharing.[28] For example, in Botswana the Court Records Management System (CRMS) is used to combat court records management problems, to address the issue of loss or misplacement of case files which cause delay in processing and finalizing litigations. Some scholars argue that some of the African countries such as Ghana, Kenya and Namibia are still striving to manage their court records effectively.[29] They further indicate how the use of ICT in Tanzania has been introduced though it needs some improvement to serve the purpose in most courts.[30] One among the reasons pointed out as the source of delaying of the cases in Tanzania is the use of paper. It was suggested that, ICT will offer an opportunity of complementing the paper based legal infrastructure with the electronic legal infrastructure.[31] It is thus recommended that files and case management systems should be electronic. This will make sharing and retrieving of documents easier. As was seen in the previous section in this article, once ICT is used it will improve information sharing and finally enhance justice accessibility. Once judiciary implements fully ICT as the tool to improve information sharing, the citizens or clients will be able to access justice easily regardless of the place they reside or time.

Again, once the court uses paper based infrastructure to keep its records, it will not be easier to retrieve them. To retrieve the document kept in this mode, one will have to fetch the entire file. Not only that, but also a person has to travel to fetch it if it is kept in a far distance. All these affect justice accessibility. The only solution for it is once ICT is used to keep court records.

It is also difficult to keep back up once records are kept in paper based since they increase quantity of documents. In this regard, the paper based documents cause delay of cases. Such problems may be eliminated or reduced by resorting entirely to ICT.[32] Once there is a delay of case in court, it will hinder justice accessibility in time.

Keeping court records in paper based means all proceedings should be recorded in paper. This will be a problem in case there is a shortage of stationery since the magistrate will adjourn the case. Ubena argues that, in a situation where there is no stationery, the court proceedings do not stand still for they will use the ICT tools available.[33] Once ICT used to record proceedings, automatically the proceedings (records) will be kept electronically as a result improve court records and hence justice accessibility will be enhanced.

The use of ICT in judiciary makes the information of the court more accessible regardless of the time and location. Mshana argues that ICT helps to make court systems more accessible to court users, litigants and the general public by making judgements, hearing calendar, court procedures and case information available over the internet.[34]

Sometimes justice accessibility is denied when a person appeal against the decision made by the lower court. This happens when the appeal court has no access to the decision made by the lower court if the records are kept on paper based. Once the court keeps its record using ICT, the relevant appeal court will be able to access the decision made by lower court, assumption here is that, the judiciary has connected all courts through ICT. In this

26 Marco V., (2007) Justice systems and ICT- What can be learned from Europe available from <https://www.researchgate.net/publication/26463184_Justice_systems_and_ICT_-_What_can_be_learned_from_Europe> accessed on April 23, 2020

27 IRMT (2011) *Managing Records as A Reliable Evidence for ICT/ e Government and Freedom of Information, available from* < http:// www. irmt.org. > *accessed on April 8, 2020*

28 IRMT (2011) *Managing Records as A Reliable Evidence for ICT/ e Government and Freedom of Information: Rwanda Court Case Study, available from* < http:// www. irmt.org. > *accessed on April 8, 2020*

29 *Ibid*

30 *Ibid*

31 Ubena John, 'ICT as a solution to delay of cases in the Administration of Justice in Tanzania' JTLS (2008), pg 119.

32 *Ibid.*

33 *Ibid.*

34 Juma A. M, 'Effective use of ICT in Judicial Systems: Tanzania and other Jurisdictions in comparative perspectives' (2017) IJA Journal, Vol I Issue I, p. 31

respect, Mshana argues that:

"And perhaps most conveniently, in cases where a decision of a lower court is appealed, networked information systems would allow the electronic record of the lower case to be readily accessed and re-used by the relevant appeal court[35]"

One of the greatest advantages of electronic case tracking systems, usually a core element of any e-judiciary innovation, is that it can provide a level of transparency and information quality control that is not available to the same degree in systems that lack ICT. Automated data is more likely to be recorded promptly, accurately, completely and transparently than otherwise.[36] This has the advantage of preventing low level corruption in court registries where court staff may be in the habit of seeking additional and secret payments from lawyers and others to find documents/information about case. Barry[37] says:

Under electronically managed systems, it is harder for court staff to sustain corrupt practices that are based on their ability to lose records or otherwise restrict access to information about case files and documents. Again, however, as a justification for introducing ICT in courts, its role as an anti-corruption measure should be proportionate to the extent of the problem.

It is obvious that, corruption limit accessibility of justice. Once ICT is used to keep court records and information sharing in any judiciary regardless of the continent, the problem of corruption that is caused by accessibility of records or information will be eliminated as a result of enhancement of justice accessibility.

The need to deliver a copy of a claim on a defendant in any civil or criminal case is the first, and usually essential, preliminary step before courts can validly do their work. Barry[38] referred to as "serving" or "service" of initial court process, which step can delay the active engagement of courts in dispute resolution, sometimes for many years when there are difficulties in finding a defendant. The use of ICT for information sharing will improve the process and hence justice accessibility will be enhanced.

5.2 ICT as tools in court records and information resources sharing in Tanzania

As it is pointed out in the previous section (3 &4), there are impacts caused by proper court records and information resources sharing to increase justice accessibility. If there is poor record keeping in JoT and poor information resources sharing, that means access to justice will be in trouble and hence the JoT will fail in its mission.

Some efforts have been taken by the JoT which facilitate sharing of information to the public as well as the clients such as advocates, plaintiff, defendant etc in comparison with the past five years. According to the survey (2019), the major means the courts use to relay information remains to be a summons, which was reported by 46% of all respondents followed by the new way of contacting court clients through telephone/WhatsApp/SMS whose proportion is 27%. This is followed by announcements made during earlier hearings (21%), other means (4%), and the least used method is email (1%).[39] The survey shows that, the uses of ICT by JoT as the media for information resources sharing to the public and other stakeholders are still poor compared to other methods. The JoT has been using various methods to disseminate information to the public. The methods include the uses of Newsletter, radio, television, website, blogs as well as social media network such as twitter and Facebook.[40] Meanwhile, there is addition of the uses of short messages (SMS) to notify the stakeholders through the JSDS 2.0 to improve the information resources sharing.[41] All these are efforts done by JoT to improve information resources sharing to the public to enhance access to justice. The challenge is on the effectiveness of using newsletters. But the application of ICT such as social media networks, radio and television somehow sounds. JoT should think on the best way (s) of sharing information to the public or client to ensure there is equal and undoubtful justice accessibility in Tanzania. Lack of effective information channel of any judicial system including JoT affects access to justice.

On the other hand, there is an issue of court records and the way they are kept and managed. The efforts have been seen as discussed on this article as to how JoT has adopted and applied ICT in various operations. Based on the time taken for the court records to be transferred from lower court to the higher court for any business, it reflects the reality that the lower courts still keep records on the paper.

Access to court process documents (proceedings, judgments and or decrees) is essential to the court users to facilitate their engagements in the court. The absence of difficulties in obtaining such documents among some clients was an area where the judiciary of Tanzania targeted to improve. In the last five years, there have been several positive changes. These changes have been reflected in the way court users obtained various documents related to court proceedings, judgments, decrees and others.

According to the survey report, the majority said it takes more than thirty days for records to be transferred from lower to a higher level of courts. Nine of ten users (90%) said it takes longer for records to come from primary court to district court.[42] The longer time taken for processing court documents and transfer them to appropriate levels is a reflection that more efforts are needed from the courtside to manage time and this will be possible if the application and adoption of ICT will be used.

Despite the efforts done by the JoT in access to justice, there is a need for judiciary to make full application of ICT in its operations. There is still a problem when it comes to the accessibility of various documents of the courts. The survey had it that:

Close to half of the court users (four in ten) have attempted to access case-related information from the courts in the period of 12 months leading to the survey. When court users were asked about the time it takes to obtain case-related documents (Judgement,

35 Juma A. M, 'E- Judiciary: A step towards transforming Tanzanian Legal systems' (2018), IJA Journal, Vol. I Issue II p. 25

36 *Ibid*

37 Barry Walsh (2011) *E-Justice Projects – Distinguishing Myths from Realities* [Online] available at <http://www.iijusticia.org/docs/Barry.pdf> accessed on April 25, 2020.

38 *Ibid.*

39 JoT (2019) Court Users' Satisfaction Follow up Survey

40 JoT (2019) *Taarifa ya Mwaka*

41 Chief Justice of Tanzania (2020) Hotuba fupi ya Jaji Mkuu Kuwakubali Mawakili kwa Njia ya Mtandao

42 JoT (2019) Court Users' Satisfaction Follow up Survey

proceedings and records of appeal) from the court, and the majority said it takes zero to twenty-one days[43].

In comparison to the year 2015 on the same baseline survey, there are some improvement on the application of ICT after five years later. The survey further observed:

There is a significant improvement between the baseline and the current survey in the ease with which one may access such documents. The proportions of those with a positive rating on easy to access court documents increased by 40% in 2015 to 70% in 2019.[44]

The variation of time or duration depends on the way court records are kept. The level differs because digitization and uses of ICT in JoT varies from lower courts to higher courts. It is time for JoT to improve the way records are kept and information resources are shared through the uses of ICT to enhance access to justice in Tanzania.

6. Conclusion

Justice accessibility is a constitutional right of every nation including Tanzania. There are many factors that contribute to impediment of the justice accessibility. Among them as discussed in this article are problem of court records in regard to the way they are kept and how information is shared to the citizens. The court needs to improve the way it keeps its records and sharing the information to the public. The use of ICT in the judiciary is viewed as fundamental to promote access to justice in any country. This is because it is seen as a step towards promoting a judiciary that is transparent and efficient in delivery of its service. Once the system is effectively implemented, there will no longer be incidences where files mysteriously disappear or judgments are plucked out of the files. There will as a result be speedy dispensation of justice and the courts will be viewed as the centre of justice. Upon doing so, justice accessibility will be enhanced and the public or citizens will have faith on the judiciary as well as the government in general.

43 *Ibid.*
44 *Ibid.*

Plea Bargaining In Tanzania: Is It A Grab of Judicial Powers Or Coercion To Compromise?

By Lameck Nyangi Samson, Esq.[1]

Abstract

Plea bargaining as a concept was introduced in Tanzania criminal justice system by the amendment made on the Criminal Procedure Act, [Cap. 20 of 1985], passed by the parliament through the Written Laws (Miscellaneous Amendment) Act No. 4 of 2019. Ever since its introduction, the concept has been a subject of debate from journalists and academicians. While some criticize it on the ground that it violates fundamental principles of the Constitution, others hail it as instrumental in lessening the burden of trials and ensuring speedy disposal of cases. The purpose of this article, therefore, is to throw some light on the existing law relating to plea bargaining in Tanzania by examining the concept of mutual satisfactory disposition, the extent of victim's participation as well as judicial involvement at the negotiation stage.

Keywords: Plea-negotiation, constitutional principles, discretion, scrutiny, guilty pleas, accountability

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1.0 Introduction

Under the Tanzania criminal justice system, for all crimes committed, the offender is required to be punished as per the laws of the land.[2] Traditionally, it is the cardinal principle of law in criminal cases that the prosecution is under the duty to prove the offender's guilty of the criminal charges he is accused of, beyond reasonable doubt.[3] By entering a guilty plea, an accused waives certain procedural rights, including the right to plead not guilty, the right to require the prosecution to prove the charges made against him at a fair and public trial, and the right to put forward a defence to those charges at such a public trial.[4]

Plea bargaining is a concept in which an agreement takes place between the prosecution and the accused person by which he pleads guilty to the criminal charges in exchange for some concession in charges or punishment. A plea bargain allows both parties in a trial to avoid a lengthy trial procedure. Plea bargaining as most criminal justice reformers believe, is more suitable, flexible and better fitted to the needs to the society, as it might be helpful in recurring admissions in cases where it might be difficult to prove the charge laid against the accuse.[5]

2.0 The Origin of the Concept of Plea Bargaining

The concept of plea bargaining evolved in United States and has become a prominent feature of American criminal justice system throughout the years. Plea bargaining was adopted with the result of the classic case of *Martin Luther King Jr.*[6] In 1969 James Earl Ray was accused of murder of Martin Luther King Jr. He pleaded guilty in order to avoid death penalty. After his plea, he got 99 years of punishment.[7] In 1970s the plea bargain was recognized as a formal procedure for the resolution of criminal cases. The concept was given the constitutional validity in the case of *Brady v. United States,*[8] where the Supreme Court held by saying that a plea of guilty is not invalid merely because it was entered to avoid the possibility of a death penalty. The Supreme Court also held that award of lesser punishment pursuant to plea bargain is not invalid. In *Santobello v. New York,*[9] the US Supreme Court held that plea-bargaining was necessary for the operation of justice and was to be encouraged when properly managed. Today, plea bargaining dominates most criminal cases in the USA. Almost every criminal case is now conducted by plea bargaining and today it is often understood that the American criminal justice system would collapse if plea bargaining is removed from it.

2 Article 13(6)(c) of the Constitution of the United Republic of Tanzania, 1977

3 See the Court of Appeal decision in *Horombo Elikaria v. Republic,* Criminal Appeal No. 50/2005 (*Unreported*)

4 See *Kabula Luhende v. R,* Criminal Appeal No. 281 of 2014 (CAT-*Unreported*); Also see Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977

5 Justice Pasayat A. Plea Bargaining, 5 Nyaya Deep, National Legal Services Authority, 2007, VIII

6 William Bradford Huie, "*He Slew the Dreamer: My Search for the Truth About James Earl Ray and the Murder of Martin Luther King, Jr.* (Revised ed.)", 1997 available at Montgomery: Black Belt Press, ISBN 13: 978-1- 57966 005-5

7 Ray pleads guilty to King assassination, Feb.19 available at https://www.history.com/this-day-in-history/ray pleads-guilty-to-king-assassination, last seen on Feb. 19, 2020.

8 *Brady v. United States*, 397 U.S. 742 (1970)

9 *Santobello v. New York*, 404 U.S. 257 (1971)

3.0 Plea Bargaining in Tanzania Criminal Justice System

Mounting backlog of cases in the courts, effective utilization of scarce judicial as well as prosecutorial resources and the resultants pain and agony suffered by the accused led the law makers to introduce the concept of plea bargaining in Tanzania criminal justice system**.** Plea bargain was introduced through amendments made on the Criminal Procedure Act Cap. 20 of 1985, passed by the parliament through the Written Laws (Miscellaneous Amendment) Act No 4 of 2019. The Act[10] amended several legislation including the contents of section 3 of the Criminal Procedure Act (CPA) by adding the meaning of plea agreement and plea bargaining and addition of section 194A to 194H, immediately after section 194.

3.1 Plea Bargaining Defined

Alshuler describes plea bargaining as one that consists of the exchange of official concessions for a defendant's act of self-conviction.[11] Those concessions may relate to the sentence imposed by the Court or recommended by the prosecutor the offence charged, or a variety of other circumstances.[12] Black's Law Dictionary[13] defines the term "plea bargaining" as:

"The process whereby the accused and the prosecutor in criminal case work out a mutually satisfactory disposition of the case subject to the Court approval. It usually involves the accused pleading guilty to a lesser offence or to only one or some of the courts of a multi-count indictment in return for a lighter than that possible for the graver charge."

10 Act No. 4 of 2019

11 *Alschuler, Albert W.* (1968) "The Prosecutor's Role in *Plea Bargaining,"* University of Chicago Law Review: Vol. 36: Iss.1.

12 Rai S. 2007 Law relating to Plea bargaining, 47 Orient Publishing Company, New Delhi, Allahabad, 1st ed.,

13 Plea Bargaining, Black's Law Dictionary, 8th edition, 1190 (2004)

In Tanzania, s. 15[14] which amends s. 3[15] defines "plea bargaining" to mean negotiation in a criminal case between a prosecutor and the accused whereby the accused agrees to plead guilty to a particular offence or a lesser offence or to a particular count or counts in a charge with multiple counts; or cooperate with the prosecutor in the provision of information that may lead to a discovery of other information relating to the offence or count charged, in return for concession from the prosecutor which may lead to a lenient sentence or withdrawal of other counts.[16] The section provides for a negotiation between the accused and the prosecutor during which the accused person agrees to plead guilty in exchange for some concession in the form of reducing the *quantum* of sentences by the prosecutor; it is a kind of compromise.

3.2 Nature of Plea Bargaining

As provided forth in s. 3 of Act No. 4/2019 plea bargaining is not a collective and cumulative scheme. It is based on needs and demand of both sides, that is to say, the prosecution and accused. Since it is a negotiation, the accused may agree to plead guilty to a less serious charge, or to one of several charges or count or counts, in return for the dismissal of other charges, or it may mean that the accused may plead guilty to the original criminal charge in return for a more lenient sentence which is commonly known as charge bargaining.

Furthermore, the accused may cooperate

14 See Act No. 4 of 2019

15 The Criminal Procedure Act, 1985

16 See s. 15(a-b) of Act No. 4 of 2019

with the prosecutor in the provision of information that may lead to a discovery of other information relating to the offence or count charged in return for a more lenient sentence which is also known as Sentence Bargaining. Thus, it involves an active negotiation process between the prosecution and the accused.

3.3 Application of Plea Bargaining in Tanzania

The provisions of s. 194F[17] provides that plea bargaining shall not be entered into in the following offences including; sexual offences with a punishment which exceeds five years, sexual offences involving a victim whose age is under eighteen, treason and treasonable offences, offences relating to possession or trafficking in narcotic drugs whose market value is above twenty million shillings, terrorism, possession of government trophy whose value is above twenty million shillings without the consent of Director of Public Prosecutions in writing, and any other offence as the Minister may, upon consultation with other relevant authorities and by order published in the *gazette* proclaim.[18]

3.4 Procedures of Plea Bargaining under the Criminal Procedure Act, 1985

According to s. 194A, application for plea bargaining may be initiated by a public prosecutor after the consultation with the victim or investigator or the accused person or his advocate and notify the court of their intention to negotiate a plea agreement with a prior written consent of the Director of Public Prosecution (DPP). The court shall not participate in plea negotiations between a public prosecutor and the accused person.[19] The plea agreement shall be in writing and shall state in full the terms of the agreement, the substantial facts of the matter and all other relevant facts of the case and any admissions made by the accused person.[20]

Under s. 194D, the plea agreement reached by the parties must be registered to the court to gain a status of a formal court judgment. At this stage, the court is vested with wider discretion to examine and satisfy itself on whether the negotiation and finally reached agreement was mutual and concluded with free consent. However, before it registers the agreement, the court shall satisfy itself that the agreement was voluntarily obtained and the accused was competent to enter into such agreement. Furthermore, before court records the plea, the accused must be placed under oath and the court must address the accused person in court in a language that he understands, and must inform him that by entering into a plea agreement, the accused waives his right to a full trial (i.e. his right to confront and cross-examine witnesses) and his right to appeal except as to the extent or legality of sentence.[21] However, prosecution has the right, in the case of prosecution for perjury or false statement, to use any statement that he gives in the agreement against him.[22]

17 The amended Criminal Procedure Act, 1985
18 See s. 194F of the amended Criminal Procedure Act, 1985
19 Section 194A(1-3) of the amended Criminal Procedure Act, 1985
20 *Ibid* at s. 194C
21 S. 194E of the amended Criminal Procedure Act, 1985
22 *Ibid* t s. 194E(b)(iii)

Upon registration, the plea agreement becomes binding upon the prosecution side and the accused and the agreement shall become part of the record of the court. Moreover, s. 194D[23]gives the court the power to reject a plea agreement for sufficient reasons. Therefore, even in situations whereby the plea agreement has the approval of the DPP, it is still open to the court to either accept or reject the same. It presupposes that, upon rejection by the court the plea agreement reached shall become null and void and the proceedings giving rise to such agreement shall be inadmissible in a subsequent or future trial relating to the same facts. Therefore, the rejection necessitates a plea of not guilty being consequently entered in the court record. This is contrary with the power of the DPP to enter a *nolle prosequi*, upon which the proceedings are discontinued and the accused discharged in respect of the charge for which the *nolle prosequi* was entered.[24] However, the rejection shall not operate as a bar to subsequent negotiations preferred by the parties.

4.0 Plea Bargain: A Grab of Judicial Power or a Coercion to Compromise?

Plea bargaining is necessary for the continued function and efficiency of any criminal justice system. Tanzania is no exceptional. With increase in crime rates, the criminal justice system is getting over-burdened every day. Plea bargaining provides an effective solution as all the actors within the criminal justice system, that is, the prosecution, judicial officers and the accused work in *tandem* avoiding unduly long trials and cumbersome process of producing evidences and witnesses.[25] Undoubtedly, speedy trial is an essence of criminal justice system and delay in trial by itself constitutes denial of justice. Plea bargaining has become a disputed concept because there are many views regarding its introduction in our legal system. Some authorities' stress that its introduction in our legal system is exceptionally good as it will reduce heavy backlog prevalent in Tanzania Judiciary[26] as well as congestion in jail. On the other hand, the introduction of the same has provoked scholarly debate on a number of legal issues as discussed hereinafter:-

4.1 Judicial intervention after Plea Bargaining

Contrary to popular belief, plea bargaining has become ingrained in our legal system because offenders and agencies such as police departments, prosecutor's offices, and the courts benefit from its use. It can be efficient, time saving and less risky to the parties involved. It has been reported that more than 500 accused persons had applied to the DPP for the application of plea bargain. The plea bargain system is a move that ensures timely delivery of justice, reduces backlog of cases, as well as reducing inmate congestions in prison facilities.

Under s. 194A (3),[27] the court is prohibited from becoming involved in plea negotiations and limit the courts' role to reviewing a plea bargain once it is presented by the parties.[28] Of course, under the Act, the court invariably participates in the plea bargaining

23 Ibid at s. 194D(1)(3)
24 See s. 91(1) of the Criminal Procedure Act, 1985
25 K. V. K. Santhy, *Plea Bargaining in US and India Criminal Law Confessions for Concessions*, Nalsar Law Review Vol. 7, 2013 Hyderabad
26 See the Chief Justice Speech at the celebration to mark the Country's Law Day of 2014 at Dar es Salam
27 Of the Criminal Procedure Act, 1985
28 *Ibid* at s. 194D(2)

process through accepting or rejecting the plea bargaining itself.[29] The Act has refrained from involving the court in plea negotiations. The common practice is for the court to review a guilty plea to ensure that it is voluntary and knowing, but only after the plea is concluded between the parties.[30] The court does not have to entertain an agreement if it is ascertained at the very outset that the accused did not voluntarily consent, the Act provides the court with the power to reject the settlement arrived at.[31]

The role of the court as can be seen in such cases is just that of a figure head in such cases. The parties bargain informally outside of court and strike a deal with little judicial involvement between prosecutors and accused person, behind closed doors and with practically no or minimal judicial input or oversight.[32] The entire secretive procedure leaves the adjudication of criminal cases to prosecutors not the court, as the prosecutors maintains charging decisions by selecting the charges, prosecutors strongly influence the sentence. This presents significant issues concerning transparency, fairness, and effective sentencing.[33] Therefore, in a scenario where there may be serious failure in the capabilities of the accused, a risk of prosecutorial coercion and the probability of corruption at various levels, a reasonable level of discretion on the part of the deciding authority is required.[34] Keeping the court at the sidelines will result in the inequality of the bargaining power of the prosecution and the accused.

29 *Ibid* at s. 194D(3-4)
30 *Ibid* at s. 194D(2)
31 *Ibid*
32 Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining*, 76 COLUM. L. REV. 1059, 1064-66 (1976)
33 Sulabh Rewari and Tanya Aggarwal, "*Wanna Make a Deal? The Introduction of Plea Bargaining in India*" (2006)
34 S. 194D(3) of the Criminal Procedure Act, 1985

However, one may argue that the court's participation in negotiations may seem to interfere with her role as an impartial arbiter, particularly if the same judicial officer who participates in the negotiations would preside over a subsequent trial and sentencing of the accused person. Possibly, it can give the accused impression that he will not receive a fair trial if he is tried by the same judge or makes it difficult for the judge objectively to determine the voluntariness of the plea.[35] As it is provided under s. 194D(2),[36] a plea of guilty by the accused must be made 'voluntarily', therefore judicial participation may be seeing as inherently coercive that judicial involvement renders the plea involuntary.[37]

4.2 Judicial Scrutiny

Unlike in a normal criminal proceeding where judges/magistrates must confirm that prosecutor has sufficient evidence to support and make out a *prima facie* case,[38]in plea bargaining process prosecutorial discretion in plea-negotiations operates essentially free from external scrutiny or transparency. Basing on s. 194D (2)[39] in the interest of justice in criminal prosecutions, judges/ magistrates must approve plea bargains before registering such agreement. The Act[40] emphasizes two prerequisites for judicial acceptance of guilty pleas; the voluntariness of the accused's plea, and the accused competence to enter into such agreement. Furthermore, s. 194G provides a court with the power to set

35 John Paul Ryans and James J. Alfini, "*Trial Judge's Participation in Plea Bargaining: An Empirical Perspective*", 13(2) Law and Society Review 482, 479-507 (1979)
36 Of the Criminal Procedure Act, 1985
37 *Boyd v. United States*, 703 A.2d 818, 821 (D.C. Cir. 1997)
38 See s. 230 of the Criminal Procedure Act, 1985. Also the case of *DPP v. Peter Kibatala*, Criminal Appeal No. 4/2015, CAT at Dar es Salaam.
39 Of the Criminal Procedure Act, 1985
40 *Ibid*

aside conviction and sentence relating to plea bargaining on ground of fraud, misrepresentation and involuntariness of the plea. Considering the above provisions one may argue that judges/ magistrates have broader implicit authority to approve or reject party-negotiated guilty pleas based on their independent determination that the proposed disposition is inconsistent with the public interest. However, a judge/ magistrate generally cannot wipe out a plea agreement after they have accepted it and entered the conviction unless for sufficient reasons.[41]

The unchecked prosecutors' discretionary power to decide whether or not, and how to, proceed includes which offence(s) to pursue, and whether to dismiss charges, engage in plea-negotiations[42] and make/ accept a plea-agreement[43] takes upon the role of the judge/magistrate. Again, the prosecutors' ability to threaten inflated sentences, combined with their power to trade those sentences away for pleas of guilt, allows them to control 'who goes to prison and for how long.' Such powers give them a quasi-judicial role. In our unregulated interstices of criminal justice system such unchecked discretion power may transform them into administrators of an 'unwritten criminal law' that consists only of their own discretionary decisions' to charge certain offenses or to offer certain deals.[44] Meanwhile, the Act imposes virtually no constraints on prosecutors' plea bargaining practices at all, neither does it give the courts powers to examine prosecutorial conduct to ensure that they met the most meticulous standards of both promise and performance in plea bargaining[45].

41 S. 194D(3) of the Criminal Procedure Act, 1985
42 *Ibid* s. 194B(a-c)
43 *Ibid* s. 194D(3)
44 Gilien Silsby, *Why Innocent People Plead Guilty*, USC NEWS (Apr. 18, 2014)

4.3 Accused Constitutional Right

The Bill of Rights in our Constitution[46] protects some of our most fundamental liberties including rights to impartial and fair trial, to confront adverse witnesses as well as right to appeal. However, despite such supposed protection, most of those charged with crimes do not get to exercise these rights. Most accused persons charged, plead guilty and waive away their rights through the process of plea bargaining.[47] A discount for pleading guilty made under plea bargaining process imposes a price on the right to be tried and appeal. That is to say, during the plea bargaining process, prosecutors generally offer charging or sentencing concessions to induce accused persons to plead guilty and waive their right to trial[48] or threaten accused persons with increased charges or more severe sentences if they do choose to go to trial.

Generally, one can say that, the state is in fact penalizing those accused who choose to exercise their constitutional rights and rewarding those who refrain from doing so, hence undermining the presumption of innocence[49] and encouraging self-incrimination.

Again, article 18[50] provides for right to be informed. Plea negotiations are between the accused person and the prosecutor,[51] the negotiations are informal and totally outside the purview

45 Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 53 (1968)
46 See Articles 12 to 29 of the Constitution of the United Republic of Tanzania, 1977
47 S. 194E of the Criminal Procedure Act, 1985
48 *Republic v. Erick Kabendera*, Economic Crime Case No. 75/2019 in the Resident Magistrate's Court of Dar es Salaam at Kisutu.
49 Article 13(6)a of the Constitution of the United Republic of Tanzania, 1977
50 Of the Constitution of the United Republic of Tanzania, 1977
51 See s. 194A(1-2) of the Criminal Procedure Act, 1985

of judges/magistrates,[52] yet a court will enforce the agreement that the parties have made.[53] The accused guilty plea based on the extent of his knowledge of the prosecutor's case against him and any tactical, mitigating, or exculpatory information that might exist are known only to the prosecution.[54] Therefore, it is a give and take process. In this sense, lack of relevant information prevents the accused person from a reasoned decision whether to plead guilty or to stand trial. In the effort to guarantee 'due process',[55] the accused must be provided with all type of information that would aid the accused in making decision including all items relevant to an assessment of the prosecution's case against the accused.[56] A key concern in this context, worsened by the absence of plea negotiation information and/or data, is the potential for negotiations to create pressures that compel accused persons to plead guilty.[57]

The practical reality is that plea bargain is an unsupervised practice[58] with an imbalance of bargaining powers, yet the court is required to assume that plea negotiations were conducted fairly. In this situation, accused may not be able to understand the nature of the plea bargained offer or what may happen if the case goes to trial.[59]

52 *Ibid* s. 194D(3)
53 *Ibid* s. 194D
54 D. Newman, Conviction: *The Determination of Guilt or Innocence without Trial* 3 (1966).
55 Article 13 of the Constitution of the United Republic of Tanzania, 1977
56 *Brady v. Maryland* 373 U.S. 83 (1963)
57 Baldwin, J., & McConville, M. (1977). *Negotiated justice: Pressures to plead guilty*. London, England: Martin Robertson.
58 *Ibid* s. 194D(3) of the Criminal Procedure Act, 1985
59 Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. GHI.L. REV. 50, 58-60 (1968)

4.4 Prosecution Unregulated Monopoly

The process of plea bargaining hurts the innocent and gives rise to unfair bargains in content and in time. In plea bargaining, the prosecutor is the central and controlling figure in the bargaining process.[60] Practically, in Tanzania the decision whether to permit plea bargaining in any particular case is solely a matter of prosecutorial discretion.[61] Prosecutors enjoy wide latitude and power in the plea bargaining process and can agree to dismiss a case outright, or dismiss charges, or allow an alternative sentence, such as a fine or community service. One side is very strong and the other side is very weak. In the eyes of the accused, it may well be a rational calculation given the penalty of going to trial, for there is clearly such penalty. The sentencing differential in plea bargaining from that of an ordinary trial makes plea bargaining coercive leading to risk of prosecutorial coercion.

The accused person obviously has more to lose than the prosecution, particularly if it may involve a jail term. There is of course a natural pressure upon the accused, because if the accused goes on with the trial and lose, there are bigger consequences.[62] And if the accused does not settle, he/she may get an acquittal, but it is unknown. It is a gamble either way, and unpredictable. There is therefore pressure on them to plead guilty on an account that additional charges or even consecutive punishment may not be brought forward nor new charges be introduced during trial. The prosecutor's unlimited discretion to pick and choose which charges to bring against defendants and ability to create significant sentencing differentials between similar defendants can lead to the practice of overcharging and the use of threats to seek the harshest sentence to keep defendants from going to trial.[63] Such threats might induce an innocent accused to plead guilty to suffer a light and inconsequential punishment rather than go through a long and difficult criminal trial which, having regard to our cumbrous and unsatisfactory system of administration of justice is not only long drawn out and catastrophic in terms of time and money, but also uncertain and unpredictable in its result. Hence making the plea bargaining an unfair contract since accused persons will accept a plea agreement that is not in their own best interests.[64] That is, the expected return for tactical concession from acceptance is less than that from rejection or going to trial.

60 John H. Langbein, *"Torture and Plea Bargaining"*, 46(1) The University of Chicago Law Review 8, 3-22(1978)
61 Section 194C(3) of the Criminal Procedure Act, 1985
62 Davis, K. (1969). Discretionary justice: *A preliminary inquiry*. Baton Rouge, LA: Louisiana State University Press.

4.5 Victim's Participation

The Act[65] obliges a public prosecutor to conduct plea bargaining with the accused person after consultation with the victim/ investigator and before pronunciation of judgment. In any criminal justice system victims of criminal conduct have two rights; the right to be informed, and the right to be present.[66] In the context of plea bargaining, the Act introduces a contour that allows prosecutors to negotiate with the accused person after consulting the victim. A significant third party affected by the plea bargain is the victim of the crime. Nonetheless the Act[67] accords victims the most minimal right to information regarding the plea bargain. The Act is silent about the most substantial right of victims which is the right to participate in the plea bargaining decision. The Act does not expressly state what constituting consulting the victim. Does it imply giving the victim the right to veto a decision to plea bargain? Or provide victims with an opportunity to be heard? Although the victims have a direct interest on the outcome of the criminal trial, their position is not formally recognized by the Act.

The Act unfairly excludes the victims to participating in plea bargains process even where he/she has a legitimate interest. The State being the prosecutor and aggrieved party, the actual victim had no say in the proceedings apart from informing the crime to the police and giving evidence when called for. It is taken for granted that punishing the accused is satisfaction enough for the victim.[68] This is borne out of the entrenched universal principle that sees the prosecution of crime as an exclusive prerogative of the State. Hence, the victim, for the most part, serves the role of a source of information about the crime and the criminal and features mostly as the individual whose injury triggers State action.[69] For most part, his or her interest is subsumed by public interest and overwhelmed by the prerogative of the State. Victims feel excluded and ignored in their own case[70] hence victims suffer silently as a result of crime and abuse of power. Therefore,

63 Jeff Palmer, Note, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 512–13 (1999)
64 Sulabh Rewari and Tanya Aggarwal, "*Wanna Make a Deal? The Introduction of Plea Bargaining in India*" (2006)
65 See s. 194A(1) of the Criminal Procedure Act, 1985
66 Article 13(6) a of the Constitution of the United Republic of Tanzania, 1977
67 *Ibid*
68 Dr. Subhash Chandra Singh, *"Justice for Victims of Crime"* Criminal Law Journal, Oct 2009, p.13
69 Gittler Josephine, *'Expanding the role of the victim in a criminal action: an overview of issues and problems'* (1983) Pepp. L. Rev. 11, 117.
70 Maguire, Mike, and Trevor Bennett, 1982 *'Burglary in a dwelling: The offence, the offender, and the victim'* (London Heinemann).

implementing the provision of Article 13(6) (a)[71] it is imperative to develop/ adopt guidelines or regulations stressing the need for compassion to the victims putting in place suitable machinery and legal framework for protection of the victims.[72]

4.6 Public attitudes to Plea Bargains

The Judiciary of Tanzania (JoT) is well known for its impartiality, independence and justice oriented approach. The Preamble of our Constitution promises "a society founded on the principles of freedom, justice, fraternity and concord."[73] And that, the Judiciary which is independent and dispenses justice without fear or favour, thereby ensuring that all human rights are preserved and protected.[74] However, of recent, many persons involved in corruption and financial crimes have gotten away with ridiculously low sentences that the ordinary man on the street began to wonder if the country's judiciary is not already compromised.

Traditionally, judges/magistrates when trying an accused for an offence must apply his mind to the evidence recorded before him and, on the facts as they emerge from the evidence, decide whether the accused is guilty or not. Therefore, conviction on plea of guilty entered by the accused as a result of plea bargaining is contrary to public policy because a judge/magistrate is likely to be deflected from his path of duty to do justice and he might convict an innocent accused of accepting plea of guilty or let off a guilty accused with lighter sentence, thus subverting the process of law, and frustrating the social objective.[75] It is argued that plea bargaining allows accused to escape full punishment by providing them with more lenient sentences.[76] This act as motivation to other offenders that justice can be bought and sold[77] and that offenders can easily beat the criminal justice system, hence weaken the deterrent effect of punishment.[78]

Since plea bargaining cases invariably results in disposition of a case, it is argued that judges/magistrates may be persuaded to accept plea bargaining agreements so that they could be assessed and evaluated in accordance with cases they disposed of. Also, the heavy case-load of judges/magistrates are easily reduced by the number of cases in which plea bargaining has been successful pleaded and invariably help the court to dispose of some of its cases. Therefore, it must always be remembered by every judicial officer that administration of justice is a sacred task and according to our hoary tradition, it partakes of the divine function and it is with the greatest sense of responsibility and anxiety that the judicial officer must discharge his judicial function, particularly when it concerns the liberty of a person.[79]

Equally, plea bargaining allows the prosecutors to evade the rigorous standards of due process and proof imposed during trials. Consequently, instead of establishing accused's guilt and sentence through an impartial process with a complete investigation and an opportunity for the defense to present its case, prosecutors take on the role of a judge, making all determinations based on the probability of whether they will win or lose at trial. And the accused person is induced to confess to a plea of guilty of an allurement being held out to him that if he enters a plea of guilty he will be let off lightly. The end result is a decision that has little to do with the primary objectives of the criminal justice system.[80]

5.0 Conclusion

The economic realities of our criminal justice system and the ever growing criminal population as well as over congested prisons in Tanzania dictate that plea bargaining cannot be altogether abolished. Undoubtedly, speedy trial is an essence of criminal justice system and delay in trial by itself constitutes denial of justice. It cannot be denied that plea bargaining may result in faster disposal of cases, relieving the prosecutors of the long process of proof, technicalities and long arguments, as well as the court of its ordeal surrounded by a crowd of paper and persons is avoided by one case less and the accused is happy that he is free early in the day to pursue his old profession.

The concept has been introduced in our Criminal Procedure Act, 1985 by the Written Laws (Miscellaneous Amendment) Act No 4 of 2019 as a prescription to the problem of overcrowded jails, burdened courts and abnormal delays. The provisions relating to plea bargaining in the Act[81] show that throughout the process, the court is not a moot spectator, but it plays an active role in ensuring that there are no pressure tactics adopted by the prosecution to extract guilty plea from the accused and that the agreement reached between the parties is voluntary. However, it has been observed that accused persons are not provided with material information regarding their charges and the prosecution case against them. Furthermore, plea bargains are conducted before the investigation is complete,[82] it is also done when the accused is under difficult environment. The way it is conducted does not reflect a balanced process but one side process. Definitely, from its outset it is not based on a win-win situation, but money oriented thus subjecting the accused to confess guilty in order to save life and get out of remand prison.

The practice of plea bargaining can be a fair and legitimate alternative to trial if the principles of dues process are observed. Thus, plea bargains negotiations should be handled expeditiously, without subjecting the accused person to long, tough and complex court proceedings unnecessarily. Also, regulations or rules or guidelines ought to be made providing guiding procedures on how plea bargain negotiations and plea bargaining agreement should be done thoroughly.[83] Furthermore, regulations or rules or guidelines should define the parameters of authority and capacity of the court in plea negotiations in fulfilling its constitutional duty of doing justice in criminal prosecution.

71 Of the Constitution of the United Republic of Tanzania, 1977
72 Ibid at Article 13(6)(d)
73 See the Preamble of the Constitution of the United Republic of Tanzania, 1977
74 *Ibid*
75 Jeff Palmer, Note, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance,* 26 AM. J. CRIM. L. 505, 512–13 (1999)
76 Alissa Pollitz Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, 73 JUDICATURE 335, 336 (1990))
77 *Ibid*
78 Douglas D. Guidorizzi, *Comment, Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 765 (1998)
79 See *Kasambhai v. State of Gujarat,* AIR 1980 SC 854
80 Douglas D. Guidorizzi, *Comment, Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics,* 47 EMORY L.J. 753, 765 (1998)
81 Criminal Procedure Act, 1985
82 See *Republic v. Erick Kabendera*, Economic Crime Case No. 75/2019 in the Resident Magistrate's Court of Dar es Salaam at Kisutu.
83 See s. 194H of the Criminal Procedure Act, 1985

INSTITUTE OF JUDICIAL ADMINISTRATION LUSHOTO

JOURNAL POLICY, RE: 2019

Introduction

This policy may be cited as the *IJA Journal Policy*.

1.0 Name and Publication of the Journal

1.1 The name of the Journal shall be the Institute of Judicial Administration Lushoto Journal and its mode of citation shall be *IJA-JOURNAL*.

1.2 The Journal shall publish quality scholarly articles from Judicial Officers, academics, students, legal practitioners and other professionals in interdisciplinary works of relevance to law and practice in Tanzania.

1.3 The Journal shall be published in print and electronic form (online).

1.4 The Journal shall be published twice in a year.

2.0 Management and Administration of the Journal

2.1 The Administration and Management of the Journal shall be vested in the Editorial Board.

2.2 The Editorial Board shall comprise of members from IJA, The Judiciary of Tanzania, external members from institutions of higher learning and legal practitioners.

2.3 The Editorial Board shall comprise of Chief Editor and other members who shall not exceed eight.

2.4 The Chief Editor and other members of the Editorial Board shall be appointed by the IJA Deputy Rector – Academic, Research and Consultancy after consultation with the Principal.

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2.6 The tenure of the Editorial Board and the Advisory Board members shall be three years subject to renewal for another term of three years. No member shall be allowed to serve more than three terms. However, the tenure of an individual member may be shortened or terminated due to failure to perform his/her duties, resignation or any other good cause.

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3.1 The Journal shall address a wide range of issues on law and other related subjects.

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Manuscripts for comment, articles analyzing and commenting on recent cases, legislation and other topical matters must range between 1500 and 2500 words. No footnote shall be allowed in comment articles. References, case citation, legislation and relevant literature should appear in brackets in the main text.

All comment on articles should be accompanied by a short abstract not exceeding 50 words. The comment must bear the following headings;

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Book reviews may range between 1500 to 2000 words although review articles could be much longer. The title of any book review must take the following format;

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For fonts in the main body text, use font size 12 and in the footnotes use font size 10.5.

4.2 The following rules of citation shall be applicable to submissions;

- Books should be cited starting with author's surname followed by initials. The title of a book should follow, edition, with publisher, place of publication, and year of publication, finalized by page number. Example: Peter C. M., Human Rights in Tanzania: Selected Cases and Materials, Rudiiger Verlag, Koln, 1997, p.11.
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4.7 All manuscripts shall further be subjected to editorial review for style, arrangement, literary quality and scholarly

contents. The Editorial Board serves the right to reject, edit or shorten any submission approved for publication.

4.8 A decision on every manuscript shall be made in a timely manner and communicated to authors.

4.9 No two manuscripts of the same author shall be published in one journal issues. However, a co-authored manuscript may be published alongside a sole authored manuscript.

4.10 Upon publication of their submission, authors will receive one hard copy of the issue of the Journal where their submission appears and/or be allowed to access their published articles electronically.

4.11 The Journal shall provide a vibrant forum for discussions, study and research; where contributors may freely express their opinions on legal and other related matters.

4.12 Manuscripts must be submitted in word format (soft copies) and all correspondence must be addressed to the Chief Editor, in the following address;

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