# INSTITUTE OF JUDICIAL ADMINISTRATION LUSHOTO

# Journal


**Volume I** *Issue No. I November, 2017* , **ISSN** *2467-4680*

# JOURNAL POLICY, 2016

# 105

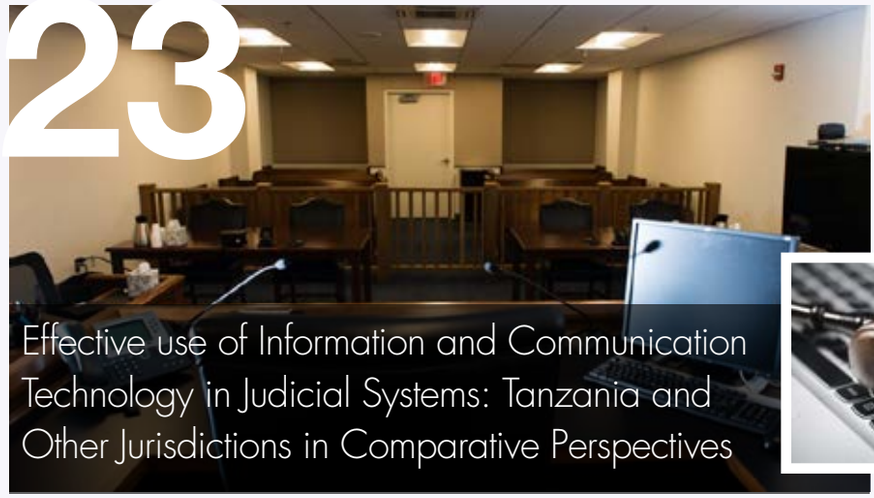
# Contents



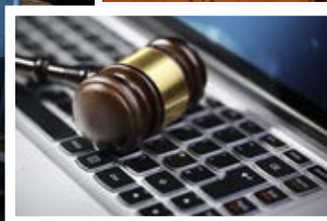

**Institute of Judicial AdministrationLushoto**
P. O. Box 20
LUSHOTO
TANZANIA
Tel: +255-27-2660133
Fax: +255-27-2660021
Websitehttp://www.ija.ac.tz



IS ICT LAW A DISCIPLINE WITHOUT JURISPRUDENCE? 6


23 Effective use of Information and Communication Technology in Judicial Systems: Tanzania and Other Jurisdictions in Comparative Perspectives


34 VIOLENCE AGAINST WOMEN IN TANZANIA: A CALL FOR AN ANTI-DOMESTIC VIOLENCE LEGISLATION

The Principle of Common Intention under the Tanzanian Penal Code: A Review of *Practice through Judicial Interpretation* 65

THE BANKERS' DUTY OF CONFIDENTIALITY: ITS ORIGINS AND PRACTICAL APPLICATION IN TANZANIA 78



52 THE WAR AGAINST IMPUNITY: THE FALLING BATTLE IN AFRICA



89 THE UNION IN TANZANIA: CHALLENGES AND OPPORTUNITIES AS TANZANIA STRIDES TOWARDS A NEW CONSTITUTION

# Editorial

This volume is the first issue of this journal. It has a total of seven articles. It is issued in commemoration of 19 years of anniversary of the Institute of Judicial Administration Lushoto and its 17th graduation. I am sure readers will find the articles in this volume interesting, informative and inspiring. While five articles are purely legal, the remaining two articles are on cross-cutting areas of Law and ICT.

I wish to commend the Editorial Board and Reviewers of the articles for the work well done in ensuring that the articles are of high standard and in conformity to our house style. The Publications Office was instrumental in ensuring that there were no errors introduced during the production process.

The first article in this volume is on "ICT and the Law?". In this article, Dr. Ubena makes a contribution to the understanding of ICT Law as a discipline. He argues that most legal scholars and practitioners in Tanzania are unfamiliar with the tenets of ICT Law. The article enquires whether ICT Law is a mature discipline in its own or it is an infant discipline that is devoid of any jurisprudence. The second article is authored by Mshana. It addresses "the use of Information and Communication Technology in Judicial Systems". In this article the author explores the effective use of ICT in judicial systems. Discussing Results of the study that he conducted; the author points out the advantages of using ICT in judicial systems. They include enhancing accessibility to justice, quality justice, transparency, cost effectiveness and carrying legal research. He concludes that with the effective use of ICT handling of court proceedings from filing to delivery of decision recorded and information about costs and delays involved in the process can instantly be obtained. The availability of such information will increase the accountability and efficiency of the judicial systems.

The third article is by Ms. Mwenegoha. The article is entitled "Violence against Women in Tanzania: A Call for an Anti-domestic Violence Legislation". It tackles the problem of violence against women in Tanzania. In this article, the author raises concerns on the efforts taken through amendment of several laws to overcome the problem. She argues that the scattered laws that were so far amended still have various gaps. In the final analysis, she argues in favour of enactment of a specific law regulating violence against women.

Mr. Samson authored the fouth article. The article is entitled "The War Against Impunity: The falling battle in Africa". Samson discusses how, armed conflict between people has in the modern world occurred within state borders, rather than between countries. The paper shows that internal conflicts imply that there will be civilian casualties, terror and torture, and exceptional detention. Therefore the civilian's populations become direct victims of terror and atrocities or indirect victims of displacement and deprivation. Samson argues that Africa has been particularly vulnerable to conflicts of identity, which have decimated populations and violated numerous human rights norms. The author uses Liberia, Sierra Leone, Sudan (Darfur), Libya, Cote d'Ivoire, Northern Uganda, Rwanda and the Democratic Republic of Congo as examples of this scourge.

Application of the Principle of Common intention as stipulated under section 23 of the Tanzanian Penal Code is critically examined by Mr Mtulya in the fifth article of this volume. The principle has it that when a number of persons engage in a criminal act with a common intention, each person is made liable as if he alone did the act. Mr Mtulya uncovers, through examination of decided cases, inconsistencies and uncertainties that are apparent in the judicial interpretation of the relevant provision. Finally, Mr Mtulya suggests general principles and circumstances that might need to be considered by the court in interpreting and applying the provision relating to common intention.

Dr. Mandopi's article ventures on origin and application of the bankers' duty of confidentiality in Tanzania. The article raises a concern on the duty of officials of the bank to observe the principle of confidentiality in their daily banking responsibilities. The principle of confidentiality binds the bank not to disclose the affairs of the customer of the bank to a third party. However, this is not the case in practice. In some circumstances, he argues, the law compels the Bank of Tanzania, commercial banks or financial institutions to disclose affairs of their customers' accounts.
The last paper in this volume is authored by Raulencio. He discusses the Union in Tanzania and the Challenges and Opportunities involved as the country strides towards a New Constitution. According to him, the Union formation was characterized by absence of public consultation and participation, personal interests, lack of constitutionalism and structural ambiguity. Raulencio argues that there are Union muddles rooted in anomalies characterizing the Union formation and operation. The muddles are posing challenges on the survival of the same. The author states that, in the year 2014/2015 the constitutional review process was inaugurated and therefore Constitution reforms in Tanzania is expected to offer remedies against Union challenges. He argues that through the review process there are several opportunities and solutions to the Union problems.

I am highly convinced that you will enjoy reading the articles in this volume. I would also take this opportunity to invite potential authors to submit their manuscripts for consideration for publication in our subsequent Volumes of this journal.

**Mr Mtulya, Fahamu**
*Editor- in- Chief*
**IJA Journal**

# IS ICT LAW A DISCIPLINE WITHOUT JURISPRUDENCE?

*By Ubena John**

**Key words**: ICT Law, Discipline, Jurisprudence


## Abstract

This article argues that ICT Law should not be looked at as immature discipline. Rather it should now be regarded as mature discipline. That apart from developing it's own methodology this new discipline is making a remarkable contribution to jurisprudence. There are several areas that present evidence of ICT Law's contribution to legal system such as admissibility and authenticity of electronic evidence, data privacy, access to information and cybercrimes to name but a few. This article therefore while depicting examples from Tanzania and other jurisdictions presents a case to justify the maturity of ICT Law discipline. Despite that there are some areas that may be regarded as weaknesses of the discipline such as being too techy, and that most components of ICT Law are found in traditional law areas. Meaning that the unique area of ICT Law is the intersection of law and ICT.


*LL.M, LL.D (ICT LAW , Stockholm University), Senior Lecturer in Law, Advocate of the High Court and Head of Department of Teaching and Learning, Quality Assurance Directorate, Mzumbe University. I am grateful to anonymous reviews for their comments, and Stockholm University and Mzumbe University where my interest and experience in teaching ICT Law was propagated since 2008.

### 1.1 Introduction

This article aims at making a contribution to the understanding of ICT Law as a discipline. Most legal scholars and practitioners in Tanzania are unfamiliar with the tenets of ICT Law. The article therefore charts out the path of ICT Law and examines the question whether ICT Law is a mature discipline in its own or it is an infant discipline that is devoid of any jurisprudence. The study is a result of a desk review of literature and Tanzanian case law on ICT Law in a global perspective. The findings indicate that despite divided opinions among legal scholars, ICT Law is now a mature discipline that has its own jurisprudence. The paper is organized as follows: Part 1, looks at the concept of ICT Law and presents the debate on whether ICT Law is a discipline. Part 2 focuses on theoretical and methodological foundations of ICT Law. Part 3 deals with contributions of ICT Law in legal theory. Part 4 examines the situation in Tanzania, and finally part 5 draws a conclusion and areas for future investigation.



### 1.2 What is ICT Law?

ICT Law deals with interaction between Law and ICT. It focuses on how legal rules interact with tools (ICT devices, applications, etc.).[2] It extends to control of human behaviour in the use of ICT such as criminalization of certain behaviours in the cyberspace. They include cybercrimes such as cyber bullying, and illegal access of computer system.[3] Moreover, this branch of law regulates the design, production and use of ICT devices and software. It also deals with how legal rules influences ICT development and how the latter influences the making of legal rules in a particular legal system. Furthermore, it regulates or legitimizes the deployment of ICT in public service delivery, such as e-government projects. This is because the adoption of ICT in public service delivery involves interpretation or translation of administrative law rules into computer programs.[4] In this respect, a question that arises is who makes the rules between legislature and computer programmer in the e-government system.

ICT law emerged as a response to challenges posed by technological advancement. A need for guaranteeing communication, interconnection, and interoperability also pushed for not only establishment of standards but also regulation of ICT.[5] ICT law started as a response to concerns about privacy violation which resulted from introduction of Electronic Data Processing through the use of Computer technology.[6] Connected with that, was the problem of Software protection.[7] The question that arose by then centred on how software (computer program) should be protected. In specific terms, the question was whether, computer program should be protected by copyright law or patent. There was consensus between Europe and USA. The USA allowed both copyright and patenting of computer software and the use of antitrust laws to protect software.[8] In Europe software became largely protected by copyright law.

Although it is generally assumed that ICT Law emerged in 1960s, it is implicit from historical perspectives that ICT existed perhaps 1000 or even more years ago. However, the name ICT Law was not in use at that early time. While tracing the history of ICT Law is not the main purpose of this article, it is worthy to mention some key developments without losing sight of the emerging information and communication technologies. The invention of writing (from oral communication to writing), paper (recording memory in paper instead of keeping it in human brain) and printing press are all but critical contributing factors to the upheaval.[9] To justify that ICT Law has some history, one may consider cryptography- technology used in electronic signature as an example. What is taken to be electronic signature today its foundation is Caesar's cipher technology of about 1000 years ago.[10]

As if the above is not enough, ICT Law as a discipline started to gain its shape in 19th Century. Its essence is the invention of Telegraph, Telephone, Radio, Television,

2 Seipel, P., 'Law and ICT - A Whole and its Parts,' IT Observatory Report, in SOU 2002:112; Seipel, P.IT Law in the Framework of Legal Informatics . In Wahlgren, P. (ed.), *IT Law, Sc. St. L. V.47*, Stockholm: Stockholm Institute for Scandinavian Law, 2004, pp. 31-47; Seipel, P., ICT Law-A Kaleidoscope View. In Wahlgren, P. (ed.), *ICT Legal Issues, Sc. St. L. V. 56,* Stockholm : Stockholm Institute for Scandinavia Law, 2010, pp. 33-58: Bing, Internationalisation and Constant Change, Sc. St. L., 2004

3 John, U., How to Regulate Information and Communications Technology, Jure AB, Stockholm, 2015; Schartum, D. W., Developing eGovernment Systems-Legal, Technological and Organizational Aspects. In Wahlgren, P. (ed.), *ICT Legal Issues, Sc. St. L. V. 56*, Stockholm: Stockholm Institute for Scandinavian Law, 2010, pp. 125-147.

4 John, U., Automation of Law, Tanzania Lawyer Journal, 2015.

5 ITU Convention of 1865 (it was established to formulate standards that will support communication, interconnection and interoperability of communication devices); see also s.5 of TCRA Act (outlining the duties of the regulatory authority among others to ensure availability of regulated service/communications and establishing standards); cf. s.4 of EPOCA, 2010.

6 See German Data Protection Act of 1971; Sweden's Data Protection Act of 1973.

7 See Depoorter, B., Technology and Uncertainty: The Shaping Effect on Copyright Law, 157 U. Pa.L. Rev. 2009, pp. 1831-1868 (discussing software protection).

8 See Berman, P. J., 'Computer or Communications? Allocation of Functions and the Role of the Federal Communications Commission,' 27 Fed. Comm. B.J., 1974, pp.161-230.

9 Bing, J., Internationalisation and Constant Change, in, ,. In P. (Wahlgren, IT Law, Sc. St. L. V. 47, 2004, pp. 11-30).

10 Jay Forst e-Signature seminar paper presented at the Faculty of Law, Stockholm University, Nov. 2011(discussing *inter alia* the origin of cryptography).

and much later in 1940s computer. While the Telegraph, Telephone, Television and Radio are data transmission technologies, the Computer on the other hand processes and stores data. Unlike the previous technologies, the computer has a data processer and data storage facility. The data transmission technologies as inventions were subject to regulation. Therefore, many of its inventors applied for patent to protect their inventions. Graham Bell is one of such inventors. He invented telephone and applied for patent in 1876. This shows that ICT inventions were regulated by Intellectual Property Law.

However, the first International initiative to regulate ICT emerged in 1865 under the so called International Telegraph Union. This was essentially controlled by the Western Union. After telephone invention, it was changed to International Telecommunication Union (ITU) in 1949.

It is important to note that during all this time, the regulation of telephone, Radio and Television was more of licensing for services. Actually the users were applying for licence. An example in this regard is the use of Radio service licence. By then the rate of telecommunication crimes was not as high as it came to be in 1980s. The concerns about Intellectual Property Rights were there but the challenges were not of large magnitude as it later came to be.

The development of data transmission technologies continued to progress until 1960s when computer came to be used for electronic data processing (EDP). Concern over its processing speed, and among other things its impact on privacy, came to the fore. And it was during that time that the need for laws was amplified. It should also be noted that, during 1960s and 1970s the convergence of Telecommunication, Broadcasting and Computers begun to take its own course.[11]

That was a time when many hidden regulatory challenges came to surface. The legislature, regulators and even consumers were left stranded. The laws were turned obsolete. The regulator was in a dilemma whether to deregulate some of ICT services or goods.[12]

In around 1970s, the US Army and Universities worked seriously in the computer research and how to interconnect various computer networks. With the convergence of telecommunication and computers finally the computer network called the Internet was invented and it was named ARPA NET. The Internet possessed many unique features (e.g. being decentralized and global) which at the beginning were not familiar to its inventors, users and regulators. It was very difficult to tame it. The Internet did not only kill the distance but also created vulnerabilities (e.g., emergence of cybercrimes). Hence, the OECD and European Community in 1980s begun to draw the framework through which such technology can be regulated.[13] But before that initiative became effective, in around 1995 the World Wide Web (W3) was invented (by Tim-Barnes Lee) to work with the Internet infrastructure. This invention made the Internet a global upheaval. The Internet which was originally seen as a military and University thing came to be a technology for everybody. This is what makes it interesting.[14] Thus, confirming Moore's law that the value of a network increases by the increase in number of users.

Apart from its usefulness, the legal challenges that Internet poses are so terrible that no government will manage to stay away from it. The challenges include, defying geographical boundaries (territories), challenging state sovereignty, increasing cyber vulnerabilities (cybercrimes such as electronic fraud, identity theft, vandalism, on-line child pornography and cyber terrorism).[15] The challenges were therefore escalated to the extent that the whole globe felt them.

At this juncture one may ask what happens if the dispute by its nature relates to ICT Law. However, such matters have not yet been legislated for and the knowledge of litigants, judges and advocates about the subject matter is equally limited.[16] The above brief detour of ICT Law is of no value if one does not explore the views of legal scholars about the discipline itself. There are two schools of thought. On the one hand, there are scholars who strongly believe that ICT Law is a matured discipline capable of standing independent of other legal disciplines. On the contrast, there are legal scholars who hold the view that ICT Law is not a discipline at all. The discussion below makes reflection on these opposing views.

### 1.3 Pro ICT Law discipline

There are several scholars who support ICT Law as a discipline. Their argument is that ICT Law is a mature discipline with its own defined area, methodology and even followers. The key argument is that ICT Law is an interdisciplinary study whose understanding requires knowledge of both ICT and Law. To understand electronic contract one must not only know the legal rules that govern formation, performance and discharge of contract but must also know the application of those rules in the electronic environment. This is important for example in determining when and where the contract was formed. Below is a presentation of some scholarly works and their contribution in ICT Law as a discipline.

Lee Loevinger in 1940s published an article called *Jurimetrics, The Next Step Forward*.[17] In this article, the author's focus was on lawyers use of scientific methods in their professional works. The article is believed to ignite the understanding of how computers could be used in legal profession. In 1960, Ray Freed wrote an article on Lawyers' computer maze.[18] This is probably the first article which spelled out clearly lawyers' use of computers in the firms and business.

In 1973, Collin Tapper published a book called *Computer and the Law*.[19] This was the first book trying to define the field of law that focused on interaction of computers and law. Following Tapper's book in 1977, Peter Seipel published his doctoral thesis called Computing Law.[20] The book attempted to set the ground and define the structure of new discipline which today is called ICT Law. This book among other things predicted the emergence of challenges of networked society, and problems like cybercrimes.

There were regional initiatives to understand computer technology and its legal issues. These included regional organizational response to the emerging cybercrimes. For example, the OECD and the European Community (EC) in 1980s initiated the Cybercrimes legislation. The legislation indicated how the governments should respond to these emerging unique crimes. In addition, the EC proposed the introduction of a new course for lawyers called computer law. The new course was designed for bachelor in law programme. The programme faced resistance from traditional lawyers who regarded ICT Law as nothing but computer application. Nevertheless, in countries like USA, Germany, France and Nordic countries the seeds of the new discipline started to be propagated. The invention of the World Wide Web and the global reach of such technology made it hard for countries to fight cybercrimes. The crimes became sophisticated. Sovereignty of states was threatened. The nature of cyberspace drew more attention of legislature from various

11 See Berman (n. 7 above); Federal Communications Commission Computer Inquiry Report I & II.

12 Deregulation of TV Broadcasting, see Berman (n. 7 above); Federal Computer Inquiries I, II and III.

13 See Seipel (2002).

14 Dertouzos, M., What will be-How the New World of Information Will Change Our Lives. New York: HarperEdge, 1997.

15 Wu, T. & Goldsmith, J., Who controls the Internet?: Illusions of a Borderless World, Oxford University Press, 2008.

16 See **Trust Bank Ltd case** (where the admissibility of computer print-out was a subject of discussion in that case and by then the legislature has not legislated for)

17 Loevinger, L.,Jurimetrics, the Next Step Forward,' Minnesota Law Review Vol.33, 1949, pp.455-493.

18 Freed, R., A lawyer's Guide Through the Computer Maze,' The Practical Lawyer, ABA,1960.

19 Tapper, C., Computers and the Law, London, Weidenfeld & Nicolson, 1973 Tapper, C., Computers and the Law, London, Weidenfeld & Nicolson, 1973

20 Seipel, P., Computing Law-Perspective on a New Legal Discipline, (Doctoral Thesis Submitted to Stockholm University), (Published in) Stockholm, LiberFörlag, 1977.

jurisdictions. That drew a need for G8 meeting in Bonn, Germany[21], and the WIPO meeting which ended in adoption of WIPO Copyright Treaties (WCT) of 1996 to address copyright challenges posed by technology changes such as digital technology. Alongside, the EC enacted the Data Protection Directive in Cybercrimes Convention in 2001. These are the most exported European legislation in ICT law.

The Internet and the Web also brought opportunities to government to deliver public service in efficient manner. This led to growth of e-government. But without ICT Law it would have been impossible to understand how e-government projects related to rules of administrative law like right to appeal and legal requirement that public institution should give reasons for a particular decision and how that can be done when decision making is computerised. In general, how rules and procedures under administrative law can be translated into computer programmes. How such translation can affect citizens' rights like right of appeal, duty to give reasons for decision.[22]The use of ICT to deliver public services extended to legal services. Several scholars support such development.

In 1996, Richard Susskind published a book on the future of law.[23] The focus of the book is on how ICT support and affect legal services delivery. In other words the focus of the book included the administration of justice conducted via ICT means. Susskind argued inter alia that legal profession will be affected by Information Technology and that it will open the profession to competition from other professions such as accountancy.[24]

Another ground was the work written by Lessig in 1999. It is titled *Code and Other Laws of Cyberspace*.[25] That is probably the first book to show how cyberspace can be regulated. It was published at the time when internet was thought to be borderless. That borderlessness frightened many law makers globally. Lessig showed how constitutional rights are affected in the cyberspace but he also showed how such rights may be restored and protected. He rightly contended that the code (architecture) may be used as law. Therefore, once the architecture of code is regulated then that code may be used to regulate behaviour in the cyberspace. This can nowadays be seen via digital rights management system used for protecting copyrighted works in the digital environment. The law legitimizes the use of code to secure copyright protection in the electronic world.[26]

In 2006 Koops and his friends published Starting Points for ICT Regulation.[27] This book is a regulatory toolkit assembling some strategies that may be adopted to regulate ICT. It examined among other things the use of code, the use of functional equivalence rule (what applies offline applies online), self-regulation. These strategies may be adopted by legislature in making the laws for regulation of ICT or control of behaviour of ICT users.

In 2008, Jonathan Zittrain authored *The Future of Internet and How to Stop It*.[28] In his book he takes the readers through a world that depicts threats posed by closed internet. He contends that the internet that threatens to take away the societal values brings in almost a perfect control. However, that development too has brought some threats, for example,. certain legal concepts such as ownership becomes licensing as well as goods become services. Software and electronic books are examples in this regard. They were originally regarded as goods but now they have become services. The purchasers turn from owners into licensees. These changes have significant impact on legal concepts and legal relations.[29]

Yet another scholar Chris Reed in 2012 published *The Making of Laws of Cyberspace*.[30] Among other things, this book presents an interesting case of what happens if the regulator or legislature does not understand regulatory environment. An example in that regard was electronic money directive which was enacted before the adoption of electronic money.The author used some of principles developed by Fuller to guide law makers in ironing out his arguments.[31] Having sketched the development of ICT Law and presented the arguments of scholars who support the discipline, the section below examines the shortcomings of ICT Law as a discipline.

### 1.4 Arguments against ICT Law

In presenting arguments against ICT Law a starting point may be the nomenclature problem. One of the many weaknesses of ICT Law is lack of clear name to represent the discipline. There are many names used to imply ICT Law these are Computing Law, Computer Law, Information Technology Law or IT Law, Cyber Law, Internet Law, and Information and Communications Technology Law or ICT Law. ICT Law has therefore been criticised for lack of nomenclature consistency. This can be illustrated by examining some of the names referring to the same discipline. The Computing Law placed more emphasis on the aspect of computing machines and their legal implications.[32] It should be noted that computing law emerged at the time when computing machines or data processing machines were dominant. The machines referred here included inter alia computers. However, the name Computing Law may be considered to include calculators and abacus, while in reality legal implication and regulation of latter devices are unknown.

As to Computer Law the focus is on legal aspects of computer uses. Computer Law has not been dominant because it is technology specific. It limited itself to what Computer does and how it affects the existing rights of people.[33] Therefore, the convergence of telecom, computers and internet caused Computer Law to lose its ground.

Information Technology Law on the other hand emphasized on the information processing and retrieval technology.[34] The main area was legal information retrieval system and its application to legal services. The advent of internet and its increasing use attracted some scholars to think that the Cyberspace cannot be regulated while others opposed such view.[35] Consequently, the buzz word Internet Law or Cyber Law emerged in the USA where the debate on regulation or non-regulation of internet was prevalent.

The invention of the World Wide Web that works on the Internet as the infrastructure led to the emergence of many services such as online market places. Moreover the convergence of telecom and Internet led to emergence of among other things Internet telephony. Other services that emerged included web TV, web casting, and Internet radio. The convergence of technologies brought regulatory dilemma. Regulators started to realize that the compartmentalised regulation is not ideal as it may be turned obsolete due technology changes and convergences.[36] The scholars also began to understand that the convergence relates to technologies primarily for information processing, storage, retrieval and communication and how these technologies and their uses affect law and vice versa. As a result the name information and Communications Technology Law emerged. That name embodies many technologies, their use and regulation. Apart from nomenclature problem as discussed herein above, there are other weak links that have been pointed out

21 Koops, B-J., et al, (eds.), *Starting Points for ICT Regulation,* TMC Asser Instituut, The Hague, 2006.
22 Schartum supra note 2; John, U., Automation of Law, 2015.
23 Susskind, R., *The Future of Law, Facing the challenges of Information Technology*, Oxford University Press, Oxford,1996.
24 See Susskind, R., The End of Lawyers, Oxford University Press, Oxford, 2010.
25 Lessig, L., Code and Other Laws of Cyberspace, Basic Books, New York, 1999
26 See s.44 of Copyright and Neighbouring Rights Act, [Cap 218 RE 2002].
27 Koops supra note 20.
28 Zittrain, J., The Future of Internet And How to Stop It, Yale University Press, New Haven, 2008.
29 See also John (2015).
30 Reed, C., Making Laws for Cyberspace, Oxford: Oxford University Press, 2012.
31 Ibid
32 Seipel supra note 19
33 Tapper supra note 18.
34 This is closely connected to IT Law is legal informatics (see Seipel 2004).
35 Barlow, J., *A Declaration of the Independence of Cyberspace* (1996, February 8th ), Retrieved May 30th , 2017, from Electronic Frontier Foundation: https://projects.eff.org/~barlow/Declaration-Final.html (he argued that the Internet cannot be regulated); Lessig 1999(he believed that Internet can be regulated).
36 Wessner, C. et al (eds.), The Telecommunications Challenge: Changing Technologies & Evolving Policies –US Technology and Science Report of a Symposium. Committee on the Telecommunications Challenge, Changing Technologies and Evolving Policies-USA Technology and Science Report. Washington, D.C.: National Academic Press, 2006.

by legal scholars.

**Glorifying the media** is one of the said problematic areas. Greenbaum for example views ICT Law as being centred on media and nothing more.[37] To him ICT is nothing but a medium for communication. It does not carry anything special to attract attention of legal theory and legal profession.[38]The core of ICT Law has also been criticised that it focuses more on media and not law as such. ICT or computer is a medium. Therefore ICT Law emphasis is thought to be on media which is ICT. But we do not have for example law of typewriter. It has however been argued that if there is not law of typewriters, why there should be computer law. The criticism though is in ignorance of the fact that ICT is more than media. Nevertheless, the understanding of ICT Law requires understanding of the underlying technology. Without understanding how the technology is designed, developed and how it is being used it would be difficult to regulate such technology. Moreover, regulation through technology i.e. the use of technology for law enforcement as being done in copyright law area requires the regulator to appreciate how that technology is developed and used so that one can understand legal implications of such enforcement mechanism.

Moreover, ICT Law has been criticised for **lack of focus**. ICT Law cuts across many law subjects. As such, if such subfields of law are reallocated back to their original fields, ICT Law is left with nothing.[39] For example electronic contract belongs to Contract Law, Cybercrimes – criminal law; electronic evidence – Evidence law, and e-government – administrative law. What was forgotten is the fact that to understand these areas require command of both ICT and law. Such interdisciplinary understanding is therefore crucial.

37 Greenbaum, E., Is the medium the message? A discussion of Susskind's The Future of Law, International Journal of Legal Profession, Vol. 6, Issue No.2, 1999, pp. 197-207(criticising Susskind's book the Future of Law as being ICT media centric).
38 Greenbaum (1999).
39 Guadamuz, A., Attack of Killer Acronym: The Future of IT Law, International Review of Law, Computers & Technology, Vol. 18, Issue No. 3, 2004, pp. 411-424.

There is also **lack of contribution of ICT Law to legal theory**.[40] Some scholars have argued that ICT has not made any contribution to legal theory. It is however not true that there are no contributions made by ICT Law to legal theory. It may be argued that ICT Law has contributed to emergence of new legal concepts such as digital property, Digital Rights Management (DRM), electronic book (eBook), software as a service (Saas), Infrastructure as a Service (IaaS), and electronic signature (eSignature). In some jurisdictions, these concepts have acquired legal recognition. In that way they have increased legal concepts and new legal relations have emerged. In addition to that understanding of cybercrimes, electronic contracts and electronic evidence all have been contributed by ICT Law. Without ICT Law therefore these concepts would hardly be understood by legislature, judiciary and even citizens.

Another quagmire in ICT Law is **the proliferation of many sub disciplines** such as Artificial Intelligence (AI). One among problems of ICT Law is the risk of sub fields breaking away such as AI, and Privacy Law. For that matter even cybercrimes law experts may equally demand or form their own branch. Instead of keeping the pieces together they are dispersing. The discipline will eventually lack unity.

### 1.5 Requirements for establishing a discipline

In this section, there is no attempt to make a detailed discussion on requirements for establishing a new discipline. Therefore, there are a few aspects that are worthy of discussion. In making arguments for ICT Law as a discipline one ought to consider its jurisprudential foundations. This is a requirement of developing a new discipline. Another requirement is methodology. The discipline must have its own methodology, namely, theoretical foundation and methods which are used in studying some of its

40 Guadamuz (2004).



aspects.[41] The clarity of such methodology is paramount. For ICT law the methodology is a combination of various methods, interdisciplinary approach, system theory, and legal instrumentalism.

Another requirement of a discipline is the **Acceptance of its paradigm** among the professionals in the mother field.[42] In the case at hand the mother field for ICT Law is Law. For that matter the paradigm brought by ICT Law ought to be accepted by certain group of people among the professionals in legal profession. If such group does not exist then the paradigm of ICT Law is not accepted and consequently its prophecy is scientifically unfounded.[43]

### 1.6 Is ICT Law a discipline?

From the above requirements a conclusion may be drawn that ICT Law is a discipline as it has followers who support its paradigm. Moreover, the discipline has its methodology though it is a combination of certain aspects from various theories. Further to that ICT Law has made a number of contributions in e-Government. They include interpretation of rules or translation of rules into codes; setting legal rights and liabilities online-safeguarding trust and reliability in e-Commerce. In addressing Cybercrimes, the contribution included defining crimes, investigation (prosecution procedures) and admissibility of electronic evidence.

### 1.7 Dimensions of ICT regulation

ICT Law may also be understood from its functional perspective. In that way one may ask how ICT is seen in action. As such, for traditional conservative lawyers, ICT is business as usual and therefore there is not anything new in ICT Law. Thus, where there is an emerging issue the usual process is to use old laws to regulate it. A commonly cited example is *Online and offline equivalence principle*. The rules applied in offline can also apply online.[44] This is good as laws are broadly drafted and future development is foreseen. Therefore, when new developments emerge there is no need to enact new laws. Alternatively, reliance may be placed on the judges who will interpret the law broadly or they will fill the gaps left by the legislature.[45] But this assumption may not always work especially where the emerging legal problem posed by new technology is unfamiliar and the existing laws are unfit to address that the problem. For that matter the making of a new law is considered necessary.

ICT legal issues are new and they need new laws, legal system and legal personalities accorded to electronic agents.[46] There is an assumption that some of legal issues that have emerged cannot be regulated by existing laws and they require not only new laws but also new legal systems. More controversy is in the fact that some scholars sought even to suggest creation of legal personalities to electronic agencies.[47] However these turned not to be reality softwares which have not been accorded legal personality. It is noteworthy that in the virtual world there are in existence characters which in the future may be accorded legal personality. This however will only be possible when virtual world is legally recognized and legal relationships in that world are legally regulated.

The last dimension is that ICT is too new to be regulated.[48] The technology involved is frequently changing such that it is regarded as a moving target. The law cannot be flexible enough to keep pace with such changes. Moreover, when technology is new it is hard to regulate it as it can change at any time leaving the law obsolete. Therefore, the legislature may adopt hands off approach

41 Seipel (1977).
42 Kuhn, T.S., The Structure of Scientific Revolutions, University of Chicago Press, London, 1962, pp.10-22 and 43-51; Seipel (1977)
43 Kuhn (1962); Seipel (1977).

44 Koops supra note 20.
45 See Calabresi, G., A Common Law for the Age of Statutes, Harvard University Press, Cambridge, Massachusetts, 1982.
46 Bennett Moses, L. (2007, April 11th). *Recurring Dilemmas: The Law's Race to Keep Up With Technological Change*. Retrieved on May 30th, 2017, from Social Science Research Network (SSRN): http://papers.ssrn.com/sol3/papers.cfm?abstract_id=979861 .
47 Bygrave, Electronic Agents and Privacy: A Cyberspace Odyssey, International Journal of Law and Information Technology, Vol.9, No.3, 2001, pp.275-294.
48 Barlow (1996).

leaving the market to regulate itself.[49] The problem with such dimension is that minority and consumers' interests may be at stake.

## 2. Theoretical and Methodological Foundations of ICT Law

In many ways ICT Law is unique. It is the branch of law that is not limited to particular legal system, it cuts across public and private law, international and municipal laws, public international law and private international law, Civil and Criminal law, and substantive and procedural law. It is neither limited to common law nor to civil law legal systems. It is equally a discipline that bridges ICT and Law. These features make methodology of ICT Law rather complex.

To appreciate the methodology of ICT Laws, the interaction of technology and legal rules must be understood. Therefore, its jurisprudential school should be understood and methodology of ICT should also be appreciated. In addition to that tool application and tool regulation is equally important. One ought therefore to understand the development, uses and regulation of ICT devices.[50] As stated earlier, clarity of methodology is an important requirement of any discipline. ICT Law combines several theories as discussed herein below.

While theories and methods of natural science are relevant to the study of ICT such as experimentation, empiricism and observation, they may not be core aspects of ICT Law. Nevertheless, those methods are crucial in understanding how computer systems are developed. In this respect, regulation will become effective if such aspect is understood. It should however be observed that ICT Law is not really about being technology designer (IT developer), rather it is about appreciating how technology design and development goes about. If this requirement is not met it may be difficult to regulate ICT.[51] The paragraphs below provide some hints on this.

49 Wahlgren, P., IT and Legislative development, *Sc. St. L. V. 47*, 2004, pp.601-617; Lessig, 1999 (market as a regulatory mode).

50 Seipel (2004).

51 Seipel (1977); John (2015).

The first theory that forms part of ICT Law theoretical foundation is *jurimetrics*. The focus of the theory is on the use of scientific methods in the study of law and legal profession generally. The theory has been embraced in ICT Law because it emphasized on the use of scientific method which is relevant to ICT. The other theory is *Cybernetics* postulated by Nobert Wiener. Cybernetics is a study of control in animals and machines.[52] Cybernetics is relevant to control of human through machines. In ICT Law the use of technology for controlling human behaviour is increasingly being accepted. A good example of application of cybernetics in ICT Law is the use of antivirus secures computer against computer viruses and the use of DRM in securing copyright protection.

System theory is another theory that form part of ICT Law theoretical foundation. Under system theory some fields such as Legal informatics and legal system management[53] are included. Legal informatics focus is on the application of ICT in managing legal information. It is thus relevant in legal information retrieval. Legal system management on the other hand concentrates on development and management of information systems in legal perspective. It therefore relates to design and use of certain applications to address legal problems. It is somehow related to cybernetics. However, although the latter restricts itself to control of behavior, the former extends to even addressing legal implication of use ICT applications to regulate behaviour. Example of areas where legal system management is important is in the use of Privacy Enhancing Technologies (PETs) to secure privacy.

Besides the above theories, interdisciplinary approach has now been accepted as the centre of ICT Law. Twining and Loth argue for interdisciplinary method in which law is a dominant field.[54] ICT Law combines the methods of legal and non-legal discipline. In so far as the interdisciplinary approach is concerned, one ought to remember *de lege lata a*nd *de lege ferenda*.[55] With de lege lata, the focus area is law as a closed system. This means law as it is, and should therefore only focus on legislation and case law. *De lege ferenda* focuses on law as it ought to be. This allows for application of non-legal issues to improve the law.[56]

Last but not least, there is legal instrumentalism which aims at achieving certain purpose.[57] Therefore, the assumption is that law is meant to achieve certain end. Legal instrumentalism is applicable in ICT Law. It is particularly so in the application of computer programs for achieving effectiveness of law enforcement. A discussion as to whether the use of ICT to enforce the law is in conformity to fundamental rights is beyond the scope of this paper. Application of legal instrumentalism is explicit in the so called regulation through ICT. An example is in adoption of DRM to effect copyright law in the digital environment. What one may gather from the above discussion is that ICT law is not only a discipline but it has contributed to legal theory. The following section examines the contribution of ICT Law to legal theory.

52 Weiner, N., Cybernetics or Control and Communication in the Animal and the Machines, MIT, 1965.

53 Seipel (1977); Luhmann, N., Introduction to Systems Theory, Polity Press, 2012.

54 Twining, W., Law in Context: Enlarging a Discipline, Oxford, Oxford University Press, 1997.

## 3. The contribution of ICT Law in the legal theory

As discussed in the section above, there are certain scholars who have contended that ICT Law is devoid of any contribution to legal theory. This section therefore provides rejoinder to that argument. One notable contribution of ICT Law is how ICT can be used as a tool for law enforcement. It has been observed that ICT has restored copyright from deformation posed by digitalisation and the Internet.[58]

Another contribution to legal theory is on children protection online. The children have been left vulnerable due to advent of Internet. The predators are taking advantage of anonymity to lure children online. To protect children online the law in some jurisdictions such as USA has set requirements that manufactures of TV sets to embed them with technology that enable children protection e.g. parental control. Moreover, software developers especially those developing operating systems are required to ensure that the software have an option of creating user access accounts for children and grownups. Microsoft has implemented this requirement in its operating system.

Apart from the above contribution ICT Law has enabled legal theory to appreciate application of computers or ICT in public service delivery. This is known as *Computer legis* i.e. the use of ICT (as a tool) to assist governments in reaching out to the citizens (e-Government). Through that it enhances democracy and the rule of law as it facilitates citizens to participate in decision making. Along that ICT as a tool has played a great role in assisting the law makers to improve quality of legislation (during PLI, drafting, communication-promulgation, enforcement and monitoring and evaluation). One question that emerged is whether legislation published online is more authoritative than the paper legislation. That however depends on the law that regulates law making and promulgation of laws.

Moreover, ICT as a tool has played a significant role settling disputes. The reference is made to online dispute resolution (ODR). It was ICT of all the technologies that has come to rescue the overturned judicial system in many legal systems.

55 See Schrama, W., How to Carry Out interdisciplinary legal research –Some experiences with interdisciplinary research method, Utrecht Law Review, pp.

56 See also Seipel (2002).

57 See Von Jhering, W., or Law as a Means to an End,' 13 U. Chi. L. Rev. 87, 1945- 1946, pp.71-89; Summers, R.S., Instrumentalism and American legal theory, Cornell University Press, Ithaca, 1982; John (2015).

58 Gillespie, T., *Wired Shut-Copyright and the shape of digital Culture*. Cambridge, Massachusetts: The MIT Press, 2009; Fujita, A.K., The Great Internet Panic: How Digitization is Deforming Copyright Law, Journal of Technology Law and Policy, Vol. Vol.2, 1996, http://jtlp.org/vol2/fujita.html#ren101 visited on 30th May 2017.

ICT as a tool has profoundly changed the outlook of modern legal profession.[59] It has contributed to access to legal services. Lawyers are now being reached via mobile phones. Furthermore, clients can now get legal services such legal advice online. Clients may also access contract templates online.

It will be a mistake to assume that the tool functionality and its impact on the legal system is a minor thing that has no effect on the legal theory. Besides, to understand all that it needs specialization hence ICT Law. Some scholars such as Twining and Loth have supported the vision that interdisciplinary approach so as to widen the context of law is a good idea.

## 4. Position in Tanzania

In examining whether ICT Law is a discipline with or without jurisprudence the situation in Tanzania was revisited. The jurisprudence of ICT Law in Tanzania is divided into three pillars, the legislative, judicial and legal scholarly works.

To begin with scholarly works, there are several of them that have been written by Tanzanian scholars. There are dozens of articles that have been published. There are more than thirty dissertations which have been written at PhD, Master and undergraduate levels. A number of books have been published, that focus on ICT Law in Tanzania.[60] These scholarly works have not only contributed to understanding of ICT Law among legal fraternity but also to law students and community at large. The publications have also contributed to law reforms. The enactment of laws such as EPOCA and ETA have somewhat been contributed by commentary by legal scholars.

59 Susskind supra note 22; Susskind, R., Transforming the Law, Oxford University Press, 2010; Susskind,supra note 23.

60 Lukumay, Z., & Mollel, A., Electronic Transaction and Evidence, Peramiho, 2007; Mambi, A., ICT Law – A Source of East African Community, Mkuki na Nyota, Dar es salaam; John(2015); Makulilo, A.B., (ed.), Data Privacy Laws in Africa, Springer Verlag, Berlin,2016.



Apart from legal scholarly works, academic institutions have introduced new Courses in the Law Faculties/schools: MU - ICT Law; UDSM - Economic and Cybercrimes; OUT - LLM in IT & Telecom Law. At the moment Tanzania has one centre or institute for ICT Law established in 2017. It is called African Law and Technology Institute located in Dar es salaam. This institute is still a new and much cannot be said about it. Meanwhile, one may wish to note that there is no university in Tanzania that has ICT Law as a research agenda.

### 4.1 Legislative development

To start with legislative development, several enactments have been made to respond to changes brought by ICT in particular the Internet. In early 2003, the legislature enacted the TCRA Act which established the TCRA, its functions, powers and duties. The TCRA under that Act is the regulator of communications including electronic communication in Tanzania. In 2006 and 2007 the legislature amended the Tanzania Evidence Act via written Laws Miscellaneous Amendment Act No.2 and Written Laws Miscellaneous Amendment Act No. 15 of 2007. These laws were amended to provide for admissibility of electronic evidence in banking transactions and in criminal proceedings. In 2010 the legislature enacted the Electronic Postal Communications Act (EPOCA), which aimed at regulating electronic communication in Tanzania. In 2013 the legislature amended Tanzania Evidence Act (herein after referred to as TEA) to provide for adducing of evidence via video conferencing. As that is not enough the legislature enacted ETA in 2015 to provide for among other things, recognition of electronic contracts, electronic signature and admissibility of electronic evidence in civil proceedings, and finally the legislature in 2015 enacted Cybercrimes Act to criminalize certain behaviours or acts in the cyberspace.

### 4.2 Case law

While at the moment there is still no Court of Appeal of Tanzania decision strictly focusing on ICT Law, however the Court of Appeal of Tanzania made important observation in **Tanzania Cotton Marketing Board v. Corgecot Cotton Company SA [1997] TLR 165** case where court interpreted widely the meaning of registered post under rule 4 of Arbitration Rules of 1957 taking into account development in communication technology. Consequently registered post extends to DHL. However as will be shown here in below there are several High Court of Tanzania decisions that deal with certain aspects of ICT Law particularly the issue of admissibility and authenticity of electronic evidence. In the following section some of the issues that confronted the High Court in determining the admissibility of electronic evidence will be discussed.

To start with there is **Trust Bank Ltd v. Le Marsh Enterprises Ltd, Joseph Mbui Magari, Lawrence Macharia, [2002] TLR 144.** This case dealt with the question of admissibility of computer print-out of bankers' book. The court admitted the same though it gave obiter dicta that the legislature should enact the law to provide for admissibility of electronic evidence.

There is also the case of **Lazarus Mirisho Mafie and M/S Shidolya Tours and Safaris v. Odilo Gasper Kilenga alias Moiso Gasper, Commercial Case No.10 of 2008, HC Commercial Division at Arusha** (Unreported). In this case there was a preliminary objection on the admissibility of email as evidence. The court observed that at that time there were no court rules on admissibility of electronic evidence in civil proceedings. The court further noted that standard for determining the authenticity of electronic evidence was missing. The court further explored the issue of authenticity of email as evidence. It also inquired into the standard for authentication needed before electronic evidence can be admitted. According to the court authentication goes to the weight to be attached by the court to the email in the event it is admitted in evidence. The court provided some guidelines on how to admit electronically stored information. Consequently, the court construed and extended the definition of the term "document" to include evidence generated from computers including e-mails subject to the general evidential rules on documentary evidence under Part III of TEA, [Cap 6 RE 2002].

Another interesting decision is the case of **Exim Bank (T) Ltd. v. Kilimanjaro Coffee Company Limited, Commercial Case No. 29 of 2011(HC Commercial Division at Dar es salaam) (unreported)**. This case set procedure for authentication of electronic evidence. In this case a preliminary objection was raised against tendering by PW1 of print out statements extracted from an account operated by the defendant at the plaintiff's bank on two grounds: (i) failure to prove that the print out statements in the entries of the alleged bank accounts were made in the usual and ordinary course of business of the bank and that the statements were in the custody or control of the plaintiff's bank (s.78 TEA). (ii) There is no proof that the printed out statements or documents were examined with the original entries and certified to be correct as required by s.79 TEA.

After proving that the books were made in the usual and ordinary course of business and whether they are in custody or control of the plaintiff's bank, the next question is how such proof can be given in court? The court observed that the Written Laws Misc. Amendment act No.2 of 2006 and the Act No. 15 of 2007 do not provide for admissibility or receiving of electronic record in civil proceedings generally but they apply in criminal proceedings and banking business.

Section 78(2) of TEA provides that proof may be given orally or by an affidavit of a partner

or officer of the bank. However, electronic evidence must be authenticated because of the potential for unauthorized transaction or of the processing of such evidence. In addition to that there is a need to know the history, source and custody of such kind of evidence.

For that matter the prints out statements are to be certified and maintained by the bank in a written form, the conditions must be met;

1.1.1 The print out statements must be accompanied with certificate written at the foot of such print outs that it is a true copy of such entry and that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of the business as well as such a book is still with custody or control of the bank.

1.1.1 A certificate that the print out statements were obtained by electronic process which itself ensured accuracy of the print out, dated and subscribed or signed by the principal accountant or manager of the bank.

Besides other tests for guiding the court in admitting electronic evidence such as hearsay rule, authenticity, relevancy, unfair prejudice, there must be a statement made by a declarant offered to prove the truth of its contents which excludes hearsay or covered by one of the exceptions to the hearsay rule. The other tests are that electronic evidence should pass test of original writing rule. This rule requires that a party relying on electronic evidence must be prepared to introduce an original, a duplicate original or be able to demonstrate that one of the forms of secondary evidence is admissible.

The party who want to rely on such evidence must prove that the original is authentic in the form of audit trail and that the evidence has not been altered since the date it was retrieved short of that such evidence may be rejected by the court.

Apart from that certificate that certify that the print out as a true copy of such entry and that entry is contained in one of the ordinary books and was made in usual and ordinary course of business and that such book is still in the custody or control of the bank there must be another certificate to show that such print out statements were obtained by an electronic process with in itself ensured accuracy of the print out. The two certificates must be drafted and signed by the principal accountant or manager of the bank with his name, signature and official title.

Under section 78 and section 79 of TEA it is unclear that electronically generated information in the form of print outs should be accompanied by:

(a) A certificate that certifies it is print out of such entry certified by the principal accountant or manager of the bank;

(b) A certificate by a person in charge of computer system containing a brief description of the computer system and particulars of;

(i) The safeguards adopted by the system to ensure that the data is entered or that any other operation is performed by authorized persons;

(ii) All safeguards adopted to prevent and detect an unauthorized change of data;

(iii) The safeguards available to retrieve data that is lost due to systems failure or any other reasons;

(iv) The manner in which data is transferred from the system to removable media like floppies, discs, copies or other electro-magnetic data storage devices;

(v) The mode of verification in order to ensure that data has been accurately transferred to such removable media.

(vi) The mode of identification of such data storage devices

(vii) The safeguards to prevent and detect any tempering with the system and;

(viii) Any other facts which will vouch for the integrity and accuracy of the system.

There must be a further certificate by the person in charge of computer system certifying that to the best of his knowledge and belief the computer system operated properly at the material time when he was provide with all the relevant data and the print out in question represent correctly or is appropriately derived from relevant data. The court sustained the objection because the above requirements were not satisfied.

The other case that is worth examining is **William Mungai v. Cosatu Chumi, Election Petition No.8 of 2015 (HC at Iringa) (Unreported)**.

A preliminary objection was raided against admission of audio CD prayed to be tendered in court by PW14 as part of his evidence in respect of interview held between Ebony FM Radio and the 1st respondent (RW10).

Section 64A(1) TEA [Cap 6 RE 2002] provides that electronic evidence is admissible in any proceedings. The admissibility and weight of electronic evidence shall be determined in the manner provided under s.18 of Electronic Transactions Act (ETA) of 2015. The court admitted the audio CD.

The court reiterated section 18(1) of ETA which provides that in any proceeding, nothing in the rules of evidence shall apply so as to deny the admissibility of data message on the ground that it is a data message.

Section 18(2) of ETA provides that:

In determining admissibility and evidential weight of data message, the following shall be considered:

(a) The reliability of the manner in which the data message was generated, stored or communicated;

(b) The reliability of the manner in which integrity of the data message was maintained;

(c) The manner in which its originators was identified; and

(d) Any other factor that may be relevant in assessing the weight of evidence.

Section 18(3) of ETA provides for presumption of the authenticity of an electronic records system in which an electronic record is recorded or stored in the absence of evidence to the contrary.

In the case at hand the court was satisfied that PW14 possessed reasonable knowledge and electronic gadgets meetings the determining factors prescribed by section 18(1) and (2) of ETA. Therefore, the objection raised was overruled.

Last but not least is the case of **Emmanuel Godfrey Masonga v. Edward Franz Mwalongo [2016]** where a preliminary objection was raised against admissibility of Video Compact Disc (VCD) sought to be tendered as evidence in election petition.

The video clip recorded by PW6 in a cell phone which later got lost but before it was lost the video clip was already sent to the petitioner who later sent it back to PW6's new cell phone and from this it was eventually translated into VCD. The question whether such VCD is admissible as evidence?

This was objected on the ground of reliability and authenticity.[61] Electronic evidence is admissible but subject to conditions set out in section 18(2) of ETA.

The court rightly observed that when admitting VCD there is risk of manipulation of the contents as they are electronic data. The court lamented that no evidence was given to prove that the computer from which the VCD was made could not be accessed by any other person.

Neither can it be said that the manner in which it was communicated from PW6 to the petitioner and back to PW6 was such that any possibilities of manipulation could be excluded. Nobody can be sure what has been recorded in the VCD was actually what was in the scene of event. Here the issue of chain of custody arises.[62] This article does not give a detailed discussion of chain of custody but since it is relevant to ICT Law the section below gives some highlights.

Apart from above shortfalls noted in the evidence sought to be tendered the model of the cell phone that was used to capture the clip was not stated. The court went on observing that no police loss report was tendered to support the claim that the phone was lost.

The issue is whether the VCD is admissible. If admissible the next question is how is it admissible? Whether the VCD can be admitted as evidence as prayed by the petitioner or whether it should be rejected as objected by the respondents?

The court referred many cases on admissibility electronic evidence in Tanzania from **Trust Bank,Exim Bank, Mirisho to Salum Said v. DPP** (Zanzibar High Court at Vuga).[63] In the latter case the though a criminal case, the court provided some guidelines on admitting VCD as follows;

61 See s. 18(2)(a),(b),and (c) of ETA
62 See also Paulo Maduka's case(for detailed discussion on chain of custody).
63 HC of Zanzibar at Vuga.

(a) The accuracy of the recording can be proved

(b) The voices are properly identified

(c) The evidence is relevant and otherwise admissible.

While section 64A TEA provides for admissibility of electronic evidence in any proceedings, section 18 (2) of ETA provide for criteria for admissibility and evidential weight of data messaged. The latter criteria are similar to those stated in **Exim Bank's case**. The counter rightly noted that under section 18 of ETA authenticity is the key issue. It went further observing that section 18(3) ETA deals with authenticity of electronic records.

The section provides that authenticity of electronic records sought to be tendered can be presumed if:

(a) There is evidence to suggest that computer system or device was operating properly or if it was not it did not affect the integrity of electronic record and the are no reasonable grounds on which the doubt the authenticity of the electronic record.

(b) It is established that the electronic record was recorded or stored by a party to the proceedings who is adverse in interest to the party seeking to introduce it; or

(c) It is established that an electronic record was recorded in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record.

Besides authenticity of electronic records the court give remarks on the issue of **chain of custody.** The electronic data changed hands physically and electronically to the extent that it waters down its authenticity.

According to the court, in criminal proceedings, failure to lead evidence providing a full proof chain of custody of potential exhibits is fatal to the prosecution case.[64] In this case the Court of Appeal of Appeal of Tanzania described what chain of custody mean:

> *"By chain of custody we have in mid the chronological documentation and or paper trail showing seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronic. The idea behind recording chain of custody is to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance having been planted fraudulently to make someone appear guilty… the chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody could have accessed it."*

The court further cited an article by Carmen R.C. Ferrer "Electronic Evidence: Admissibility"[65] which had it that:

> *"…it requires that evidence is stored in a manner where it cannot be accessed by unauthorized personnel, and the location of the evidence from the moment it was collected to its presentation at trial needs to be traced."*[66]

The question whether the evidence tendered is original was discussed too. Since the device (cell phone) in which the video clip was recorded was lost it means the evidence sought to be tendered by PW6 was not original. It is rather secondary evidence.

The evidence/data sought to be tendered was recorded and produced into copies of VCDs by PW6 who is not adverse in interest to the party seeking to introduce it in evidence. Therefore, the electronic record/data in terms of section 18(3)(b) ETA is inadmissible.

64 See Paulo Maduka & Others v. R. Criminal Appeal No. 110 of 2007.
65 Ferrer presented his paper in ISACA Conference in 2006.
66 Quoted in Masonga v.Mwalongo pp. 27-28.

The court further observed that, it has not been established that the video clip (VCD) was recorded and stored in the usual and ordinary course of business by the a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record. Moreover, PW6 did not tell whether his usual and ordinary business is to record speeches in campaign/meetings or any other meetings.

The court went on remarking that the fact that he sent the video clip to the petitioner it suggest that he was acting under the control of the petitioner in whose interest the VCD is sought to be tendered. These contravene section 18 (3)(c) of ETA and hence inadmissible. Consequently the court sustained the preliminary objection and refused to admit in evidence the VCD.

At this juncture and evidenced from the above issues as revealed by the cases cited electronic evidence requires knowledge of ICT Law. Appreciating the risk of manipulation, accounting for chain of custody and to guarantee its authenticity are central matters that ICT Law may offer contribution. Apart from electronic evidence there other cases that are relevant when one discusses ICT Law in Tanzania such as **Jebra Kambole v. A.G., 2015** (unreported) (the court declared inter alia that section 50 of Cybercrimes Act to be an anomaly as it gives power to DPP to compound offences without giving the accused person an opportunity to defend himself). However, we did not discuss that into details as this article did not aim at discussing the entire jurisprudence of ICT Law in Tanzania. That deserves its own article.

Although these decisions have not reached Court of Appeal of Tanzania where justices of appeal could have an opportunity to develop the jurisprudence in this branch of law, the understanding of electronic evidence requires

knowledge of interaction between law and ICT Law. This is particularly vital when issues of authenticity of electronic evidence is challenged or objected in the court of law. In such situation the court and advocates ought to possess such vital knowledge otherwise the evidence so admitted may risk being manipulating or fabricating. That could consequently lead to miscarriage of justice

## 5. Conclusion

It is not hard to notice the ICT Law's contribution to the legal theory. With the increasing obsolescence of law, ICT Law paradigm makes more sense to adopt. Apart from that, the rich literature in the area reveals that the discipline is mature. It must not be forgotten that legal theory is not static. With this note, ICT Law is a discipline like any other legal discipline. But it must be remembered that a discipline emerges, grows and it can as well die. Moreover, there is no discipline that is immune from criticisms. What is crucial to be noted is the contribution of ICT Law to legal profession and legal system generally.

This study therefore depicted in a brief manner the development of ICT law and attempted to show that ICT Law is a discipline. In a study of limited space like this one it is hard to cover everything that is deemed relevant. Therefore, there are some areas which though relevant were not covered due to space constraint. These are the areas for future investigation. The said areas are methodology of ICT Law and a detailed analysis of development of jurisprudence of ICT Law in Tanzania.



# EFFECTIVE USE OF INFORMATION AND COMMUNICATION TECHNOLOGY IN JUDICIAL SYSTEMS: TANZANIA AND OTHER JURISDICTIONS IN COMPARATIVE PERSPECTIVES

**Juma Ally Mshana** *


## ABSTRACT

*The aim of this research was to explore the effective use of ICT in judicial systems. The research utilised both triangulation research methodology which employed both qualitative method and a morsel quantitative method to investigate the effective use of ICT in Judicial systems. A sample of 250 judicial staff including 15 judicial ICT staff was given questionnaires to fill and some of the staff were interviewed by face to face. Results of this study indicate that, the biggest advantages of using ICT in judicial systems are accessibility to justice, quality justice, transparency, cost effectiveness and carrying legal research. It is therefore concluded that the handling of court proceedings from the stage of filling to the deliverance of the decision has to be recorded and information about costs and delays made available. Indeed the availability of this information will increase the accountability of the judicial systems and would thereby increase its efficiency.*


**Keywords:** Judicial systems, Case management system, and ICT

## 1. INTRODUCTION

Information Communication Technology (ICT) is an umbrella term that covers all technologies for the manipulation and communication of information. The use of ICT is considered one of the key elements to significantly improve the Judicial Administration. "Around the world, several statutory reforms have been introduced to allow the use of exchange of electronic data and documents within the national judicial systems but also between them and supranational courts"[2].

* MBA-ITM (COVENTRY UNIVERSITY-UK), ADIT (IAA-TANZANIA), Assistant Lecturer,
Secretary-editorial board -IJA journal, Coordinator- Diploma programmes, Institute of Judicial Administration Lushoto, Reviewer- African Journal of Information Systems.

2 Marco, Velcogna "*The use of information and communication*

In Tanzania there is no any clear legal requirement that enforces the uses of ICT in judicial systems. It is only in 2017 that the government has come out with a draft proposal known as ***the Judicature and Application of Laws (Electronic Filing) Rules, 2017*** that seek to allow the uses of electronic documents in the court. Clause 10(3) of the proposed rules reads thus:

*'Notwithstanding any provision under these Rules, the Registrar or the magistrate in-charge may allow a document, part of a document or any class of documents to be filed, served, delivered or otherwise conveyed other than by using the electronic filing system[3]'*

The availability of web services, the possibility of consulting online court registers, legislation and case law, the use of electronic filing, the electronic exchange of legal documents, are only some examples that are spurring judicial administrations around the world to rethink their current functions and activities. ICT can be used to enhance efficiency, access, timeliness, transparency, accountability, thus helping judiciaries, to provide adequate services. Apart from that, the files and case management systems will be electronic ones. This will make sharing and retrieving of documents easier[4]. New possibilities are emerging for the integration and automation of court procedures and practices. In addition, the use of the internet, can offer the chance to open the judiciary to the public by providing both general and specific information on its activities, thereby increasing the transparency in the dispensation of justice.

Reducing the length of judicial proceedings, improving efficiency and effectiveness, and the more general objective of promoting confidence in justice system through the use of technologies are laudable aims and are unlikely to generate much dissention.[5] However, given the nature and importance of the judiciary as one among the pillars of the state authority and compared to other public services, due process, impartiality and independence should also be carefully taken into account. This is especially when structural and procedural changes such as the ones driven by the introduction of technology, take place.

The extent and success that the use of ICT have had in other areas, particularly the management of public services, has meant that during the last decade the judicial powers from the majority of developed countries have started to implement electronic solutions in the government and administration of its services. There is little doubt that the capacity, turnover and output of judicial system could be markedly improved and that ICTs could contribute to the most efficient way of achieving that improvement.

It is often expounded that since the domains of Law and Justice are bound by a superfluity of procedures, the resistance to change is strong. Certainly, there is a lot of reason in this analysis. However, it is also possible that the slow uptake and problems encountered in the introduction of ICTs into the world of Justice not taking into account the peculiarities and specific problems of each country could also lie with the need of judges and lawyers to minimise the risks implied by the implementation of new methods of courts management where the consequences on the global system have not yet been fully evaluated. In a very uncertain territory, there is nothing lawyers fear more than uncertainty. If you ask the real actors such as judges, lawyers, prosecutors, and other legal practitioners their opinions, the answer is always the same: technologies YES, but they have to guarantee the basic principles of legal certainty, integrity and authenticity of documents, data privacy and an independent judiciary. Ubena writes,

> *'It has been noted that automated systems are often collecting, and processing data. However, if such data is not well secured it may illegally be shared or sold to marketing companies which may amount to infringement of person's privacy. The risk here is not that the judicial officials may leak such data but rather the information system itself may be designed is such a way that it collects, stores or shares personal data'*[6]

The study was therefore, carried out to explore the current situation on the uses of ICT in judicial system in Tanzania, other parts of the world (few countries were taken as an example), and the way it can be implemented in Tanzania for the better performance of the judicial systems. There were questions which guided the researcher such as the necessary technologies for implementing ICT in judicial systems, advantages and challenges of implementing ICT in judicial systems. The research utilised triangulation research methodology which employed both qualitative and morsel quantitative methods to investigate the effective use of ICT in Judicial systems to ensure the issues of validity and reliability. Also through the process of triangulation of data sources, that is, data gathered from a range of different participants, and use of different methods of data collection, a broad range of data were gathered. The triangulation of data, according to Pitman and Maxwell, is "an essential validation technique for conclusions and recommendations"[7]. With this in mind, the use of multiple data collection methods served as a verification check. The face to face interview method was used to get information from the staff of the judiciary of Tanzania to know the challenges of implementing ICT in judicial systems and knowing the basic technology that are needed. But also some questionnaires were given to some staff to obtain information that was needed where the interview method was not easy to be used. Researcher also used internet to collect some of the information in order to understand the uses of ICT in judicial systems in foreign jurisdictions.

## 2. ICT IN TANZANIA JUDICIAL SYSTEMS

Enhancing unrestricted access to justice and dispensing quality and speedy justice through accountability, transparency and fairness is the main and the core objectives of the judiciary. To accomplish the vision of the Judiciary of Tanzania "***Timely and Accessible Justice for All***"[8], there must be an establishment and implementation of good ICT systems. ICT is a remarkable tool for providing comprehensive, current and timely legal services to the public.

The judicial system for it to accomplish its vision, it must implement Case Management System (CMS) in which all courts will be connected to the centralised database from the highest court to the lowest courts whereby all information regarding the case can be accessed. Electronic solution to case system is managed through the use of CMS. The CMS generates database and overall information related to cases, and the overall case information case by case and court by court. The case information includes the details of the petitioners, defendants, types of cases, number of the hearings and the rulings of the courts with the quoted section(s) of the laws. Through the submission of the overall case information to the High Court by individual courts – one can get information as to the number of pending cases, number of new registered and completed cases within a specified period.

*technology in European Judicial Systems"* (2007) [Online] available at www.coe.int/t/dghl/cooperation/cepej/series/Etudes-7TIC_en.pdf [June 26, 2017]

3 the Judicature and Application of Laws (Electronic Filing) Rules, 2017 [CAP. 442] (10)(3)

4 Ubena John, *ICT as a solution to delay of cases in the administration of justice in Tanzania*, The Tanzania Lawyer (JTLS), vol. 2, 2008, pp.116-130. ISBN 1821-5564

5 Loveday, B. " *Address to EGPA conference, Cape Sounion, Greece, in M. Fabri and Ph. M. Langbroek (eds.)"*The challenge of change for Judicial Systems," (2000) IOS Press, p.23

6 Ubena John, *Automation of Law and Decision-making*, The Tanzania Lawyer, JTLS, vol. 1, 2015, pp.158-176. ISBN 821-5564

7 Ashleigh, D, "A study of successful implementation and management of educational technology I three New South Wales primary school" (2005) [Online] available from < http://dlibrary.acu.edu.au/digitaltheses/public/adt-acuvp71.25092005/02whole.pdf> [June 30, 2017]

8 Judicial Website, (2017) Vision [Online] available at http://www.judiciary.go.tz/background-history [June 29, 2017]

Meanwhile in Tanzania judicial system, there is Judiciary Knowledgebase System which is online from which a person can access judgements, ruling and orders from the Commercial Court, Court of Appeal, High Court and Labour Court. Therefore, the judiciary need to computerise its courts and establish a good CMS to make sure that all information about pending cases, new registered cases and decision passed in a month are available. Somehow the Commercial Court has advanced and it has been using voice recorder and a partial CMS which can assist the administrators to know the information about cases quickly and allocation of judges to cases. This system is capable of notifying the judges and advocates concerning the date of the cases seven days before the date of hearing. The Court of Appeal on the other hand is recently said to employ ICT tools to record court proceedings and three cases have already been heard using such tools.[9]

## 3. PRACTICE IN OTHER PARTS OF THE WORLD

The Royal Court of Justice in Bhutan (South Asia) with the support from UNDP has formulated the Royal Court of Justice Strategic IT Plan[10]. The plan envisaged the development of communication infrastructure and website development and the development of an integrated web-based judicial management system as the way forward. Amongst others, it included the establishment of Local Area Network (LAN) in the courts, website for the judiciary, e-mail and Internet access in district courts, enhance data collection and reporting of case flow and fully automating the judiciary's procedures using web-based technologies and the internet architecture.

The computerization of the courts and the dissemination of information about judicial and legal reforms have been given paramount importance. An effective and efficient legal system with public confidence is essentially valuable and promotes development by protecting persons and their properties, allowing peaceful resolution of disputes, facilitating economic exchange, and letting citizens know their rights and obligations.

In Kenya also the judicial systems are using ICT for the purpose of case management[11]. The efficiency of judicial functions is being enhanced with the use of ICT for case management. Until now, the allocation of matters before different judges and the preparation of cause-lists is a time-consuming process. However, computerization of the higher courts has led to tremendous improvements.

The widespread use of ICT in Brazil courts has provoked a whole set of questions that vary from the originality of a judicial decision to the parties protection of privacy[12]. Furthermore, it has redefined the boundaries of lawyers and judges' works as it enables anyone to track and question the professional decisions they make. This has a significant impact on the courts' effectiveness as it reduces time and increases participation. As a consequence, what used to be a ciphered knowledge becomes then available to the parties who no longer feel the necessity to go through a professional's mediation in order to know what is happening and anticipate what may happen.

In Singapore, a well-kept case tracking system databases are implemented which contains virtually all the important information concerning every action , cause or matter filed in the court, including parties particulars, the nature and quantum of the claim, the document filed and the outcome of the proceedings. Having all these data in electronic format open up number of options to further enhance the efficiency of the court. In this respect, Sze writes:

> *"Office automation functionalities have been developed to allow the user to automatically fill standard documents, (e.g. notification tickets), extracting data directly from the database, (e.g. the date of the event that is notified, name and addresses of lawyers and parties)"*[13].

This not only reduces the workload of personnel but also probability of making mistakes. In most cases, once generated, these documents are printed, signed and sent by mail or by other means of transmission. In Finland, where no signature is required, the documents are sent electronically to the post office in the area where the addressee lives, then printed and delivered physically[14].

In 2008, the incoming Chief Justice of the Malaysian judiciary began a program to reduce backlog and delay, and increase judicial productivity. The program began with a stocktaking exercise in the six (6) largest court complexes in which cases were counted, organized into three categories – closed hibernating and active – and targets were set for eliminating all backlog, first dating to pre-2005, and then to cases over a year old. Civil High Courts (with original jurisdiction for high value cases and appellate jurisdiction for cases coming from the subordinate courts) were reorganized to facilitate the process and judges were given targets for case disposition. Within two years the stock of pending cases had been reduced by half, and an automation program was underway featuring audio-video recording of hearings, an automated case management system, scheduled to introduce electronic filing in March 2011, and an automated system for lawyers awaiting hearings. Linn observes:

"*Although paper files will soon disappear a new filing system was also introduced to control the location of physical files. The program is expensive, (US$40million over three years) but this is partly because of the desire to resolve the problems of congestion and delay rapidly. Automation has been an important element but the Chief Justice notes that only 50 percent of the results can be attributed to it"*[15]

The rest depended on taking stock of the number and status of pending cases, setting targets for their elimination, setting and enforcing quotas for judges, targeted procedural reforms, and reorganizing the courts to allow a quicker attack on the problems.

## 4. FINDINGS

To explore the main objective of the study, (the way ICT can be implemented for the better performance of the judicial systems) the researcher interviewed 15 ICT judiciary staff if they were aware on the necessary technology to be used for the implementation of ICT in judicial systems. 80% (12 ICT staff) were aware on the necessary technologies for the implementation and 20% (3 ICT staff) were not aware.

9 Ubena John, *ICT as a solution to delay of cases in the administration of justice in Tanzania*, The Tanzania Lawyer (JTLS), vol. 2, 2008, pp.116-130. ISBN 1821-5564

10 UNDP "Strengthening Judicial Integrity through Enhanced Access to Justice" (2013) [Online] available at < http://www.undp.org/content/dam/rbec/docs/Access%20to%20justice.pdf > [July 13, 2017]

11 J.E. GICHERU (2009) Paper presentation in Southern African Chief Justices' Forum [Online] available from < http://www.venice.coe.int/SACJF/2009_08_BTW_Kasane/speeches/Gicheru_Judicial_Reforms.pdf > accessed on July 13, 2017

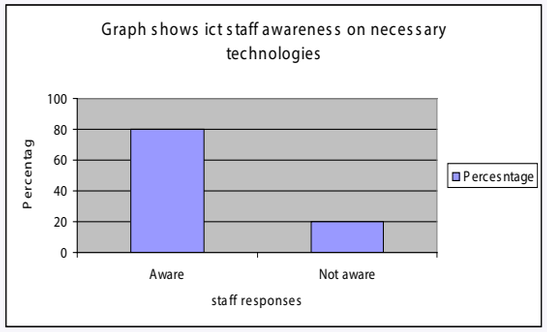
12 Roberto Fragale Filho (2009) The use of ICT in Brazilian Courts [Online] available from < https://www.google.co.tz/search?sclient=psy-ab&site=&source=hp&q=The+widespread+use+of+ICT+in+Brazil&oq=The+widespread+use+of+ICT+in+Brazil&gs_l=hp.3...6018.10734.1.11626.21.13.0.0.0.0.0..0.0....0...1.1.64.psy-ab..21.0.0.zBu1LLQsAmQ&pbx=1&bav=on.2,or.r_cp.&biw=1366&bih=609&dpr=1&ech=1&psi=UQNnWZ3VHob5UujspJgM.1499923284491.7& ei= UQNnWZ3VHob5UujspJgM&emsg=NCSR&noj=1 > Accessed on July 10, 2017

13 T.Y Sze, 'Singapore', in A. Oskamp et al (eds.), "*IT Support for the Judiciary"*, (2004), p.48. [Online] available at http://lml.bas.bg/iccs2002/acs/breuker.pdf [July 13, 2017]

14 K. Kujanen, "E-services in the courts in Finland, Presentation at the Seminar on Law and Informatics", Bern, 26 October 2004, p. 4; see also http://www.oikeus.fi/15955.htm and http://www.oikeus.fi/15956.htm

15 Linn Hammergren, "JUDICIAL GOVERNANCE AND THE USE OF ICT" (2012) [Online] available at http://www.iijusticia.org/docs/Linn.pdf [July 11, 2017]

**Figure 1** represents ICT staff awareness on necessary technologies




Results from graph 1 above show that majority of respondents (80%) from the department of ICT are aware on the necessary technology for the implementation of ICT in judicial systems.

The necessary technologies for implementing ICT in judicial systems are found to be:-

- Basic technologies such as desktop computers, word processing programs, spreadsheets and both internal and external e-mail for judges as well as administrative personnel.
- Applications to support the administrative personnel which include automated registries and CMS
- Technologies to support the activities of the judges such as law and case law, electronic libraries, and sentencing support systems.

**Table 1: Staff response to necessary technologies for implementing ICT**

| Necessary technologies | Response | Level of Agreement | | |
|---|---|---|---|---|
| | | Agree | Undefined | Disagree |
| Basic technologies | N | 200 | 20 | 30 |
| | % | (80) | (8) | (12) |
| Applications to support the administrative personnel | N | 225 | 0 | 25 |
| | % | (90) | (0) | (10) |
| Technologies to support the activities of the judges | N | 175 | 25 | 50 |
| | % | (70) | (10) | (20) |

Results from **table 1** shows that, 80% of respondents agreed that the judicial systems need basic technology for the implementation of ICT. These include basic computer hardware and basic computer software. Sufficient percentages of the respondents (90%) opined that administrative personnel need applications to support their daily activities. Similarly, a sufficient number of respondents (70%) agreed that judiciary needs technologies to support the activities of judges.

**Table 2: Opinions about the advantages of implementing ICT in judicial systems**

| Advantages of ICT in judicial systems | Response | Level of Agreement | | |
|---|---|---|---|---|
| | | Agree | Undefined | Dis-agree |
| Accessibility to justice | N | 180 | 40 | 30 |
| | % | (72) | (16) | (12) |
| Transparency | N | 220 | 10 | 20 |
| | % | (88) | (4) | (8) |
| Cost effectiveness | N | 175 | 25 | 50 |
| | % | (70) | (10) | (20) |
| Efficiency | N | 190 | 30 | 30 |
| | % | (76) | (12) | (12) |
| Research tools | N | 200 | 20 | 30 |
| | % | (80) | (8) | (12) |

It is evident from **table 2** that, sufficient number of respondents (72%) agreed that when implemented, ICT will increase accessibility to justice in judicial systems and 88% of respondents supported that ICT will cause transparency.

Similarly, a sufficient number of respondents (70%) supported the statement that the vision for cost effectiveness will be met when the implementation of ICT in judicial systems will take place. Efficiency is another aspect which was supported by the majority of respondents (76%) when ICT is implemented in judicial systems. A prominent majority of 80% respondents also supported that ICT simplifies research activities when used.



**Table 3: Challenges of implementing**

**ICT in judicial systems**

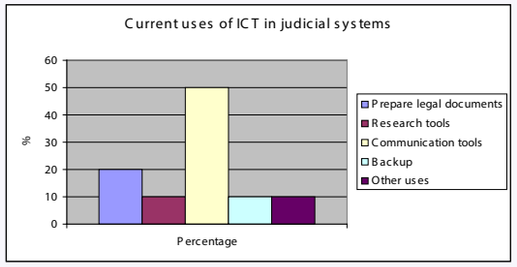
| Challenges | Response | Level of Agreement | | |
|---|---|---|---|---|
| | | Agree | Undefined | Disagree |
| Lack of awareness of the technology | N | 180 | 30 | 40 |
| | % | (72) | (12) | (16) |
| Technical difficulties | N | 220 | 10 | 20 |
| | % | (88) | (4) | (8) |
| Computer illiteracy | N | 180 | 40 | 30 |
| | % | (72) | (16) | (12) |
| Unreliable internet connectivity | N | 175 | 25 | 50 |
| | % | (70) | (10) | (20) |
| Lack of electricity | N | 225 | 15 | 10 |
| | % | (90) | (6) | (4) |

Results from **table 3** reveal that, one among the challenges of implementing ICT in judicial systems is lack of awareness of the technology. This is agreed by 72% of the respondents. Similarly, 88% of respondents said that technical difficult is another challenge and 72% said that computer illiteracy is also a great challenge. In our country electricity and internet connectivity are the major problems in most of the areas. The results also depict that 70% and 90% of the respondents declared that unreliable internet connectivity and lack electricity were respectively challenges to the implementation of ICT in judicial systems.

**Table 4: Current uses of ICT in judicial systems**

| S/N | Uses of ICT | No. of Staff | Percentage |
|---|---|---|---|
| 1 | Prepare legal documents | 50 | 20 |
| 2 | Research tools | 25 | 10 |
| 3 | Communication tools | 125 | 50 |
| 4 | Backup | 25 | 10 |
| 5 | Other uses | 25 | 10 |

**Figure 2:** Current uses of ICT in judicial systems




It is obvious from figure 2 that a sufficient majority of the respondents (50%) said they normally use ICT in judiciary for communication purpose. A few staff also confirmed that they use ICT as a research tool (10%), backup purposes (10%) and other uses (10%). The remaining percentage (20%) of the respondent said that they use it for preparing legal documents.

## 5. DISCUSSIONS

Judicial work is not what it used to be. In fact, in a time not so long ago, decisions used to be written as if they were one of a kind even for cases related to mass litigation. In order to get its contents, even if one could anticipate them, one would have to physically go to Court. A daily follow-up of every case is required in order to avoid surprises such as the missing of a deadline. Briefly, the everyday judicial work is then a very time consuming task. But, one must recognize, the effective uses of ICT in the Courts will completely reshape judicial work

As it has been found in findings **(figure 2)**; the use of ICT in judicial systems is not much as expected. Although there is a minimal use of ICT, there is quite a few judicial staff who uses. This is particularly so because most of the workers are computer illiterate. This fact is consistent with the finding obtaining from 72% of the respondents shown in **table 3.** Indeed, computer illiteracy is among the challenges for implementing ICT in judicial systems. Regardless the challenges which are

depicted in **table 3** for implementing ICT in judicial systems, there are many advantages of using ICT in judiciary as revealed by a few staff in **table 2**. Therefore, the judicial systems must find away on how to implement technology to enjoy its benefits.

The effective use of technology improves working practices and provides better court services. At this level, justice can be conceived as a product of combined efforts of plurality of actors. Some of these actors, such as administrative personnel and judges, operate within the court organisation, while others, such as lawyers, litigants and witnesses, but also the community and public institutions, constitute the environment within which the court traditionally operates. The results from **table 1** depict the necessary technology which can be adopted within the court for the implementation of ICT in judicial systems and are divided into three categories. The first category consists of basic technologies such as desktop computers, word processing, spreadsheets and both internal and external e-mail for both judges and administrative personnel. The second category consists of applications used to support the administrative personnel of the court, which include automated registers and case management systems. Finally, the third category consists of technologies used to support the activities of the judges, such as law and case law electronic libraries, and sentencing support systems. Velcogna writes:

> *"Basic technologies are standard products that can be easily acquired on the market. They mainly consist of hardware and software used to create, collect, store, manipulate, and relay digital information needed for accomplishing basic office tasks"*[16].

Unfortunately, the dissemination of such technologies, when not followed by other actions, such as training and redesign of working practices, will often result in a very limited impact on efficiency. The use of basic technologies allows people working within the courts to discover what ICT is and to start experimenting with it. This is particularly important as courts have often been characterized by a very low level of technological competence. The mere fact that some courts are starting to use computers for drafting and printing simple documents, using e-mail for informal communication and surfing the internet, helps with the sharing of a basic computer knowledge much needed for the adoption of further systems. This is supported from the finding in **table 4** which shows the current uses of ICT in judicial systems. So this basic technology is needed because it is fundamental for the

implementation of other technologies.[17] For example, without a computer and an internet connection, a judge cannot access on-line legal information services and also cannot use it as a research tool.

The role of the administrative component of the court is to perform a number of tasks that range from case-tracking and keeping official records of all court matters to official court notifications. Furthermore, court personnel carry out an important role as an interface, and at the same time a buffer between the judge and the other actors that participate in the judicial process. Legal practitioners very well know the judicial proceeding starts long before a case reaches the courtroom. The administrative personnel of the courts file and keep registers and documents in compliance with codes of procedure, laws and regulations. Under Order IX of the Tanzania Civil Procedure Code Act of 1966 the parties are bound to appear before the court for purpose of hearing during the trial or for the purpose of receiving orders. The same may be dispensed with when employing ICT and when court deems it fit. For instance in a situation where a party is unable to appear physically before the court to prosecute his or her case and the case may thus be adjourned, hence delay. In this situation, the party may file relevant documents online. The documents like pleadings may be filed online.[18] One of the clauses in the proposed rules for electronic filing provides:

> *'Any requirement for filing, service, delivery or otherwise conveyance of a document shall be satisfied by the filing, service, delivery or otherwise conveyance of a single copy using the electronic filing system in accordance with these Rules*[19]*'.*

All these actions require time and resources. In supporting the clerks' activities, ICT can play an important role in saving much needed resources at the earliest stage of the trial. It guarantees that the formal procedure has been respected, e.g. for computing any period of time prescribed or allowed by regulation[20]. Furthermore, it allows a quick review of the status of a case without having to physically access and read the case file. For these reasons, one of the first applications that need to be developed in the courts is the automated register. When this is done, it will increase accessibility to justice, transparency, efficiency and cost effectiveness as reflected in findings that are consistent with **table 2**. ICT helps to make court system more accessible to the court users, litigants and the general public by making the judgments, hearing calendar, court procedures and case information available over the internet. Lungten supports the findings that ICT enables the judiciary to execute the court functions in much faster and in efficient ways.[21] For example, the recording and the entry of the case information by the bench clerks and the writing of judicial orders and judgments becomes much faster with improved efficiency and effectiveness.

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. Effective case flow management makes justice possible both in individual cases and across judicial systems and courts, both trial and appellate. It helps ensure that every litigant receives procedural due process and equal protection. Case management involves the monitoring and managing of cases in the court docket from the time the action is filed to the moment it is finally disposed of by way of trial, settlement or otherwise. It ensures that all cases progress swiftly without unnecessary delay[22]. ICT when used properly will help the judicial systems to develop a very good CMS that used to perform different courts functions.

Some of the functions performed by the CMS are strictly related to the management of the single case. These functions include the support and automation of the back-office and the administrative work of court staff, case tracking, case planning, document management, scheduling of hearings and support of judicial activities. For example, after the receipt of a pleading the event needs to be registered, the case needs to be allocated to a judge, notices need to be sent, a hearing must to be set, as well as time allocated for the judge to review the pleading before the hearing. Clause 4 sub 2 of the proposed eFiling Rules, 2017, says:

16 Marco Velcogna, "*The use of information and communication technology in European Judicial Systems"* (2007) [Online] available at www.coe.int/t/dghl/cooperation/cepej/series/Etudes7TIC_en.pdf [June 26, 2017]

17 CEPEJ, "European Judicial System" (2006) [Online] available from http://www.google.co.tz/url?url=http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2006/CEPEJ_2006_eng.pdf&rct=-j&frm=1&q=&esrc=s&sa=U&ei=piBnVNebDpPtaMLXgL-gH&ved=0CBgQFjAB&usg=AFQjCNHgh-ZNeOge-sg-ON-sWXbqsiuCILw [February 15, 2017]

18 Ubena John, *ICT as a solution to delay of cases in the administration of justice in Tanzania,* The Tanzania Lawyer (JTLS), vol. 2, 2008, pp.116-130. ISBN 1821-5564

19 the Judicature and Application of Laws (Electronic Filing) Rules, 2017 [CAP. 442] (10)(1)

20 Marco Velcogna, "ICT within the Court in the E-justice Era" (2010) [Online] available at < www.effectius.com/.../**ICT within the court in the e-Justice Era** by Marco Velicogna.207234735.pdf [September 5, 2016]

21 Lungten Dubgyur, "JUDICIAL REFORMS AND ACCESS TO JUSTICE THROUGH THE USE OF INFORMATION AND COMMUNICATION TECHNOLOGY (ICT) IN BHUTAN" (2010)[Online] available at < www.**judiciary**.gov.bt/html/education/.../IT%20Paper-Lungten.pdf

o

o > [November 15, 2016]

22 Marco Velcogna "ICT within the Court in the E-justice Era" (2010) [Online] available at <www.effectius.com/.../**ICT within the court in the e-Justice Era** by Marco Velicogna.207234735.pdf [June 5, 2017]

*'Where a document is required to be filed with, served on, delivered or otherwise conveyed to the court under any other provision of these Rules, it shall be so filed, served, delivered or otherwise conveyed using the electronic filing service in accordance with these Rules and any practice directions for the time being issued by the Chief Justice[23]'*

If a response is not received from the opposing party, a reminder may be sent by the clerk. In the paper based system, the flow of cases is carried around in the heads of court personnel, or is ingrained in procedures and material artefacts such as to-do lists. Correa writes:

*'The CMS embeds such knowledge and automatically performs most of these tasks, providing support to others (e.g. tracking events and generating reminders of deadlines) and thus helping to improve the service[24]'.*

It is not only the issues of CMS, but also ICT is used to design applications to support and to automate judges' activities. ICT supports the work of the judges in several areas, including the organization of the activity, the information management and retrial, document production and the decision-making. One of the aspects of the judge's activity that has been probably most affected by the use of ICT is that of legal research. From the findings in **table 3 &4**, when used, ICT facilitates legal researches which judges must do.

Various technological support tools ranging from cds to local intranets, to the internet provide access to constitutional material, laws, appellate decisions, rules, statutes, local ordinances and much more. Conducting on-line legal research and surfing the growing number of websites has become more and more a part of a judge's daily activity. The use of search engines and text mining techniques has highly increased both quality and efficiency of legal research.

Forums and discussion groups in which judges can 'virtually' meet and discuss legislation, procedures and cases, have been an important development. In some cases, with the reduction of opportunities for judges to work in panels, electronic forums and discussion groups are thought to be a tool providing an opportunity for judges to share information and receive support[25].

Another direction that ICT investments have taken is the development of sentencing support and automated judgment systems. These systems should help improving the quality and timeliness of judgements, and leading judges to impose sentences which are more consistent over time. "One of the most successful examples is the Sentencing Information System for the High Court of Judiciary of Scotland. The system 'uses computer technology to allow sentence quick, easy access to relevant information about past sentencing of the court in 'similar' cases, without placing any formal restrictions on the exercise of judicial discretion[26]". In general, however, the development of such systems seems to pose serious problems. This is probably related to the nature and complexity of the tasks compared to the present state of technologies.

## 6. CONCLUSION

Despite the challenges which might face the judicial systems on implementing ICT as found in **table 3**, the benefits the judicial systems and all other parties will get are much more. It is therefore concluded that fully endorsement of the implementation of ICT solutions right from the Court of Appeal to the subordinate courts will enable Judges to assume far greater responsibility in tracking and managing cases. A national level tracking mechanism can therefore enable the monitoring of the progress of cases, the scheduling of Judges' workloads and the listing of cases among other parameters. The progress of a case right from the stage of first instance to its conclusion can be recorded and information about costs and delays made available. Indeed the availability of this information increases the accountability of the judicial systems and would thereby increase its efficiency.

## 7. RECOMMENDATIONS

Through the findings accrued in this study for better automating the judiciary systems in Tanzania, two recommendations are made:-

7.1 Judiciary must develop the fully CMS which is currently used by the commercial court and the same system should be implemented to other courts

7.2 Since the automation is necessary, the judiciary must prepare its staff by training them on ICT matters just basic computer courses which will enable them to work in the new environments of automation starting from court clerks to Judges.

23 the Judicature and Application of Laws (Electronic Filing) Rules, 2017 [CAP. 442] (4)(2)

24 Jorge Correa, "Access to justice and judicial reforms in Latin America any hope of equality?" (2010) [Online] available at < www.law.yale.edu/documents/pdf/Sutil_**Access_to_Justice**.pdf> [November 15, 2016]

25 UNDP, "Strengthening Judicial Integrity through Enhanced Access to Justice" (2013) [Online] available at < www.undp.org/content/dam/rbec/docs/**Access**%20to%20**justice**.pdf > [November 15, 2016]

26 Scottish Summary Justice Review Committee, "The Summary Justice Review Committee: Report to Ministers",( 2004), pp. 208-211, available at <http://www.scotland.gov.uk/Resource/Doc/47171/0031637.pdf> [November 14, 2016]

# VIOLENCE AGAINST WOMEN IN TANZANIA: A CALL FOR AN ANTI-DOMESTIC VIOLENCE LEGISLATION

*Hamisa Omari Mwenegoha* *

**ABSTRACT**

*Violence Against Women is a concern of International Community at the moment. Tanzania being part of that community has tried to overcome this problem through amendment of several laws. However, those scattered laws still have various gaps. This paper argues that it is necessary for state in Tanzania to enact specific law regulating Violence Against Women.*

KEYWORDS: Gender Inequality, Domestic Violence and Legislation

## 1.0 INTRODUCTION

Violence Against Women (VAW) is a reality all over the world. It is, to a large extent, attributed to gender in-equality and vulnerability of the women, in which much of the violence is rooted. The occurrence and presence of VAW is influenced by various factors of which are society-based. This reality makes it quite complex as the cultural norms causing it to differ from one society of community to another. This is why there is no clear and common, acceptable language of VAW.[2]

It should be noted that, violence against women is both a violation of human rights and a form of discrimination. It has direct consequences for its victims including loss of life, physical injuries and disability, chronic ill health, sexual and reproductive disorders as well as psychological and negative behavioral outcomes. The outcomes of these consequences on individual victim have wider social and economic implications on society as a whole.[3] VAW occurs on a vast scale and takes different forms throughout women's lives, ranging from physical or sexual abuse, early marriage, female genital mutilation, and wife beating to abuse of elderly.[4]

A recent study, Tanzania Demographic Health Survey (TDHS) Report of 2015-16 makes it more explicit that, about 40% of women aged 15-49 have ever experienced physical and 17% have ever experienced sexual violence. Although experience of violence is higher among married women, particularly formerly married women, 16% of never married women have also ever experienced physical violence and 9% have ever experience sexual violence.[5] In order to overcome such challenges, Tanzania adopted initiatives including undergoing criminal and civil justice reforms mainly under the Legal Sector Reforms (LSRP). This has resulted into amendments and enactment of substantive and procedural laws, some of them addressing the issue of violence against women and children.[6]

Despite those and other notable legal reforms, the social and legal protection afforded to women seems to remain fragile. This situation is partly attributed by presence of bad laws.[7]

This article therefore aims at looking on the issue of violence against women in Tanzania on how cases of violence against women are handled, what pieces of legislation are in place in addressing the matter and the paper also addresses the available gaps in those pieces of legislation.

## 2. MEANING OF VIOLENCE AGAINST WOMEN

The term Violence against Women has been defined through national and international instruments. The National Plan of Action to End Violence Against Women and Children in Tanzania 2017/18-2021/22 defined the term Violence against Women[8] as;

> *all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.*

Further, the preamble language of the UN Declaration on the Elimination of Violence against Women of 1993[9] accounts for the link between VAW and GBV in regard to the attributing factors to the VAW (which are the same as those of GBV). It states that, the VAW is a manifestation of historically unequal power relations between men and women. According to the Declaration's preamble, such relations have led to domination over and discrimination against women by men and to the prevention of the full advancement of women. Furthermore, the Declaration declares that VAW is one of the crucial social mechanisms by which women are forced into subordinate position compared to men.

Due to the similarities between GBV and VAW in term of causing factors and results of the two as far as gender rights are concerned, this paper used the two terms interchangeably. Therefore, whenever GBV is mentioned, VAW is inclusive. The VAW is specifically defined by the Declaration that:

> *The term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life*[10]

The World Health Organization (WHO); United Nations (UN) Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (CEDAW); and the Ministry of Health and Social Welfare (MoHSW) of the Tanzania, have tried to define GBV/VAW.

The WHO defines GBV to include; domestic violence, sexual harassment, rape, sexual violence during conflict and harmful customary or traditional practices such as Female Genital Mutilation (FGM), forced

*LLM (Zimbabwe University), LLB (UDSM), Assistant Lecturer, Institute of Judicial Administration Lushoto

2 Tanzania Women Lawyers Association(TAWLA), *The Study on Reviews of Laws and Policies related to Gender based violence of Tanzania Mainland,* TAWLA, September 2014, p. 1

3 *Ibid* p. 8

4 *Ibid* p.2

5 https://dhsprogram.com/pubs/pdf/FR321/FR321.pdf **accessed on July 2017**

6 Tanzania Women Lawyers Association(TAWLA), *The Study on Reviews of Laws and Policies related to Gender based violence of Tanzania Mainland,* TAWLA, September 2014, p. 8

7 For instance, the Law of Marriage Act, Cap 29 (LMA), still sanctions marriage to a child below 18 years contrary to a number of international human rights instruments on the rights of women. The LMA is also silent on wife beating both of which are highly prevalent cultural practices. The Penal Code, Cap 16 is relatively blunt on Violence Against Women in many ways such as, it does not criminalize marital rape; it does not contain a specific provision on Gender Based Violence and some of the Gender Based Violence offences

8 National Plan of Action to End Violence Against Women and Children in Tanzania 2017/18-2021/22 (Dec. 2016, p. vi); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003

9 Adopted by the UNGAS Resolution 48/104 of 1993

10 Article 1 of the UN Declaration on the Elimination of Violence against Women of 1993

marriages and honour crimes. Others are trafficking in women, forced prostitution and violations of human rights in armed conflict.[11] Moreover, according to WHO, incidents of GBV include also forced sterilization, forced abortion, coercive use of contraceptives, female infanticide and prenatal sex selection.[12]

On the other hand, the CEDAW Committee's Recommendation Number Eighteen defines GBV as:-

> *Violence directed against a woman because she is a woman or which affects a woman disproportionately. It includes physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.* [13]

On its side, the MoHSW of Tanzania in its Guidelines for the Health Sector[14] defines the term 'GBV' to mean:

> *An umbrella term for any act, omission, or conduct that is perpetuated against a person's will and that is based on socially ascribed differences (gender) between males and females. It includes but is not limited to sexual violence, physical violence and harmful traditional practices, and economic and social violence. It targets individuals or groups on the basis of their being females.*

It should be noted that, there are some similarities in the definitions adopted by the UN institutions as well as the MoHSW. It pertains to the types of violence that illustrate acts of GBV. The MoHSW specifically includes the cultural specific types of violence that are more pronounced in Tanzania such as harmful traditional practices, economic and social violence. Moreover, unlike the WHO and MoHSW definitions, the CEDAW Committee's definition, focuses on violence which happens to women on the basis of their being women.[15]

11 Particularly murder, systematic rape, sexual slavery and forced pregnancy

12 Violence Against Women, http://www.who.int/topics/gender_based_violence/en/

13 A/RES/48/104 of 23 February 1994. See also: CEDAW/C/1992/L.1/Add.15

14 See United Republic of Tanzania, National Guidelines for the Health Sector Prevention and Response to Gender Based Violence of 2011

15 *Loc. cit.* TAWLA, p. 2

## 3. EFFORTS TO ADDRESS VIOLENCE AGAINST WOMEN IN TANZANIA

Tanzania adopted and acceded several international[16] and Regional[17] conventions and recognized declarations[18] which address the issue of violence against women.[19]

Through the adopted convention[20] and declarations; Tanzania was able to undergo criminal and civil justice reforms under the Legal Sector Reform Programme (LSRP). This resulted into amendment and enactment of several laws some of which address the issue of violence against women. Below are some relevant laws and decided cases which try to address some of the VAW incidents in Tanzania.

16 The Government of the United Republic of Tanzania has ratified CEDAW of 1979 on 1985, the Optional Protocol of CEDAW in February 2004, which provides for enabling environment for women to seek justice in the CEDAW Committee

17 The Government is signatory to the African Charter on Human and People's Rights and its Optional Protocol on the Rights of Women in Africa. The Protocol was adopted on 11th July 2003, at the Second summit of the African Union in Maputo Mozambique, The Protocol among others requires African Governments to eliminate all forms of discrimination and violence against women in Africa and promote equality between women and men

18 Article 9(f) of the Constitution of the United Republic of Tanzania, mentions Universal Declaration of Human Rights (UDHR) 1948, General Assembly of the United Nations, Resolutions 217A, passed in Paris, France, 10th December 1948. Tanzania is a signatory of the UDHR which stresses that each person is equal before the law and has equal rights in the distribution of resources and social services. The equality and rights of each person has been enshrined in the Constitution of the United Republic of Tanzania of 1977 as amended in 1984 and 2000. The Constitution emphasizes the equality of each person, respect for each person's humanity and right to justice before the law. Tanzania is also a signatory to the SADC Declaration on Gender Development (1977) and then Addendum on the Prevention and Eradication of Violence Against Women and Children. Tanzania further ratified Beijing Declaration and Platforms for Action (1995)

19 See National Human Rights Action Plan 2013-2017, by Ministry of Constitutional Affair and Legal Affairs, December 2013, page 55

20 In addition, Tanzania's ratification of the CEDAW and the Protocol to the ACHPR on the Rights of Women in Africa underscore the Government's commitment to ensure that rights of women are fully protected. See National Human Rights Action Plan 2013-2017, by Ministry of Constitutional and Legal Affairs, December 2013, page 55



### 3.1 The Constitution of the United Republic of Tanzania of 1977 in addressing VAW

Article 13 of the Constitution of the United Republic of Tanzania of 1977 (The Constitution) prohibits discrimination on the basis of gender, among other things. It requires that all persons should be treated equally without any form of discrimination. The word 'discrimination' has been defined under Article 13(5) of the Constitution to mean that, among other things, a person should not be treated on the basis of sex such that certain categories of people are regarded as weak or inferior and are subjected to restrictions and conditions and the other group of persons are treated differently.[21] Therefore, there is sufficient space and mandate to adopt and enforce laws and policies that prohibit violence against women and children. Failure to protect women from acts of violence that are committed against them is clearly discriminatory.

Articles 12-29 generally, incorporate the Bill of Rights and Duties, which set out the basic rights and duties of citizen which are broad enough to assert and protect rights holders against GBV. Every citizen has a duty to respect women's rights. These articles echoes the right to equal protection under the law and also imposes a duty upon every person to conduct himself and his affairs so as not to infringe upon the rights and freedoms of others or their public interests.[22]

The courts of law have shown that, the Bill of Rights of 1984[23] has to be implemented at any cost. This is witnessed by Judge Mwalusanya (as he then was) in the case of *Ephraim v Pastory*[24] where the judge said that

> *...since the Bill of Rights was incorporated in our 1977 Constitution, Act no 15 of 1984, by article 13(4) discrimination against women has been prohibited. And the Universal Declaration of Human Rights, 1948, which is part of our Constitution by virtue of article 9(1)(f) prohibits discrimination based on sex as per article 7. Moreover Tanzania has ratified the Convention on the Elimination of All Forms of Discrimination Against Women, 1979. That is not all. Tanzania has also ratified the African Charter on Human and Peoples' Rights, 1981, which in article 18(3) prohibits discrimination on account of sex. And finally Tanzania has ratified the International Covenant on Civil and Political Rights, 1966, which in article 26 prohibits discrimination based on sex. The principles enunciated in the above-named documents are a standard below which any civilized nation will be ashamed to fall. It is clear from what I have discussed that the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories.*

This appeal was about women's rights under the Bill of Rights. Women do not want to be discriminated against on account of their sex. In this case, a woman, one Holaria d/o Pastory, who is the first respondent in this appeal, inherited some clan land from her father by a valid will. Finding that she was getting old and senile and had no one to take care of her, she sold the clan land on 24th August 1988 to the second respondent Gervazi s/o Kaizilege for Shs 300 000. The second respondent is a stranger and not a clan member. Then on 25th August 1988, the present appellant Bernardo s/o Ephrahim filed a suit at Kashasha Primary Court in Muleba District, Kagera Region, praying for a declaration that the sale of the clan land by his aunt, the first respondent to the second respondent was void as females under Haya Customary Law have no power to sell clan land. The Primary Court agreed

21 As provided under article 13(5) of the Constitution of the United Republic of Tanzania of 1977, as amended from time to time; The ambit of the definition of discrimination is broad and encompasses the definition adopted by the Convention on the Elimination of All Forms of Discrimination Against Women of 1979-CEDAW

22 *Loc. cit.* TAWLA, p 12

23 Fifth Constitutional Amendment Act, 1984, i.e. the Bill of Rights

24 High Court of Tanzania at Mwanza, 22 February 1990 (Civil Appeal no 70 of 1989) (Unreported)

with the appellant and the sale was declared void and the first respondent was ordered to refund the Shs 300 000 to the purchaser.

Holaria was not satisfied with the decision of the primary court, hence appealed to the District Court. However, the Senior District Magistrate of Muleba, Mr LS Ngonyani, did not think the courts were helpless or impotent to help women. He took a different stand in favour of women. He inter alia, said in his judgment:

> *...the respondents' claim is to bar female clan members on clan holdings in respect of inheritance and sale. That, female clan member is only to benefit or enjoy the fruits from the clan holdings. I may say that this was the old proposition. With the Bill of Rights of [1984] female clan members have the same rights as male clan members.*

The learned judge stated that the first respondent had the rights under the Constitution to sell clan land and that the appellant was at liberty to redeem that clan land on payment of the purchase price of Tanzanian shillings 300 000. That has spurred the appellant to appeal to the High court, arguing that the decision of the District Court was contrary to the law. Judge Mwalusanya like the District Court held that the sale was valid. The appellant can redeem that clan land on payment of the stated amount of Tanzanian shillings 300 000 within six months. The appeal was dismissed with cost.

The Constitution justifies protection of the rights of women under article 13 and court practices show that women are protected both in text and context. However, that protection available in the Constitution is not women specific. The Constitution is silent when it comes to VAW. It is stated that it is good to have a general protection, but that invites less protection to specific group of women

### 3.2 The Penal Code, Cap 16 and VAW incidents

Penal Code, Cap. 16 R.E. 2002 is one of the oldest laws in Tanzania. It was incepted long before Tanzania's independence from Britain in 1961.[25] Despite its age, its effects on GBV related prosecutions have remained to be minimal. The missing link has been the gendered interpretation of the law. Apparently, this and other factors necessitated its major amendments done in 1998 through the miscellaneous amendment baptized as Sexual Offences Special Provisions Act (SOSPA) of 1998, Act No. 4 of 1998.

The SOSPA amended several written laws, making special provisions in those laws[26] with regard to sexual and other offences to further safeguard the personal integrity, dignity, liberty and security of women and children. The gist of it was, *inter alia* to strengthen the mechanism for using the criminal justice system to reinforce the legal regime protecting women's dignity.[27]

The SOSPA introduced and widened the offences of sexual violence (rape), trafficking in persons; sexual harassment; and a prohibition on FGM of which most of these offences was introduced for the first time in Tanzania to take legislative action against the practice. SOSPA also introduced severe punishments for sexual offences including imposition of a minimum sentence of 30 years imprisonment and compensation to survivor of sexual violence and life imprisonment if the girl raped is less than 10 years old. Moreover, gang rape is recognized as a special crime punishable with life imprisonment for each person in the group, regardless of that person's role in the rape. Others include gross indecency, with a punishment of not less than ten years imprisonment; sexual exploitation of children, with a punishment of imprisonment from five to twenty years; grave sexual abuse, with a punishment of imprisonment for fifteen to thirty years, but if the victim is less than fifteen years old, imprisonment from twenty to thirty years.[28] This is evidenced in the case of *Seif Mohamed El-Abadan v Republic*[29], whereby the appellant, Dr. Seif Mohamed El-Abadan, was convicted of rape contrary to sections 130(3)(c) and 131(1) of the Penal Code, Cap. 16 (R.E. 2002). In this case it was alleged that on 14th November, 2006 at Magunga hospital in Korogwe District, the appellant abused his office as a doctor and staff of the said hospital and had a carnal knowledge of a patient, one Stenala Pwere. Upon conviction, the appellant was sentenced to the mandatory sentence of 30 years imprisonment.

As shown from the provisions of the Penal Code and its amendments in 1998, women are clearly protected. However, that protection is only available when it comes to issues of sexual related offences. The Penal Legislation is general law covering general penal matters; it does not cover private matters like property ownership etc. It is argued that there is a need to expand the available protection in the Penal Code and from international instruments through enactment of specific legislation on the subject of VAW.

### 3.3 The Evidence Act, Cap 6 and the effort to address VAW

The SOSPA amendment affected the Evidence Act, Cap 6 by widening section 127 regarding admissibility of evidence in court of law. The said provision has been widened to incorporate the value of the evidence of a child of tender years. A child of tender years who is a victim of a sexual offence is allowed to give evidence of the events even if it is uncorroborated provided the court finds such evidence credible. This provision has helped to give value to the evidence given by children in sexual offences as long as they are assessed of being able to understand the nature of the proceedings and give credible evidence through a *voire dire test*. This was witnessed in the case of *Onesphory Materu v Republic*[30], where it was argued in the Court of Appeal that

> *...The High court addressed the point of self warning of the court by tracing the history of the law before and after the advent of section 127(7) of the Evidence Act as amended by Sexual Offence Special Provisions Act, Number 4 of 1998. Prior to the amendment, there was a requirement for the court to warn itself of the dangers of basing a conviction on the uncorroborated evidence of a child where a sexual offence was involved. After the amendment, the need for the warning was done away with. The only burden imposed on the court now is to give reasons that it is satisfied that a child of tender years or the victim of the offence is telling nothing but the truth.*[31]

That seems to be helpful because the data from the police shows that the highest number of sexual victims among both female and males below the age of 15 years doubled between 2004 and 2008 countrywide.[32] Therefore, the Evidence Act brought in the legal system the protection that has been waited for a long period of time. Nevertheless, the law is silent on specificity of the VAW. It is through judges and magistrates to interpret the law to cover situations of VAW. This shows that there is a need to legislate specific legislation regulating VAW.

25 Penal Code, Cap. 16 is part of received laws dating back to 1920s during the British trust territory. Received laws were recognised in the Order in Council 1920s via Reception Clause

26 The laws amended include the Penal Code, Criminal Procedure Act, Cap 20; Evidence Act, Cap 6; and Children and Young Persons Act, Cap 13

27 Loc. cit. TAWLA, p 15

28 Ibid p.16

29 (CA) Criminal Appeal No.320 of 2009, at Tanga; See TAWJA, Case Law Manual, Vol.II, TAWJA, pp. 67-70, (undated)

30 (CA) in Tanga, Criminal Appeal No. 334 of 2009; See in the Case Law Manual Volume II reported by TAWJA page 64 (undated); The Tanzania Women Judges Association (TAWJA); Stopping the Abuse of Power for Purposes of Sexual Exploitation: Naming, Shaming and Ending Sextortion. A toolkit for the programme of the TAWJA in Collaboration with the International Association Women Judges (IAWJ), Dar es salaam (undated) page 57

31 The Tanzania Women Judges Association (TAWJA), *Stopping the Abuse of Power for Purposes of Sexual Exploitation: Naming, Shaming and Ending Sextortion.* A toolkit for the programme of the TAWJA in Collaboration with the International Association Women Judges (IAWJ), Dar es salaam (undated)

32 *Ibid*

### 3.4 The Criminal Procedure Act, Cap 20 in addressing VAW

The Criminal Procedure Act (CPA) contains specific provisions relevant to Violence against Women including: mode of searching women as per section 26 of the CPA which provides that:

> *Whenever it is necessary to cause a woman to be searched, the search shall be made by another woman with strict regard to decency.*

Also under section 55(1) and (2) of the CPA provides for treatment of persons under restraint; a person under restraint is entitled to be treated humanely and with dignity, and shall not be subjected to cruel, inhuman or degrading treatment. These provisions support the move on violence against women. Women should be treated humanely and with dignity. Nonetheless, this protection sometimes confuses law enforcers. This may be attributed by the fact that not all people know the provisions of the CPA, let alone its enforcement. Easy enforcement of violence against women depends on a specific legislation.

### 3.5 The Prevention and Combating of Corruption Act, 2007 in overcoming VAW

The Prevention and Combating of Corruption Act, 2007 establishes the Prevention and Control of Corruption Bureau (PCCB), an organ mandated to handle all types of corruption incidents including those which are gender related such as demand or offer of sexual favors in exchange for official services.[33]

This legislation has strengthened the legal regime on violence against women by expanding the scope of sexual offences as provided in the Penal Code, Cap 16. The demand or imposition of sexual favours on subordinate staff or those who need a person in authority to exercise that authority in their favour either for services, employment, promotion, is a common complaint at work places and in the community at large. This has been shown in the case of *Mussa Zanzibar v. Republic*[34] where the appellant was a traditional healer. He allegedly raped one Siwema Rusumba on the pretence he could restore her menstrual period which had disappeared for some time. He led the victim to distant cross roads, ordered her to undress, held her by the neck and inserted his penis in her private parts. The appellant gave a sworn testimony claiming that the complainant consented to sexual intercourse. The issue before the court was whether the complainant consented to the sexual intercourse by the traditional healer. It was held by the court that the victim did not consent to the sexual intercourse with the appellant and the appellant abused his position of authority as a traditional healer in extorting sex.

Users of legal services, particularly women, young men and the poor elders are the victims of those who need a person in authority to exercise the authority in their favour. It is an obstacle to accessing justice including sexual harassment faced against service users and the employees in the legal system, demand for monetary and sexual favours as preconditions for obtaining bail or favourable judgment or employment benefits. For example, in the case of *Onesphory Materu v Republic (supra)*, where a police officer on duty at the police station raped a young girl of 14 years inside a police remand cell on a written promise that he would release her from custody. He also allowed her freedom to sit on a bench outside and get a glimpse of sunshine. When he refused to release her as promised, the girl filed charges giving the release note as part of her evidence of the illicit unfulfilled promise. The court found the appellant guilty, convicted and sentenced him to thirty years imprisonment, twenty-four strokes of the cane and an order that he pays shs. 700,000/= as compensation to the complainant.

An issue of abuse of power by adults in authority to obtain sexual favours from girls of tender age is a matter of concern in Tanzania. It happened in the famous case of *Francis Nguza alias Babu Seya and others v. R*[35] who were charged with eleven counts of raping and sodomizing eleven standard one pupils for several months in 2003 in Sinza, Dar es Salaam using threats to kill them if they refuse or told anyone about it. Eventually, two of the charged perpetrators were acquitted while the first and second appellants were convicted and sentenced to life imprisonment. Each of the appellants was also ordered to pay a compensation of Tanzania shillings two million to each of the ten complainants.

The PCCA law intends, apart from other things, to protect women from VAW. Nevertheless, the law regulates matters of corruption and associated matters. Therefore, it is difficult to invite the law in every case. The need for specific legislation regulating VAW issues cannot be avoided.

### 3.6 Employment and Labour Relations Act, 2004 and VAW issues

The Employment and Labour Relations Act (ELRA), 2004 makes provisions for core labour rights and establishes basic employment standards. Section 3 links enforcement of the law to the Constitution and related to international labour instruments.

The ELRA prohibits discrimination on the basis of one's sex or gender role.[36] The ELRA prohibits direct and indirect discrimination in the work place including discrimination on the basis of sex, gender, pregnancy, marital status disability, HIV/AIDS and age[37]. These specific gender-sensitive provisions create an enabling environment to guide both employers on appropriate boundaries so as to know when the line is crossed between execution of duties and persecution or sextortion.[38]

Although these rights are not in the criminal realm, they touch on important specific issues relating to women and girls. They guard against sexual harassment or persecution in acknowledgment that child bearing is a social function and those who perform it should not be penalized for it or have their vulnerable conditions ignored.[39] However, the law as the title speaks; it covers issues of employment and labour relations only. Sometimes, it is difficult to enforce issues of VAW through the Employment and Labour Relations Act.

### 3.7 The Anti-Trafficking in Persons Act, 2008 in addressing VAW

A number of international instruments[40]have been adopted in order to tackle the issue of trafficking with increasing emphasis on human rights perspective from the angle of protection of victims.[41]Among those instruments, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of 2002 (Parlemo Protocol)[42] is regarded as the most significant and comprehensive one.[43] The Tanzania Anti-Trafficking in Persons Act, 2008 borrows a leaf from this instrument. It

33 Section 125 of the PCCA which states that, any person being of position or authority, who in the exercise of his authority, demands or imposes sexual favours or any other person as a condition for giving employment, a promotion, a right, a privilege or any preferential treatment, commits an offence and shall be liable on conviction to a fine not exceeding five million shillings or to imprisonment for a term not exceeding three years or both

34 Criminal Appeal No 287 of 2012, Court of Appeal of Tanzania (unreported); See Tanzania Women Judges Association (TAWJA), Case Law Manual Volume II reported by TAWJA (undated)

35 See: *Nguza Viking @ Babu Seya and others vs. Republic* (CA) Criminal Appeal no 56 of 2005

36 See section 7(1), (4) and (5), 20 and 33 of the ELRA

37 *Ibid* Section 7

38 *Loc. cit*. TAWLA, p 23

39 This rationale is further explained by section 33 of the EALR which gives the details of maternity leave

40 These includes, amongst others, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (the OPCC); and the Second Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography(the OPSC), both adopted in 2002.(Quoted from TAWLA report September 2014)

41 Muntarbhorn, V. *Combating Migrant Smuggling and Trafficking in Persons, Especially Women: The Normative Framework Re-Appraised: Migration and International Legal Norms*. P. 153

42 The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15th November 2000. See at http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx

43 *Loc. cit* TAWLA, p.24

has been enacted as a way of domesticating this Parlemo Protocol and others especially CEDAW.[44]

Article 4 of Maputo Protocol provides that every woman shall be entitled to respect and the integrity and security of her person. The protocol prohibits all forms of exploitation, cruel, inhuman or degrading punishment and treatment. It also describes appropriate and effective measures that state parties of the protocol shall take to protect the life, integrity and security of a woman.[45]

The enactment of the Anti-Trafficking in Persons Act, 2008 is the result of domesticating ad implementing of those international conventions. The elements of anti-trafficking in persons were introduced by SOSPA to specifically address Trafficking. The said new section[46] describes what trafficking is and makes it an offence punishable by imprisonment for no less than twenty years and not exceeding thirty years.

The issue of trafficking was extensively elaborated in 2008, through the Anti-Trafficking in Persons Act, 2008. The enactment of the anti-trafficking law places definitions, penalties and protection of victims under one legal umbrella. Penalties are directed at those trafficking persons but also for facilitating human trafficking.[47] The law as it reads is good, but it only regulates issues of anti-trafficking of women and girls and therefore provides less protection on VAW generally.

## 4. GAPS IN ADDRESSING VIOLENCE AGAINST WOMEN IN TANZANIA

Despite those and other notable legal reforms, the social and legal protection of women seems to remain fragile. This situation is partly attributed by presence of bad laws, some of which were named in the Human Development Trust Final Report on Gaps in Policies and Laws that perpetuate GBV in Tanzania; June 2011[48]. Such laws have remained in force all the time. [49]The following are some of the laws with weak or bad provisions or poor enforcement mechanisms as far as protection of women against violence is concerned.

### 4.1 Constitution of the United Republic of Tanzania of 1977

The Constitution[50] provides for the Rights and Duties, which bars discrimination based on sex. It has been argued that the Bill addresses only the *de jure*[51] and not the *de facto*[52] since discrimination is still rampant in Tanzania. This is because there are no enforceability mechanisms in place. This falls short of the definition of CEDAW which requires state parties to take steps in putting enforceable mechanism by law. The enactment of VAW legislation is necessary as it will address this gap.

Furthermore, even if the discriminatory laws are being declared unfit for Tanzania legal jurisprudence i.e. they are discriminatory hence contrary to the Constitution; no further steps are being taken into consideration. This has been witnessed in *Holaria Pastory case*, whereby judge Mwalusanya found rule 20 of the Rules of Inheritance of the Declaration of Customary Law, 1963, to be discriminatory towards females in that, unlike their male counterparts, they are barred from selling clan land. That is inconsistent with article 13 (4) of the Bill of Rights of the Constitution which bars discrimination on account of sex. Therefore, under section 5(1) of Act 16 of 1984, rule -20 of the Rules of Inheritance was to be modified and qualified such that males and females should have equal rights to inherit and sell clan land. Likewise, the Rules Governing the Inheritance of Holdings by Female Heirs (1944) made by the Bukoba Native Authority, which in rules 4 and 8 entitle a female who inherits self-acquired land of her father to have usufructuary rights only (rights to use for her lifetime only) with no power to sell that land, to be equally void and of no effect.

It was further said that females just like males after the decision of this can inherit clan land or self-acquired land of their fathers and dispose of the same when and as they like. The disposal of the clan land to strangers without the consent of the clansmen is subject to the fact that any other clan member can redeem that clan land on payment of the purchase price to the purchaser and should apply to both males and females. Therefore, the District Court of Muleba was right to take judicial notice of the provisions of section 5(1) of Act 16 of 1984 and to have acted on them in the way it did.

However, the customary law in question has not been changed up to this day. Women are still suffering at the hands of selfish clan members. This makes Constitution toothless. Laws can be declared unconstitutional and still nothing can be done to effect the same.

### 4.2 Law of Marriage Act, Cap. 29

The Law of Marriage (LMA) Act, Cap. 29 is the main piece of legislation which governs all forms of matrimonial affairs in Tanzania. It has been in existence since 1971; but has never been substantially amended to reflect the current socio-economic situation including the new development in human rights discourse brought about by the CEDAW, Convention on the Rights of the Child (CRC) of 1989, Maputo Protocol and other several instruments. The LMA still sanctions marriage of girls below 18 years contrary to a number of international human rights instruments on the rights of women. It still permits early marriage for a girl child. It allows girls to be married at the age of 15 years provided their parents have consented and in absence of the parents the consent should come from any other relatives.[53]

This is not only contrary to various international instruments but also to the newly enacted Law of the Child Act which defines a child as a person whose age is below 18 years.[54]

This has also been discussed in the case of *Rebeca Gyumi v AG*[55] whereby among other argument the court found out The Law of Marriage Act old as it was enacted over 45 years ago. The court went further nullifying section 13 and 17 of the Law of Marriage Act by declaring them null and void as they are against the Constitution. The court also directed the Government through the Attorney General within a period of one year form July 2016 to correct the complained anomalies within the provisions of section 13 and 17 of the Law of Marriage Act and in lieu thereof put 18 years as the eligible age for marriage in respect of both boys and girls.[56] This is because there is relationship between age of marriage and various types of violence

44 For instance Article 6 of CEDAW provides that '*State parties shall take all appropriate measures, including legislations, to suppress all forms of traffick in women and exploitation of prostitution of women.'*

45 Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6(September 13, 2000); reprinted in 1 Afr. Hum. Rts. Lj. 40, entered into force 25 November 2005.(Quoted from TAWLA Report September 2014)

46 Section 139A of the Penval Code, this section was introduced in the Penal Code through SOSPA in 1998.

47 See section 4(5) of the Anti-Trafficking in Persons Act, Act No. 6 of 2008, provide for a punishment for a person who commits acts of trafficking. Such person is liable to pay fine of not less than five million shillings but not more than one hundred million shillings or to imprisonment for a term not less than two years and not more than ten years or both. Also section 5(3) provide for punishment for persons who did acts that promote or facilitate trafficking in persons is liable to a fine of not less than two million shillings but not more than fifty million shillings or to imprisonment for a term of not less than one year but not more than seven years or both. Further section 6(4) provide for the punishment for the person who committed severe trafficking in person is liable to a fine of not less than five million shillings but not more than one hundred and fifty million shillings or to imprisonment for a term not less than ten years but not more than twenty years or both. Section 14 and 15 provides for additional punishment including the penalty imposed in the committed offence

48 www.healthpromotiontanzania.org/index.php/en/library122/1n-ternal-docu accessed on July 2017

49 *Loc. cit.* TAWLA, p xi

50 Through Bill of Rights under articles 12 to 29 of the Constitution of the United Republic of Tanzania of 1977 as amended in 1984

51 Letter of the law

52 The practical effect on the law on the intended population

53 Sections 13(3), 17(1)&2 of the Law of Marriage Act, Act No. 5 of 1971, Cap 29, R.E. of 2002

54 Section 4(1) of the Law of the Child Act, Act No. 21 of 2009

55 Miscellaneous Civil Cause No 5 of 2016

56 This case is on appeal and the decision is not yet to be delivered as per July 2017

for instance beating of young wives, due to jealousy accusation of unfaithfulness and controlling behaviour loom large.

The law also sanctions polygamy[57] which is highly prevalent cultural practices that foster VAW. This was also discussed by CEDAW Committee and in its Concluding observations, the Committee urges Tanzania to address harmful cultural practices, such as polygamy and bride price, more vigorously.[58]Since then the situation is still the same. The LMA also do not prohibit spousal beatings, instead, Section 66 of this law declares that:

> *'no person has any right to inflict corporal punishment on his or her spouse.'*

However, in practice wife beating occurs in many rural and urban areas as a result of socialization that insubordinates women. Husband beating is also on the rise but rarely reported. The law enforcement officials tend to view it as a family issue that is best sorted out by the parties concerned and at most with the help of parents and relatives. Such an attitude coupled with the fact that the law does not specifically provide sanctions for wife beating, the declaratory provision falls short of meaningful legal protection against GBV/VAW despite the gender blind provisions against bodily assault under the Penal Code, Cap. 16.[59] Having specific legislation on issues of VAW in place will help to specifically address the sanctions and protection mechanisms on the concerned matters.

### 3.3 Anti-Trafficking in Persons Act, 2008

Despite the magnitude of the problem, there are only few cases which have been investigated, prosecuted and adjudicated by the court regarding trafficking in persons in Tanzania.[60] This is due to lack of awareness about the law and lack of pro-active measures by law enforcers. Dealing with the issue of trafficking of women and girls in the specific legislation of VAW will help women and girls feeling comfortable with the matter as the legislation will make sure that the protection mechanisms is friendly.

### 4.4 Penal Code, Cap. 16

It is very unfortunate that the reforms made by SOSPA did not cover domestic violence. This is probably as observed earlier, domestic violence is not defined as an offence under the LMA, 1971 and marital rape is neither an offence under SOSPA nor LMA. Information and data about GBV and sexual violence in particular is still lacking. Such sources are imperative in order to support evidence based advocacy and decision making. Although the legislation has improved protection of women and children against GBV including sexual violence and harmful traditional practices, its implementation is still hampered by social pressure to settle complaints out of court and the absence of an official mechanism for monitoring of its impact on the GBV prevalence.

There are offences created under the Penal Code, Cap. 16, which are normally regarded as including domestic violence by Police and judiciary, such offences include common assaults,[61] and assault causing actual bodily harm.[62] The common assault is defined as an act by *'any person who **unlawfully** assaults another.'* On the other hand, assaults are defined as acts committed by any person that causing actual bodily harm. The sanctions on conviction are imprisonment for one year and five years respectively. A critical look at the two sections shows that for common assault to qualify as a criminal offence, the act must be unlawful. Thus, if wife or child beating does not result into grievous bodily harm, a charge for common assault of a spouse would not stand. That is where section 66 of the LMA which takes away the right of a spouse to inflict corporal punishment on another spouse comes in an attempt to address domestic violence. However, in practice most women, the community and law enforcers tend to hold the view that wife beating such as slapping, arm twisting and pinching is permissible as long as no grievous bodily harm results from the assault. This is contrary to law and has a discriminatory effect in accordance with Article 1 of the CEDAW and the CEDAW's Committee's General Recommendation Number 19.[63]

Other offences are rape,[64] attempted rape,[65] defilement of idiots and imbeciles,[66] abduction of girls under 16 years of age,[67] sexual assaults of persons and indecent assault on women,[68] acts of gross indecency between persons,[69] sexual exploitation of children,[70] defilement by husbands of wife under 12 years,[71] grave sexual abuse,[72] sexual harassment,[73] procuring women and girls for prostitution,[74] trafficking of persons,[75] and procuring defilement.[76]

Despite the extensive coverage of some of the sexual offences (with GBV elements) including, there are apparent gaps engulfing the whole criminal justice system as far as gender rights are concerned. Such gaps include[77]:-

a) Failure to prohibit FGM on adult women.
b) Absence of prosecutions on FGM perpetrators.
c) Marital rape is not an offence under the Penal Code, Cap. 16 or LMA.
d) The law is silent on domestic violence.
e) The penalty of stern sentences of 30 years minimum imprisonment has tended to work against survivors of GBV who are often depend on their assailant for their survival (and their children).
f) Absence of shelters for victims and survivors of GBV in most parts of Tanzania effectively renders the legal process effectively inaccessible as most violence occurs in the home.
g) The requirement to prove penetration for rape, which may be next to impossible to prove in many cases where forensic evidence is lacking, is another hurdle to reporting and securing a conviction.
h) Although the reforms regarding Police Form Number (PF.3) has eased the cumbersome and victim unfriendly procedure for treatment of the GBV, the requirement to be filled by a medical officer at a government facility is still a serious limitation because the government health facility are few and widely spaced. This creates a constraint of transport charges to hire a taxi to reach the said facility.
i) Many health facilities charge a fee of Tshs 5,000 in Dar es Salaam and between Tshs 2,000 and Tshs 3,000 upcountry for filling in the PF.3. According to the Tanzania Police Force Female Network

57 Section 10(1) and (2) of the same law allows **polygamy** under customary, Islamic and civil marriage rites. According to this law, there are two kinds of marriages, namely; monogamous and polygamous marriages. The Islamic and customary marriages are presumed to be polygamous or potentially polygamous, while the Christian marriages are presumed to be monogamous

58 CEDAW forty first session 30th June-18 July 2008, CEDAW/C/TZA/CO/6

59 TAWLA, Reviews of Laws and Policies on Gender Based Violence, TAWLA, September 2014, p.10

60 *ibid*

61 Section 240 of the Penal Code, Cap 16 of the Laws of Tanzania, R.E. 2002

62 *Ibid* Section 241

63 According to article 1 of CEDAW the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field. Also General Recommendations (GR) No 19 of CEDAW aims at the elimination of all forms of discrimination against women; General Comments 6 of the GR 19 says that, the definition of discrimination provided by CEDAW includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty

64 *Op. cit.* Section 130

65 *Ibid* Section 131

66 *Ibid* Section 137

67 *Ibid* Section 134

68 *Ibid* Section 135

69 *Ibid* Section 138A

70 *Ibid* Section 138B

71 *Ibid* Section 138

72 *Ibid* Section 138C

73 *Ibid* Section 138D

74 *Ibid* Section 139

75 *Ibid* Section 139A

76 *Ibid* Section 140

77 *Loc. cit*. TAWLA, p.12

(TPFNet) operators, often the GBV victims and survivors have no money on their person by the time they escape from their assailants to the safety of a police station.

j) Finally, compensation to the victim has to wait for the release of a convicted perpetrator from prison after thirty years. In practice, apart from family pressure and police corruption forces victims to give up pursue of legal remedies or settle out of Court.

k) Due to lack of effective referral and coordination mechanisms between the police force (investigators); Director of Public Prosecutions (DPP) office (prosecutors); and other criminal justice service providers, a lot of GBV cases are lost along the way.

### 4.5 Employment and Labor Relations Act, 2004

There are no guidelines for employers to adhere to while preparing the non-discrimination plan to guide them on how to maintain minimum standards for both men and women.

### 4.6 Land Act, 1999

The provision on presumed interest of spouses in land is not well implemented. If implement it would reduce if not end the problems which widows are facing by being evicted from the matrimonial homes especially in urban areas.

### 4.7 Customary Law Declaration Order, G.N 279/ 1963 and G.N. 436/1963

The Customary Declaration Order of 1963 is set of codified customary rules derived from various tribes. This order provides for rights and duties associated with marriage, divorce and inheritance. For instance, Paragraphs 62-70 of this Order provides that a widow can be inherited by a relative of the deceased husband. The same paragraphs oust of the rights of the widow over custody of her children. The Paragraph 1-53 of the second schedule to this Order provide for the rule of inheritance which as basically discriminatory. Note that, the enactment of recent laws, in particular, the land laws of 1999 did not rectify this situation.

Almost everything contained in these Orders contravene the rights of the women and girls. It codifies customary norms of Tanzanian tribes which most of them discriminate against women and children. It is time that a whole of this piece of legislation is overhauled or deleted from the statute books as the current circumstance renders it unfit and invalid. This was also argued in the case of *Ndewawiosia d/o Ndeamtzo v. Imanuel s/o Malasi,*[78] where the facts of the case was that, the plaintiff, the youngest daughter of deceased and the only unmarried daughter, appealed against a judgment awarding deceased's land to defendant, the nephew of deceased. Deceased died twenty years ago survived by his five daughters, four of whom had married, and by the illegitimate son of plaintiff, whom he had recognized. Defendant bases his claim to the land on the fact that females are not entitled to inherit clan land and on the assertion that shortly before his death the deceased had asked defendant to take charge of the land. Both plaintiff and defendant are Wachagga. It was held that, traditionally, among the Wachagga and various other tribes of Tanzania, women were disabled from inheriting the property of their fathers in order that such property would stay within the clan. The court went on to say that the provisions of the Restatement of Customary Law [G.N. 436 of 1963, Cap. 333 of the Laws] are somewhat contradictory and do not appear to terminate this disability. Paragraph 29 declares a daughter to be a principal heir if the deceased has left no sons, but paragraph 20 provides, "Women can inherit, except for clan land, which they may receive in usufruct but may not sell". The disability preventing females from inheriting has been abolished in other areas of Tanzania. The Court stated,

78 (PC) Civ. App. 80-D-66, 10/2/1968



"It is quite clear that this traditional custom has outlived its usefulness. The age of discrimination based on sex is long gone and the world is now in the stage of full equality of all human beings irrespective of their sex, creed, race or color. On grounds of natural justice daughters like sons in every part of Tanzania should be allowed to inherit the property of their deceased fathers whatever its kind or origin, on the basis of equality."

This case shows how even courts have been tried ever since to outlaw discriminatory laws. But the efforts ended in vain. Therefore, if the applicability of customary laws in the judicial system is necessary, then it has to be clearly stated that, the application of such laws should not be inconsistence with the Constitution; and the Constitution itself should incorporate provisions which will guarantee strong protection and enforcement of the rights of women and other vulnerable groups. This can be part of the advocacy of the ongoing constitution making process.

### 4.8 Inheritance and Succession Laws[79]

The legal regime on inheritance and succession in Tanzania is pluralistic in nature, whereby customary, Islamic, statutory and Hindu laws apply side by side. This means that the law is not unified. All these laws provide for both testate and intestate successions. The two determinant factors as to which system of law shall apply are ethnicity and religious affinity. If the deceased is of African descent, customary law shall apply but only if he is not also a Muslim.

#### 3.7.1 Inheritance Aspects of Customary Law

With particular regard to gender equality, the inheritance law regime of customary law[80], favors men and especially first-born males who get the lion's share of the estate. Women can inherit if there are no male offspring; women can inherit only as daughters from the father's estate and not as wives from their husbands. Moreover, even when there are enough assets to be shared women are allowed to inherit in the third degree, after first born sons and all other sons, has had their shares.

This was shown in the landmark case of **E.S & S.C. v. United Republic of Tanzania[81].** The case concerns the plight of two widows in Tanzania (E.S. and S.C.) who, under Tanzania's customary inheritance law, were denied the right of inheriting or administering the estates of their late husbands. Thereafter they were, along with their minor children, evicted from their homes by their in-laws. The submission alleged that millions of other women in Tanzania remain governed by discriminatory customary laws, and experience the same violations encountered by the two women in this case.

In its decision the Committee criticized the patrilineal inheritance law (inheritance by persons related through male kin) that left E.S. and S.C. "economically vulnerable, with no property, no home to live in with their children and no form of financial support." It was noted that such a state of vulnerability has restricted the economic autonomy of the two women preventing them from enjoying equal economic opportunities. The Committee emphasized that women's equal rights to own, administer and enjoy property is "central to their financial independence and may be critical to their ability to earn a livelihood and to provide adequate housing and nutrition for themselves and for their children, especially in the event of the death of their spouse".

The Committee held that Tanzania, by condoning legal restraints on inheritance and property rights that discriminate against women, had violated several articles under the Convention on the Elimination of All

79 A whole of this analysis was copied from TAWLA, Reviews of Laws and Policies on Gender Based Violence, TAWLA, September 2014, page 24-25

80 *The Restatement of Customary Law Declaration Order,* G.N. 436 of 1963, Cap. 333 of the Laws

81 CEDAW/C/60/D/48/2013 Communication No. 48/2013

Forms of Discrimination against Women (CEDAW), including, among others, provisions pertaining to equality before the law [15 (1), 15 (2)], the right to bank loans, mortgages and other forms of financial credit [13 (b)], and the same rights for both spouses in respect of the ownership, management, administration and enjoyment of property [16(1)(h)]. In reaching its conclusion, the Committee also considered a number of its general recommendations,

particularly No. 29, which explicitly prohibits disinheritance of the surviving spouse.

The Committee then called on Tanzania to grant E.S. and S.C. appropriate reparation and adequate compensation, commensurate with the seriousness of the violations of their rights. Moreover, the Committee urged Tanzania to repeal or amend its customary laws, including on inheritance, to bring them into full compliance with CEDAW requirements.

Furthermore, the Tanzania inheritance laws are discriminatory against Children born out of wedlock as they are not entitled to inherit from their father unless they have been legitimized and recognized by the said father's clan or family.[82]

The whole process of customary inheritance is discriminatory in nature. Women as wives have no right of residence in the husband's family unless there are no sons by any wife or out of wedlock and no surviving male relatives. A widow has a choice to be inherited -by a relative of her deceased husband's and become his wife, or claim the right to remain with her issue in a house of the deceased and thus become one of the deceased's kinsfolk or go back to their natal family.[83]

Women are being discriminated because they are women. They only have usufructuary right on land,[84] this is contained in the Laws of Inheritance of the Declaration of Customary Law, 1963, which in rule 20 provides that:

> *Women can inherit, except for clan land, which they may receive in usufruct but may not sell. However, if there is no male of that clan, women may inherit such land in full ownership*.

Therefore, women are being infringed of their right to own property freely out of inheritance as opposed to men. It is important to have a specific law which will cover all aspects of women socially, economically and politically in order to reduce VAW.

### 3.7.2 Islamic Law

Islamic law applies to all Muslims of any ethnic or racial descent domiciled in Tanzania. The general rule is that a Muslim cannot dispose of more than 1/3 of his estate by the Will[85].
Everything about this matter is governed by the Holy Quran. According to Islamic law a daughter inherits half of the son's share, while widows are entitled to 1/6 of the estate.[86] In practice, Islamic law regime is significantly influenced by the customs of the people concerned. Nonetheless, the legal test as to when an estate is to be subject to customary law or not is the mode of life under which the deceased conducted himself. If it can be shown that he/she had abandoned customary law, then such a law could not be invoked to address a particular inheritance issue. As for the Islamic law, the test is the intention of the deceased, if by his conduct it can be shown that he intended that Islamic law should not apply to his estate on his demise.[87] There is therefore a need to make women and girls aware of the Islamic laws and which portion of estate should be claimed by them. Again, Islamic law allows Muslim scholars with knowledge and understanding of Islam to give legal reasoning in matters that are not covered in Quran and practice of the Prophet Muhammad (P.B.U.H). They can interpret Quran and practice of the prophet Muhammad to avoid VAW.

### 3.7.3 Statutory Laws

The statutory laws include the Indian Succession Act, 1865 which is in effect codified English law. It applies to estates of foreigners domiciled in Tanzania. Others are the Non-Christian Asiatic (Succession) Act, Cap.112 which applies to non-Christian Asians but who are not Muslims. This legal regime has been the subject of much agitation from various sectors and stakeholders for many years including the CEDAW Committee.[88] There is a need for state in Tanzania to abide with CEDAW committee recommendations. In that case, the state will avoid VAW in Tanzania and falls within the state responsibility under CEDAW and CRC.

## 4 ADOPTION OF VARIOUS POLICIES

Several policies have been adopted to foster gender equality in social, cultural, economic and political spheres, including the Women and Gender Development Policy (2000); The National Plan of Action for the Prevention and Eradication of Violence Against Women and Children, 2001-2015 which provides a framework of actions to be undertaken by the stake holders, including the Government, the Development partners, NGOs, Civil Societies, and local communities, to prevent and eradicate violence against women and children; and the Women Protection and Development Policy of Zanzibar (2001). The policies have been formulated to ensure that all women have equal access to rights and services. Additionally, a multi-sectoral Committee to End Violence Against Women, Children and Persons with Albinism was launched in 2011 along with a multi-sectoral action plan.[89]

## 5 CONCLUSION

Generally, various pieces of legislation have tried to improve the protection of women against violence including sexual violence, domestic violence, sexual abuse/exploitation, trafficking of women and harmful traditional practices. However, the implementation of these laws is still hampered by social pressure to settle the complaints out of court whilst there is no official mechanism for monitoring its impact. Most of violence against women issues is considered to be family issues. In this respect, there is need of having public awareness programs.

It is my view that, there should be a specific law which will address issues relating to violence against women, protection of the survivors or/and victims and lessening procedural standards for handling Gender Based Violence Cases including allowing private owned health facilities with qualified medical practitioners, to record medical evidence of physical violence if requested by a GBV survivor or victim. In doing so, there is need of pushing for enactment of specific legislation which will address the issues of VAW. Not only that in place but also, people, law enforcing agencies, Judges and Magistrates should be sensitized on how to handle VAW and related cases sensitively and effectively.

82 This rule has been modified by the Law of the Child Act, 2009, Act No. 21 of 2009

83 Rules 27 and 66A of *the Restatement of Customary Law Declaration Order of 1963*

84 See *Ephraim v Pastory,* High Court of Tanzania at Mwanza, 22 February 1990 (Civil Appeal no 70 of 1989). See also *Ndewawiosia d/o Ndeamtzo V. Imanuel s/o Malasi* (PC) Civ. App. 80-D-66, 10/2/68, whereby the court held that, *traditionally, among the Wachagga and various other tribes of Tanzania, women were disabled from inheriting the property of their fathers in order that such property would stay within the clan. The provisions of the Restatement of Customary Law [G.N. 436 of 1963, Cap. 333 of the Laws] are somewhat contradictory and do not appear to terminate this disability. Paragraph 29 declares a daughter to be a principal heir if the deceased has left no sons, but paragraph 20 provides, "Women can inherit, except for clan land, which they may receive in usufruct but may not sell*

85 See the case of *Naima Ibrahim as a Trustee of Mahamud Abdurasul Ismail v. Isaya Tsakiris*, Civil Appeal No. 119 of 2009, In the Court of Appeal of Tanzania at Dar es salaam the judge held that: *there is no dispute that under Islamic or Mohamed law, a testator cannot bequeath more than 1/3 of the estate unless the heirs…*

86 Often the problem is quantification of the exact proportion of one sixth of the estate

87 See the cases of *Innocent Mbilinyi deceased* (1969) HCD 283; and *George Kumwenda Vs Fidelis Nyirenda* (1981) TLR 211, and *Sofia Said and Yusuf Mohamed Musa v Awadh Ahmed Abeid & Three Others (*1992) TLR 29. In Sofia Said the Court stated that: *in the Islamic law of succession the principle of proximity is of great importance in that within the limits of each class the nearer of blood excludes the remote*.

88 See: the Concluding Observations of the CEDAW Committee of 6th Periodic Country Report to CEDAW, 2008

89 See: National Human Rights Action Plan 2013-2017, by the Ministry of Constitutional and Legal Affairs, p. 56-59

# THE WAR AGAINST IMPUNITY: THE FALLING BATTLE IN AFRICA

Lameck Samson *

**Abstract**

*In this century, perhaps more than at any other time in the history of the modern world, armed conflict, between peoples has occurred within state borders, rather than between countries. Internal conflicts, no less so than their international counterparts, imply that there will be civilian casualties, that there will be terror and torture, that there will be exceptional detention. And, therefore the civilian's populations become direct victims of terror and atrocities or indirect victims of displacement and deprivation. Africa has been particularly vulnerable to conflicts of identity, which have decimated populations and violated numerous human rights norms. The cases of Liberia, Sierra Leone, Sudan (Darfur), Libya, Cote d'Ivoire, Northern Uganda, Rwanda and the Democratic Republic of Congo constitute frightful examples of this scourge.*

* LLM (Mzumbe University), LL.B (Mzumbe University), Dipl. In Law (Mzumbe University), Assistant Lecturer, Directorate of Continuing Judicial and Legal Education, Institute of Judicial Administration Lushoto

## 1.0 Introduction

The struggle against impunity and for greater accountability is rooted in the liberation and anti colonial struggles of the people of Africa and Asia. It is the people of Africa and Asia who popularized human rights and used the gospel of human rights in their great struggles against the colonialists.[2] No other continent has paid more dearly than Africa for the absence of legitimate institutions of law and accountability, resulting in a culture of impunity. Events in Rwanda were a grim reminder that such atrocities could be repeated anytime. This served to strengthen Africa's determination and commitment to the creation of a permanent, impartial, effective and judicial mechanism to try and punish the perpetrators of these types of crimes, whenever they occur.[3]African countries have been among those who have been supportive of the notion of establishing the International Criminal Court ("ICC") since the 1990s. Indeed, as of 1st June 2012, 121 countries are now State Parties to the Rome Statute. Out of these, 33 are African States, 18 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin America and Caribbean States and 25 are from Western Europe and other States.[4] The facts and statistics show that the African continent has the highest number of state parties to the Rome Statute and has played a fundamental role in firming up the Rome Statute system over the years.[5] It is probably because of the consonance between the anti-colonial liberation struggles and human rights and the fight against impunity and for greater accountability that African people have had no difficulty relating to and supporting the concept of international criminal justice.[6]

Nonetheless, this enthusiasm on the part of African states seems to be within the realm of what one may call the ideology of rhetoric. As Judge Navanethem Pillay, the former judge of the ICC and the current UN High Commissioner for Human Rights, puts in the following words when warning African states against rhetorical commitment to the ICC:

> *From the standpoint of the rule of law, the ICC is one of the greatest achievements of the twentieth century. It is a court that deserved to be taken seriously by African states. On paper this appears to be the case. Currently, 30 African states have ratified the Rome Statute…but the real challenge is converting this expression of high-level political commitment into awareness and practical implementation on the ground. It is only through increased awareness, enhanced capacity and broad-based political support from practitioners and policymakers that Africa will be able to gain a reputation for being a continent seriously committed to ending impunity and non-adherence to the rule of law.*[7]

Nonetheless, the continent has continued to witness colossal and grave human rights violations, especially war crimes, crimes against humanity and genocide. The 1994 Rwanda genocide was a tragic reminder of the Second World War holocaust in Europe in the 1940s, and against which humanity had resolved 'never again.' The current reported war crimes, crimes against humanity and genocide in the Darfur region of the Sudan have once again challenged humanity's resolve: never again.[8] Therefore, these gross violations of human rights witnessed in recent times in places such as Rwanda, Sierra Leone, Kenya, Sudan, Zimbabwe, the Democratic Republic of Congo, and Egypt, Tunisia, Angola, Libya and others are in reality a betrayal of the goals of the liberation struggles of the African people.

### 1.1 Background

The first matters to be referred to the ICC after the Rome Statute came into force were referred by the Democratic Republic of the Congo, the Central African Republic and Uganda all of which are African countries.[9] Again, following its electoral crisis, Ivory Coast another African country became one of the first nations to file a declaration of acceptance of the jurisdiction of the ICC in terms of the Rome Statute. Yet given the state of human rights enjoyment from Asmara to Abidjan, from Cape Town to Cairo; Africa has experienced scores of human rights catastrophes of extreme proportions: the scourge of racism and apartheid in South Africa, the 1994 Rwandan genocide, the Darfur crisis, and civil wars in Somalia, Sierra Leone, Côte d'Ivoire and Liberia, one would be tempted to question the commitment of

2 African Guide to International Criminal Justice by Institute of Security Studies Edited by Max du Plessis

3 Mochochoko (2005), 'Africa and the International Criminal Court,' in E Ankumah & E Kwakwa (eds.), African Perspectives on International Criminal Justice ,Ghana: Africa Legal Aids, p 249

4 See http://www.icc-cpi.int/Menus/ASP/states+parties/> (last accessed on July 2017)

5 Ibid

6 African Guide to International Criminal Justice by Institute of Security Studies Edited by Max du Plessis

7 Navanethem Pillay (2008), 'International Criminal Court,' in Max Du Plessis, African Guide to International Criminal Justice, pp 8–9, Pretoria: ISS.

8 Max Du Plessis (2008), 'The International Criminal Court and its Work in Africa: Confronting the Myths,' ISS Paper 173, November 2008

9 Ibid

states to the fight against impunity.[10]

To add salt to the wound, the legitimacy, impartiality and effectiveness of African law enforcement institutions have been questioned for a long time, while the extent of corruption, abuse of power and human rights violations point to the need for stronger national institutions of accountability.[11] The atrocities witnessed in Rwanda, Kenya election violence and Sierra Leone were so severe and so shocking that most African people were left convinced that mechanisms (national and international criminal justice system) were no longer in place to ensure that these kinds of gross violations of human rights would not be repeated.[12]Therefore, a number of persons in African will have to be persuaded that Africa needs international criminal justice in view of the recent events.

### 1.2 The Fallen Battle

Recently, a number of controversies have be-devilled international criminal justice in Africa and appear to have dented the fight against impunity and the battle to ensure that perpetrators of atrocities and gross violation of human rights are held accountable.[13] These include;

#### 1.2.1 The Question of Peace versus Justice

Leila Nadya Sadat argues that the ICC represents a "quantum-leap" in the enforcement of International Criminal Law and a monumental response to the most serious crimes of concern to the international community as a whole.[14] And, they do emphasis that the ICC stands as a determination that de facto impunity should no longer be enjoyed by those perpetrating genocide, war crimes and crimes against humanity by ensuring that cases are tried even when states are unwilling or unable to do so themselves.[15] For them criminal prosecution of those accused of committing war crimes is a fundamental aspect of a victim's right to justice. However, in armed conflicts where serious violations of the laws of war have been committed on a massive scale, the notion of remedial or retributive justice[16] for victims of war crimes often has to be balanced against the need of the territorial State to deal effectively and progressively with past atrocities and not to provoke or maintain further violence.

This perception gives priority to peace. While not dismissing the need to tackle impunity, temporary immunity should be guaranteed for key actors in order to secure their engagement in peace negotiations. The argument implies that there are no ideal solutions in the field of transitional justice; there are always tensions between the desires and need to prosecute the perpetrators of crimes so that full accountability is achieved, and the reality that, in order to end conflict, there will need to be multiple compromises in which justice can only be imperfectly implemented. Therefore, using retributive measures is seen as problematic as, potentially, it obstructs efforts to reach peace accord.[17]

It argues that securing peace should be the first priority and that with time justice will always reach those who have committed crimes. In authorizing the arrest of Sudan's President al-Bashir, ICC judges agreed that he had a case to answer for his alleged role in war crimes and crimes against humanity committed in Darfur.[18] But the execution of the warrant without an adequately managed transition could create a power vacuum in Khartoum, unleashing destabilizing tremors beyond Sudan's borders. Consequently, all nine countries that share a border with Sudan are on a war footing. Without a government for two decades, nearby Somalia is already a major destabilizing factor in the region. Uganda's murderous Lord's Resistance Army, long supported by Khartoum and whose leaders are also wanted by the ICC, is re-grouping in vast ungoverned border territory between Sudan, Uganda and DRC.[19] The 2005 'comprehensive' peace agreement (CPA) that ended Sudan's half century-long north-south war risks breakdown, while the Darfur crisis in western Sudan remains active.[20]

Therefore, one cannot dismiss the AU's concern that the execution of an arrest warrant without a carefully managed transition could lead to further instability in Sudan and its nine neighbouring countries. However, this argument is a variation of the numerous excuses for inaction that inevitably accompany justice measures against a head of state. A vivid example of peace versus justice dilemma resurfaced in the course of the exercise of the ICC's mandate in Uganda. In Uganda, which was the first ICC situation country, a section of victim communities and academicians criticized the Court for partly contributing to the unsuccessful Juba Peace talks between the Government of Uganda and the Lord Resistance Army (LRA) when it issued arrest warrants for the latter rebel outfit.[21] Negotiators and community leaders working for peace in northern Uganda had claimed that the ICC warrants for the rebel Lord's Resistance Army (LRA) leadership jeopardized peace prospects, and that starting investigations before the war ended risked both justice and peace.[22]

#### 1.2.2 The Vagueness of Provisions in the Rome Statute

Indeed, the aspirations of its drafters will be fulfilled just as surely if national systems carry out legitimate investigations and prosecutions on their own. Thus, while a creation of historic import, the Rome Statute envisions a Court that "may never be employed." This perspective is reflected in two very significant ICC salutes to state sovereignty: complementarity[23] and prosecutorial deferrals in "the interests of justice".[24] These "salutes" are the product of one of the most difficult negotiation points of the Rome Conference: When should the ICC defer to national proceedings?[25] There was a battle of conflicting purposes at Rome. On the one hand, there was the international obligation of states to prosecute international crimes added to the practical impossibility of placing that burden solely upon international tribunals (ad hoc or permanent). Opposing this view were those who advocated state sovereignty and the need to retain flexibility with regard to truth and reconciliation efforts, especially amnesty, in the context of difficult regime change. The result: a system in which prosecutorial discretion will be exercised in the context of purposefully vague provisions that recognize that peace and justice are sometimes incompatible goals.[26]

The provision of which have been constantly employed by the majority of African countries and the AU in various scenarios such as in the recent investigation and prosecution

10 Louis Henkin, "The United Nations and Human Rights," 12., Org. Vol.1, XXI, No.3, (Summer, 1965): 504

11 K. Avruch and B. Vejarano, "Truth and reconciliation commissions: A review essay and annotated bibliography", (2002) The Online Journal of Peace and Conflict Resolution, Vol. 4.2, pp. 34-76.

12 Navanethem Pillay (2008), 'International Criminal Court,' in Max Du Plessis, African Guide to International Criminal Justice, pp 8–9, Pretoria: ISS.

13 Sriram, C.L. The ICC Africa experiment: The Central African Republic, Darfur, Northern Uganda and the Democratic Republic of the Congo. University of Kwa-Zulu Natal Press. 317. (2009)

14 M. P. Scharf, The Amnesty Exception to the Jurisdiction of the International Criminal Court, (1999) 32 CORNELL INT□ L L.J. 507, 507

15 Ibid

16 K. Avruch and B. Vejarano, "Truth and reconciliation commissions: A review essay and annotated bibliography", (2002) The Online Journal of Peace and Conflict Resolution, Vol. 4.2, pp. 34-76.

17 Sriram, C.L. and S. Pillay (eds). 2009. Peace versus Justice? The dilemma of transitional justice in Africa. Scottsville, South Africa: University of KwaZulu-Natal Press.

18 Branch, Adam. 2004. International justice, local injustice. Dissent (Summer): 22-28.

19 Allen, Tim. Trial Justice: The International Criminal Court and the Lord's Resistance Army. London: Zed Books. 2006

20 Ibid

21 Mary Kimani, "Pursuit of Justice or Western Plot: International Indictments stir angry debate in Africa" (October 2009) at Page 12 mentions that the warrants for Joseph Kony and other leaders of the LRA were seen as impeding a peaceful end to the conflict in Northern Uganda. Available at www.un.org/en/africarenewal/Volume23no/233-icc.html

22 "Uganda: ICC indictments to affect northern peace efforts, says mediator," IRINnews, October 10, 2005, http://www.irinnews.org/report.aspx?reportid=56654, (accessed Dec. 11, 2015); also see Richard Dowden, "ICC in the Dock," commentary, Prospect Magazine, May 2007

23 Rome Statute art. 17

24 Rome Statute art. 53(1)(c)

25 D. J. Scheffer, Fourteenth Waldemar A. Solf Lecture in International Law: A Negotiator's Perspective on the International Criminal Court , (2001) 167 MIL . L. R EV. 1,10–12

26 M. P. Scharf, The Amnesty Exception to the Jurisdiction of the International Criminal Court, (1999) 32 CORNELL INT□ L L.J. 507, 507

of perpetrator of Kenya violence and the Darfur crisis. As evidenced by Jean Ping, the AU Chairperson is quoted to have stated as follows:-

> *"The AU's position is that we support the fight against impunity; we cannot let crime perpetrators go unpunished. But we say that peace and justice should not collide, that the need for justice should not override the need for peace."*[27]

### 1.2.3 The Feud between the ICC and AU

The current turbulent relationship between the International Criminal Court and Africa was sparked off in July 2008 when the Prosecutor applied for a warrant of arrest for Omar Al-Bashir, the sitting President of the Republic of the Sudan. Al-Bashir was charged on the basis of individual criminal responsibility for committing war crimes, crimes against humanity and the crime of genocide in the Darfur region of South Sudan. Following this application by the Prosecutor, the Peace and Security Council of the AU adopted a decision in relation to the ICC Prosecutor's application for a warrant of arrest.[28]

In this decision, the Council reiterated the African Union's commitment to the fight against impunity on the African continent and also condemned the gross violations of human rights in the Darfur region.[29] The Council, however, emphasized that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace, thereby pointing to the "wrong timing" of the Prosecutor's application for Bashir arrest warrant. In addition, the Council reaffirmed its statement of 11thJuly 2008, which highlighted the African Union's concerns regarding the misuse of indictments against African leaders in conformity with decision Assembly/AU/Dec.199 (XI) on the abuse of the principle of universal jurisdiction.[30] On 3 July 2009, at the 13th African Union (AU) summit of Heads of State in Sirte, Libya, African leaders resolved to "denounce the International Criminal Court (ICC) and refuse to take action on the Court's order that should Sudan's President Omar al-Bashir land in their territories, he should be arrested, and extradited for prosecution by the ICC, for crimes against humanity, allegedly committed in the Darfur region of southern Sudan.

### 1.2.4 Non-Cooperation to the ICC (Al Bashir Escape in South Africa)

Early, 15th June, 2015, Al-Bashir escape in South Africa has been cited alternatively as demonstrating the ineffectiveness of the ICC and as showing its ability to force responses from governments and officials under arrest warrants from the court. With Al-Bashir in South Africa to attend an African Union (AU) summit, the South African Litigation Center filed a motion in Pretoria's high court to compel the execution of two International Criminal Court (ICC) arrest warrants for the Sudanese president. The court ordered Al-Bashir to remain in the country pending a ruling on the matter, but he fled before a decision on the arrest motion was issued. The South African government said that Al-Bashir had immunity because he was attending an AU summit as a head of state. The argument is against the resolution of the UN Security Council, in its 31st March 2005 Resolution 1593 referring the situation in Darfur to the ICC, implicitly waived any immunity for Al-Bashir. This follows the Rome Statute's core principle that explicitly precludes immunity regardless of government office.

And, furthermore, it is against the NGHC's judgment that relates to the content of the Host Agreement between South Africa and the African Union (hereinafter the 'Host Agreement').[31] The Host Agreement provides, in part, that the South African Government:

> *"shall accord the Members of the Commission and Staff Members, the delegates and other representatives of Inter-Governmental Organizations attending the Meetings the privileges and immunities set forth in Sections C and D, Articles V and VI of the General Convention on the Privileges and Immunities of the OAU."*[32]

The General Convention on the Privileges and Immunities of the OAU (hereinafter the 'General Convention'), for its part provides that 'Representatives of Member States' shall be accorded, inter alia, 'immunity from personal arrest or detention' and 'such other privileges, immunities and facilities ….as diplomatic envoys enjoy…'[33]. The NGHC first determines that the General Convention is irrelevant for the purposes of disposing of the matter since South Africa never ratified it.[34] Second, the NGHC determines that Host Agreement, on its terms, 'does not confer immunity on the Member States or their representatives or delegates.'[35]

While South Africa's experience with the conflict of obligations caused a stir, several African states had already faced the dilemma. Some of these states, in particular Djibouti and Kenya, have had to make 'appearances' before the Bureau of the Assembly of States Parties to the ICC to explain their non-cooperation with the duty to arrest and surrender of Al-Bashir. Others, most notably the Democratic Republic of Congo, Malawi and Chad, have had to appear before the Pre-Trial Chambers of the ICC.[36] All told, before June 2015, there had been seven cases of non-cooperation with the duty to arrest and surrender Al-Bashir, Kenya, Djibouti, Chad (twice), Malawi, Nigeria and the Democratic Republic of Congo.[37]

### 1.2.5 The Push to Merge African Court of Justice and African Court on Human and People's Rights

The African Union is trying to undermine the ICC by establishing its own court or mechanism to try international crimes. In response to AU decision in 2009 on whether to create an African substitute for the ICC, the AU Commission began a process in February 2010 to amend the protocol on the Statute of the African Court of Justice and Human Rights to expand the court's jurisdiction to include international and transnational crimes. The resultant draft protocol adds criminal jurisdiction over the international crimes of genocide, war crimes and crimes against humanity, as well as several transnational crimes such as terrorism, piracy, and corruption. Apart from, African supra national bodies such as the African Union- most recently the East African Legislative Assembly has continued to push for the Court to withdraw its mandate in Africa and leave the investigation and prosecution of grave crimes to national and

27 See "World Reaction-Bashir Arrest" (4th March 2009) BBC, available at: http://news.bbc.co.uk/2/hi/africa/7923797.stm

28 This application was made on the basis of Article 58 of the Rome Statute

29 Peace and Security Council Communique arising out of its 142nd Meeting held on 21st July 2008 in Addis Ababa, Ethiopia PSC/MIN/Comm (CXLII) Found at http://www.africa-union.org/root/au/organs/142-Communique-Eng.pdf

30 Peace and Security Council Communique arising out of its 142nd Meeting held on 21st July 2008 in Addis Ababa, Ethiopia PSC/MIN/Comm (CXLII) Found at http://www.africa-union.org/root/au/organs/142-Communique-Eng.pdf

31 Agreement between the Republic of South Africa and the Commission of the African Union on the Material and Technical Organisation of the Meetings of the 30th Ordinary Session of the Permanent Representatives Committee from 7 to 9 June 2015, the 27th Ordinary Session of the Executive Council from 10 to 12 June and the 25th Ordinary Session of the Assembly on 14 to 15 June 2015

32 Article VIII of the Host Agreement

33 Section C, Article V (1) of the General Convention

34 See generally Southern African Litigation Centre vs. the Minister of Justice, supra note 2, at § 28.4

35 Ibid, at § 28.10.1

36 See Decision Pursuant to Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Request Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, the Prosecutor vs. Al Bashir, Pre-Trial Chamber I, 12 December 2011 (ICC-02/05-01/09)

37 Decision Pursuant to Article 87(7) on the Failure of the Republic of Chad to Comply with the Cooperation Request Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir, The Prosecutor vs. Al Bashir, Pre-Trial I, 13 December 2011 (ICC-02/05-01/09); and Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, The Prosecutor vs. Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber II, 9 April 2014 (ICC-02/05-01/09)

regional justice mechanisms on the basis of the principle of complementarity which gives states the primary jurisdiction to try grave crimes and play an active role in the fight against impunity[38]; The President of the African Court on Human and People's Rights announced that the Court would request the 19th AU Summit to merge the African Court of Justice and the African Court on Human and People's Rights and give it the jurisdiction to try criminal cases. According to the President, this move will allow for Africans accused of war crimes and crimes against humanity to be tried by the African Court instead of being sent to the ICC.[39] Article 28A of the "Draft Protocol on the Statute of the African Court of Justice and Human Rights," (hereinafter referred to as the "Draft Protocol") seeks to give the Court the power to try persons for the crimes of genocide, crimes against humanity, war crimes and the crime of aggression, among others.[40]

Consequently, on 27 June 2014 African heads of state in Malabo, Equatorial Guinea, adopted an Amended Protocol on the Statute of the African Court of Justice and Human Rights (known as the ACJHPR Amendment).[41] The ACJHPR Amendment grant the resultant court jurisdiction over international criminal law, adding to the human-rights jurisdiction it currently exercises and the general international-law jurisdiction it is expected to exercise when the 2008 ACJHR Protocol comes into effect[42]. Moreover, the amended protocol contains a provision that grants immunity from prosecution to serving African Union (AU) heads of state and other senior officials.[43] Therefore, African leaders have confirmed their resolve to shield themselves from any accusation or prosecution for international crimes while in office.[44]

Likewise, at the regional level, in April 2012, the EALA passed a resolution in which it requested that the East African Council of Ministers to immediately embark on the process of requesting the transfer of proceedings for the accused four suspects in respect of the 2007 Kenya Post Election violence from the ICC.[45] In the same request citing and congratulating the people of Kenya upon a successful and speedy transition from the post-election violence, they posited that the country was now able to locally resolve the matter given that the Coalition Government was largely successful and the fact that there was constitutional order.

### 1.2.6 African States Threaten to withdraw from ICC

One of the most serious challenges the ICC has ever faced is the States threat to withdraw from the court jurisdiction. If this current attack on it succeeds, the court's future may be in doubt. Most of the African States are concerned that in its eleven-year history, the International Criminal Court (ICC) has prosecuted only Africans. States condemned the court for discrimination and for taking advantage of Africa's weak global position.[46] The ICC has not faced a pullout threat since 2013, when a group of African member states angered over the court's announcement of charges against sitting Kenyan President Uhuru Kenyatta called for the continent's en masse withdrawal from the body. Charges were subsequently dropped against Kenyatta, due in part to the Kenya's refusal to cooperate.[47] Suddenly facing prosecution, Kenyatta and Ruto buried their political differences and formed the Jubilee Alliance, sometimes mockingly called the Coalition of the Accused. Ominously, the alliance campaigned in part by denouncing the court, turning the charges against its leaders into a nationalist protest against interference in Kenya's affairs.[48] Kenyatta conveniently interpreted his narrow victory as a mandate to ignore the legitimate demands for justice of the victims and survivors of the 2007–2008 violence.[49] Kenya contends that the court's so-far exclusive focus on African crimes is unfair, a modern-day form of colonialism. As Kenyatta put it in a speech at the AU summit in October, the ICC "stopped being the home of justice the day it became the toy of declining imperial powers."

Recently, three African countries initiated a process to withdraw from the Rome Statute of the International Criminal Court.[50] **On October 18,** 2016 Burundi's president signed legislation to withdraw from the International Criminal Court, the first country to do so. Burundi officially holds the ICC as a 'Western tool to target African government'.[51] The ICC's inability to try heads of state/leaders of any of the P5 countries or even launch preliminary investigations against them for acts of impunity has bolstered the notion of substantial unfairness and geopolitical prejudice in the debate surrounding individual accountability. This allegation of institutional political bias is not a new one but has gained ground in recent times with nine out of ten situations being currently investigated by the office of the prosecutor being in Africa (Mali, Cote D' Ivoire, Central African Republic, Libya, Kenya, Sudan, Uganda, Democratic Republic of Congo) while Georgia is the only country outside Africa facing such an investigation.[52]

South Africa also announced its intention to follow suit by submitting a written notice of withdrawal to the United Nations Secretary-General. South Africa's decision to withdraw from the ICC was a first in the history of the court. South Africa justified its decision to quit the Rome Statute was due to the apparent conflict with its obligations to the African Union to grant diplomatic immunity to serving heads of states, leaders and officials. Not long after, on October 25, 2016, The Gambia, using particularly colorful language in which it referred to the ICC as "an International Caucasian Court for the persecution and humiliation of people of colour, especially Africans," announced that it, too, was going to withdraw and, on November 10, 2016, submitted its written notice to the Secretary-General. The recent decisions by South Africa, Burundi, and Gambia to leave the International Criminal Court (ICC) set a bad precedent and has swung the exit door wide open for others to follow.[53]

### 0.2.7 States' Unwillingness to Prosecute

The court can only exercise its jurisdiction when the state concerned cannot, does not, or is unwilling to prosecute the perpetrators itself. As ICC Special Prosecutor Fatou Bensouda (2012) states:[54]

*"Simply put, the Court*

38 Ibid

39 See "Africa to create criminal court" (15th July 2012) Daily Monitor Newspaper

40 See "Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights" Available at http://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf>

41 Institute for Security Studies, Implications of the AU decision to give the African Court jurisdiction over international crimes, issue paper 235, June 2012; see also Max du Plessis, A new regional International Criminal Court for Africa? South African Journal of Criminal Justice, 2, 2012, 286.

42 Robert Jackson, The Legal Basis for Trials of War Criminals, Temple law Quarterly, vol. xix, 1945

43 Jarinde T. Tuinstra, defending the defenders: The role of defence counsel in international criminal trials, Journal of international Criminal Justice, 8, 2010, 463–486.

44 Deya, D. Worth the wait: Pushing for the African Court to exercise jurisdiction for international crimes. http://www.osisa.org/sites/default/files/is_the_african_court_worth_the_wait_-don_deya.pdf

45 See the East African Legislative Assembly, "Resolution of the Assembly seeking the EAC Council of Ministers to implore the International Criminal Court to transfer the case of the accused four Kenyans facing trial in respect of the aftermath of the 2007 Kenya General Elections to the East African Court of Justice and to reinforce the treaty provisions" Available at http://www.eala.org/oldsite041111/key-documents/doc_details/266-resolution-seeking__to-try-kenya-2007-general-elections-aftermath-accused-persons-at-eacj-not-icc.htm

46 Amnesty International, (2014), Crying for justice: Victims' perspectives on justice for the post-election violence in Kenya. Available at: https://www.amnesty.org/en/press-releases/2014/07/kenya-victims-still-seeking-justice-post-election-violence/.

47 Institute for Security Studies, (2015), International justice at a crossroads in Africa, Live webcast, 16 July 2015, Pretoria, South Africa

48 Al Jazeera (2013). Kenya parliament votes to withdraw from ICC. 5 September 2013. Available at: http://www.aljazeera.com/news/africa/2013/09/20139515027359326.html.

49 Mail & Guardian, (2014), African Union unites against ICC trials. 2 February 2014. Available at: http://mg.co.za/article/2014-02-02-african-union-unites-against-icc-trials.

50 Jospeh, Abraham. "Why Did South Africa, Burundi and Gambia Decide to Leave the International Criminal Court?" The Wire. The Wire, 1 Nov. 2016. Web. 2 Nov. 2016.

51 Jospeh, Abraham. "Why Did South Africa, Burundi and Gambia Decide to Leave the International Criminal Court?" The Wire. The Wire, 1 Nov. 2016. Web. 2 Nov. 2016.

52 Ibid

53 Jospeh, Abraham. "Why Did South Africa, Burundi and Gambia Decide to Leave the International Criminal Court?" The Wire. The Wire, 1 Nov. 2016. Web. 2 Nov. 2016.

54 Bensouda, F., (2012), Setting the record straight: The ICC's new prosecutor responds to African concerns, Office of the Prosecutor, International Criminal Court, 10 October 2012. Available at: http://www.icccpi.int/en_menus/asp/complementarity/CompletedProjects/Lists/Capacity%20Building/Attachments/22/10Oct2012ICCKeyNoteAddress.pdf.

*cannot investigate if a state itself is investigating and prosecuting the same crime. In all situations referred to the Court by states themselves (Uganda, DRC, Central African Republic ...), the Office [of the Prosecutor] started investigating only after determining that there were no ongoing investigations. Even in situations referred to the Office by the UNSC (Sudan and Libya) or situations in which the Office opens investigations by [its] own motion (Kenya), the Office is obliged to first determine whether there are ongoing national proceedings before starting its own investigations."*[55]

Following the 2008 post-election violence in Kenya, a Commission of Inquiry (popularly known as the Waki Commission) was established to investigate and offer recommendations to the Kenyan government.[56]The Waki Commission identified potential suspects and recommended the establishment of an independent Kenyan tribunal with international participation. In December 2008, the government accepted the Waki Commission's findings and agreed that it would refer the situation to the ICC if the Commission's recommendations were not implemented.[57] Because Kenya's regular courts had a poor record of dealing with electoral violence, Kenya was asked by Annan and others to set up a special tribunal that would include international judges. However, twice a bill to create the tribunal was voted down by the Kenyan parliament. Not only Kenyatta's allies but Ruto himself led the opposition to the bill. They must have calculated that a Kenyan special tribunal posed a greater threat than what at the time seemed the distant prospect of prosecution by the ICC.[58] Subsequently, the Kenyan Cabinet announced that it would not establish a special tribunal, but would instead convene a Truth, Justice and Reconciliation Commission (TJRC) which would not prosecute suspects but rather to oversee reforms in the judiciary, police, and other investigatory bodies that may, in turn, deal with the issue.[59]

In 2008, a Kenyan commission of inquiry handed to Kofi Annan a confidential list of people behind the violence. It asked him to give the list to the ICC if the government did not establish a tribunal. When it did not, Annan reluctantly handed the list to the ICC in 2009. Kenya's president at the time, Mwai Kibaki, encouraged him to do so and promised his government's support[60]. In 2011 the ICC, in turn, summoned six Kenyans in connection with violent acts: Kenyatta and two alleged accomplices from one side and Ruto and two alleged coconspirators from the other. Therefore, the ICC intervened only after Parliament rejected the commission's recommendation to establish a special tribunal.[61]

55 Ibid

56 Wolf, T. International justice vs. public opinion?, The ICC and ethnic polarization in the 2013 Kenya election, (2013), Journal for African Elections, 12(1), 143-177

57 Wolf, T. International justice vs. public opinion?, The ICC and ethnic polarization in the 2013 Kenya election, (2013), Journal for African Elections, 12(1), 143-177

58 Ibid at note 61

59 See Mike Pflanz, "US Professor Quits Kenyan Truth Commission, Citing Lack of Confidence," The Christian Science Monitor, October 22, 2010.

60 Wolf, T. International justice vs. public opinion?, The ICC and ethnic polarization in the 2013 Kenya election, (2013), Journal for African Elections, 12(1), 143-177

61 Kanyinga, K., & D. Okello (eds.), Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections. Nairobi: Society for International Development and Institute for Development Studies (IDS)/University of Nairobi), pp. 1-28.



### 1.2.8 The Issue of Selective Prosecution

The issues of selective prosecution as argued by most of African's elite including President Museveni of Uganda in which the President is reported to have said, "The issue of ICC is something we want to discuss among ourselves as Africans, but the way it is being implemented it seems like it is only Africans committing crimes. There are people who have committed crimes but nothing has been done on them."[62] The President of Zimbabwe is reported to have told the UN General Assembly that the ICC has no credibility in Africa. He said:

*"The Court "seems to exist only for alleged offenders of the developing world, the majority of them Africans. The leaders of the powerful Western States guilty of international crime, like Bush and Blair, are routinely given the blind eye. Such selective justice has eroded the credibility of the ICC on the African continent."*[63]

Also, Mubarak M. Musa, the Deputy Head of Mission-Consulate General Uganda, opined that "International Criminal Court has lost its impartiality"[64] in which he argued that the ICC's selectively against the Sudanese Government during the quest for peace and efforts of national reconciliation in Africa. Finally, President Paul Kagame of Rwanda, a country which is not a party to the Court, has portrayed the ICC as a form of "imperialism" that seeks to "undermine people from poor and African countries, and other powerless countries in terms of economic development and politics."[65] Others allege that the Prosecutor has limited investigations to Africa because of geopolitical pressures, either out of a desire to avoid confrontation with major powers or as a tool of Western foreign policy.[66] The ICC's investigations in Africa have stirred concerns over African sovereignty, in part due to the long history of foreign intervention on the continent. Therefore most of the African elite are of the view that ICC is an impediment to achieve peace and also as machinery created by western countries targeting African elites hence offers no cooperation to the ICC orders.

62 See, for example, "Uganda: ICC Targeting African Presidents-Museveni" (17th December 2011) The Monitor, story available at:<http://allafrica.com/stories/printable/201112180083.html>

63 Also see "Mugabe Slams "Blind" International Criminal Court" (23rd September 2011) The Zimbabwe Mail, available at: http://www.thezimbabwemail.com/zimbabwe/9132-mugabe-slams-blind-international-criminal-court.html (accessed on 24/09/2017)

64 See the Daily Monitor Newspaper (22ndJune 2010)

65 AFP, "Rwanda's Kagame says ICC Targeting Poor, African Countries," July 31, 2008; Rwanda Radio via BBC Monitoring, "Rwandan President Dismisses ICC as Court Meant to 'Undermine' Africa," August 1, 2008

### 1.2.9 Scratch my Back, I will scratch yours

Recent events on the African continent make one sad to be African. Beginning with the African Unions' (AU) stand against the International Criminal Court (ICC) concerning the arrest warrant issued for Omar Al-Basir. A resolution[67] was passed at the last meeting of African heads' of states not to respect the arrest warrant and for that matter, to allow the Sudanese leader the right to traverse the length and breadth of the continent without fear of being arrested and sent to the Hague to face trial. Their reason is that, the Security Council of the United Nations (UN) treated the AU with contempt by not suspending the warrant for the one year they requested.[68] A few days, after the summit it became obvious that not all the leaders were in agreement. Botswana distanced itself from the resolution and vowed to arrest Al-Basir should he set foot on their land; Uganda did same a few days later which prevented the Sudanese leader from attending a regional summit. The impression created by this action is, so long as you're in power, you play blind, deaf and dumb; that is see no evil, hear no evil and speak no evil

66 Oraib Al Rantawi, "A Step Forward or Backward?", *Bitter Lemons*, 32, 6, August 14, 2008 ; also in Charles Kazooba, "African Legislators See Bias in ICC's Workings," June 7, 2010

67 Peace and Security Council Communique arising out of its 142nd Meeting held on 21st July 2008 in Addis Ababa, Ethiopia PSC/MIN/Comm (CXLII) Found at http://www.africa-union.org/root/au/organs/142-Communique-Eng.pdf

68 This application was made on the basis of Article 58 of the Rome Statute

against your fellow head of state. It may also be a case of you scratch my back, I scratch yours. This argument is backed by the fact that, out of the 53 countries making up the AU, not more than 10 are truly democratic. Most leaders are dictators with terrible human right records so they will protect their kind in order to safeguard their own futures. Robert Mugabe has turned a country from being a net exporter of food to become one depending on food aid, yet his colleagues see him as the voice of the voiceless. Yet, most of African leaders are more interested in receiving applause from their colleagues for standing up to western leaders than preventing their citizens from dying from hunger and starvation, as a result of war. They are keen to show bravado in the full glare of the media by daring the developed nations for speaking out against undemocratic practices but, never report, sent or prosecute them for grave violations of human rights.

The only case which was brought to the ICC by one African State against another state was the case of **Democratic Republic of the Congo versus Uganda**[69]; whereupon on June 23rd 1999, The Democratic Republic of the Congo (DRC) filed an application in the ICJ instituting proceedings against the Republic of Uganda; concerning acts of armed aggression by Uganda in the territory of the DRC. The DRC said this was in violation of the UN Charter and of the Charter of the Organization of African Unity; this military action was part of Uganda's involvement in the civil war and multi-state conflict that took over the DRC between 1998 and 2003. Ugandan troops entered the DRC territory on 28 July 1998. President Kabila requested for the foreign troops to leave but they refused; *inter alia* violation of the sovereignty and territory of the DRC, along with violations of human rights and international humanitarian law.[70]

69 The International Court of Justice, No. 116 (2005)
70 Democratic Republic of the Congo vs. Uganda, The International Court of Justice, No. 116 (2005)

The court found that Uganda did violate the international principles of non-use of force and non-intervention with its armed activities between August 1998 and June 2003. The magnitude and duration of their military intervention was a huge violation of Article 2(4) of the UN Charter. Uganda was also to be found in violation of human rights law and international humanitarian law. The Court granted the DRC's request for reparations, noting under prior precedent it is "well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act."[71]

### 1.1.10 The EACJ has no Mandate on Human Rights Violations Cases

The East African Court of Justice (EACJ)[72] was inaugurated in 2001 following its establishment as the judicial organ of the East African Community (EAC).[73]The Court is divided into a First Instance Division and an Appellate Division. The jurisdiction of the EACJ, as set out in articles 23 and 27 of the Treaty, is to ensure the adherence to law in the interpretation, application of and compliance with the rules and norms of the EAC Treaty.[74] In principle, the EACJ has no mandate to hear Human Rights Cases until such time when Article 27(2)[75] will be operational zed to include Human Rights in the jurisdiction of the Court. The Court's mandate derives from the EAC Treaty. The basic role of the Court, in this integration process, is "to ensure adherence to law in the interpretation and application of and compliance with [the provisions of] this Treaty".[76] Accordingly, the Court would have no direct jurisdiction over Human Rights disputes. This was clearly

71 Democratic Republic of the Congo vs. Uganda, The International Court of Justice, No. 116 (2005)
72 Art. 9(1) (e) of the 1999 EAC Treaty
73 John Eudes Ruhangisa, Role of the East African Court of Justice in the Realization of Customs Union and Common Market 2–3 (paper presented at the Inter-Parliamentary Relations Seminar, Burundi National Assembly, Bujumbura, Burundi, Jan. 27–31, 2010)
74 Art. 23 of the 1999 EAC Treaty
75 Of the 1999 EAC Treaty
76 Ibid at Article 23(1)



elaborated in **Attorney General of Kenya versus Independent Medical Legal Unit**[77]; between 2006 and 2008, over 3,000 Kenyan residents of the Mt. Elgon District were forcibly disappeared, tortured and executed by Kenyan governmental authorities. The applicants alleged that the Kenyan government's failure to take measures to prevent, investigate or punish those responsible violated several International Human Rights Conventions, the Kenyan Constitution as well as the EAC Treaty. The Appeals Chamber stated that the First Instance Division had failed to adequately address the question of jurisdiction. The Appeals Chamber affirmed the decision in *Katabazi*, on which the First Instance Division had relied, in that the lack of direct jurisdiction over human rights disputes under Article 27(2) will not prevent the Court from exercising jurisdiction over disputes under some other basis (including the rule of law, under Article 6(d)) just because they involve a human rights issue. However, the Appeals Chamber found that the First Instance Division had failed to examine or explain how this cause of action fell within one of its jurisdictional bases, particularly Kenya's infringement of State responsibility towards its citizens under Articles 5, 6, and 7.

Nonetheless, the Treaty does contain certain other provisions whose nature and, therefore, interpretation and application, fall well within the realm of democracy, good governance, accountability, social justice, rule of law, economic and civic rights, and even human rights.[78]**Attorney General of Rwanda versus Plaxeda Rugumba**[79]; The applicant, the sister of Lieutenant Colonel Seveline Rugigana Ngabo, complained that the Rwandan government committed human rights violations when her brother was arrested and detained without trial. He was in custody without justification from 20 August 2010 to 28 January 2011, and no information on Lieutenant Ngabo, or any details concerning his detention, was given to his family. He had not been formally charged in court and his wife could not file for his release because her efforts in doing so have led to harassment, forcing her to go into hiding. The applicant argued that the arrest and detention of her brother without trial and Rwandan authorities' failure to investigate constitute breaches of the Community's good governance and human rights principles under Articles 6(d) and 7(2). The Appeals Chamber found that although the EACJ does not yet have jurisdiction to adjudicate disputes concerning human rights per se, Article 6(d) of the EAC Treaty and Article 6 of the African Charter allow the Court to assert jurisdiction over this claim. The fact that Lieutenant Ngabo was held without justification for five months was not in dispute, as the Rwandan government had stipulated that his detention was in accordance with Rwandan national law. However, his incommunicado detention was not transparent and thus amounted to violations of Articles 6(d) and 7(2) of the Treaty (rule of law, good governance, transparency and human rights).

Notwithstanding the afore-stated, the EACJ exemplifies a new trend in African regional human rights enforcement. Rather than serving as a tribunal to resolve trade disputes, as envisaged by its original designers, the court has evolved into one that seeks to hold member governments accountable for violations of human rights and to promote good governance and the rule of law. Like its counterparts the Economic Community of West Africa Court of Justice (ECCJ) and the now suspended Southern African Development Community (SADC) Tribunal, the EACJ has become an important human rights court.

77 15 March 2012, EACJ Appellate Division, Appeal No. 1 of 2011
78 Articles 6 (d), and 7 (2) of the Treaty
79 June 2012, EACJ Appellate Division, Appeal No. 1 of 2012

### 1.1.11 Failure of African States to Accept the competence of ACHPR

The African Court of Human and Peoples' Rights (ACHPR) was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Court Protocol) which entered into force in 2004.[80] The ACHPR has jurisdiction to consider all cases and disputes referred to it concerning the African Charter on Human and Peoples' Rights(the African Charter), the Court Protocol and any other relevant human rights instrument ratified by the state(s) concerned.[81] There are 26 states parties to the Court Protocol. In certain circumstances, cases may be submitted to the ACHPR by states and African Intergovernmental Organizations.[82] The Court Protocol allows individuals and NGOs with observer status before the Commission to complain that a state which is a party to the Court Protocol has violated the African Charter or another relevant human rights instrument which it has ratified.[83] However, it is important to note that this right of individual petition only applies where the state concerned has made a declaration accepting the competence of the ACHPR to receive such a complaint.[84]Therefore, the African States failure to submit declarations prevents individual applicants and other organizations, from bringing claims for human rights violations before the African Court, and thus violated the African Charter and the Protocol. At the time of writing, only five states (Burkina Faso, Ghana, Malawi, Mali, Tanzania and Rwanda) have made such a declaration.

80 See Art. 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights
81 Ibid at, Art. 3
82 Ibid at, Art. 5
83 Ibid at, Art. 5(3)
84 See Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

In **Democratic Party vs. Secretary General of the East African Community & 4 Others**[85] at that time Rwanda, Kenya, Uganda, and Burundi failed to make individual country declarations accepting the competence of the African Court on Human and People's Rights (African Court), as required by articles 5(3) and 34(6) of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (Protocol). The applicant alleged that each state, after ratifying the African Charter on Human and People's Rights (African Charter) and the Protocol, was obligated to submit this declaration "expeditiously." The applicant argued that the failure to submit declarations prevented the applicant, other organizations, and individuals from bringing claims for human rights violations before the African Court, and thus violated the African Charter and the Protocol. In addition, the applicant argued that EAC Treaty articles 6(d) and 7(2) that require partner states to act in accordance with the principles of good governance, and articles 126 and 130 requiring partner states to honor their international obligations, were also violated.[86]

The court determined that it had jurisdiction to consider the claims for violation of the EAC Treaty, but found that there were no violations of the EAC Treaty articles. While article 130 of the EAC Treaty allows the court to mandate compliance where a state party has "failed to honor commitments made" to an international organization, it found that the delay in submitting declarations did not constitute such a failure. The court noted that article 34(b) of the Protocol does not require states to submit declarations "expeditiously" rather, they can be submitted "at any time" following ratification of the Protocol. It further held that it lacked the authority to rule on the alleged violations of the African Charter or the Protocol, stating that the proper forum for such a claim was the African Court. The court stated that it only has authority to interpret the EAC Treaty and cannot "delve into" state party obligations created by other international instruments.

85 29 November 2013, EACJ First Instance Division, Ref. No. 2 of 2012
86 Democratic Party vs. Secretary General of the East African Community & 4 Others , 29 November 2013, EACJ First Instance Division, Ref. No. 2 of 2012



**Conclusion**

Many in the international community cheered when the treaty to create the ICC, the Rome Statute, was adopted in 1998 as a way to pursue some of the world's worst atrocities: genocide, war crimes and crimes against humanity. Generally speaking, the underlying need for the ICC has not changed. The world, Africa, clamored for a court to ensure that those who commit the gravest crimes such as genocide, crimes against humanity and war crimes, should not go unpunished. The likelihood of such perpetrators going unpunished is great, because they often operate in contexts where the criminal justice system has broken down, and where their prosecution and conviction under the national legal system is quite unlikely.

In Africa, the AU has the mandate to address justice and human rights on the continent. Under article 3(h) of its Constitutive Act outlines the aim of the AU to promote and protect human and people's rights in accordance with the African Charter on Human and People's Rights (African Charter) and other relevant human rights instruments. Additionally, the provision of Article 4(h)[87] provides for the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity. However, the Sirte Resolution when African leaders resolved to denounce the International Criminal Court (ICC) and refuse to take action on the Court's order and the recent Malabo Protocol (as the ACJHPR Amendment).[88] The ACJHPR Amendment grant the resultant court jurisdiction over international criminal law, adding to the human-rights jurisdiction it currently exercises and the general international-law jurisdiction it is expected to exercise when the 2008 ACJHR Protocol comes into effect.

If it is established, this Court would have three chambers, one dealing with international crimes, one with inter-state disputes and one with human rights. The last chamber would be a limited continuation of the current African Human Rights Court, which sits in Arusha, Tanzania. Undoubtedly, the most controversial provision of the ACJHPR Amendment is Article 46A, which deals with immunities. This provision states: 'no charges shall be commenced or continued before the court against any serving AU Head of State of Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.' That goes without say, African leaders have confirmed their resolve to shield themselves from any accusation or prosecution for international crimes while in office. Whatever the merits of an African-based court on criminal justice may be, it will be justifiably viewed with skepticism due to the conflict between this clause and the ICC Statute. Under article 27 of the Statute, in contrast, provides that "official capacity" as head of state or senior state official "shall in no case exempt a person from criminal responsibility". Therefore, the underlying political motivation behind the African court's expanded jurisdiction, which can be traced to unsuccessful attempts to curtail the ongoing proceedings involving the Kenyan and Sudanese presidents before

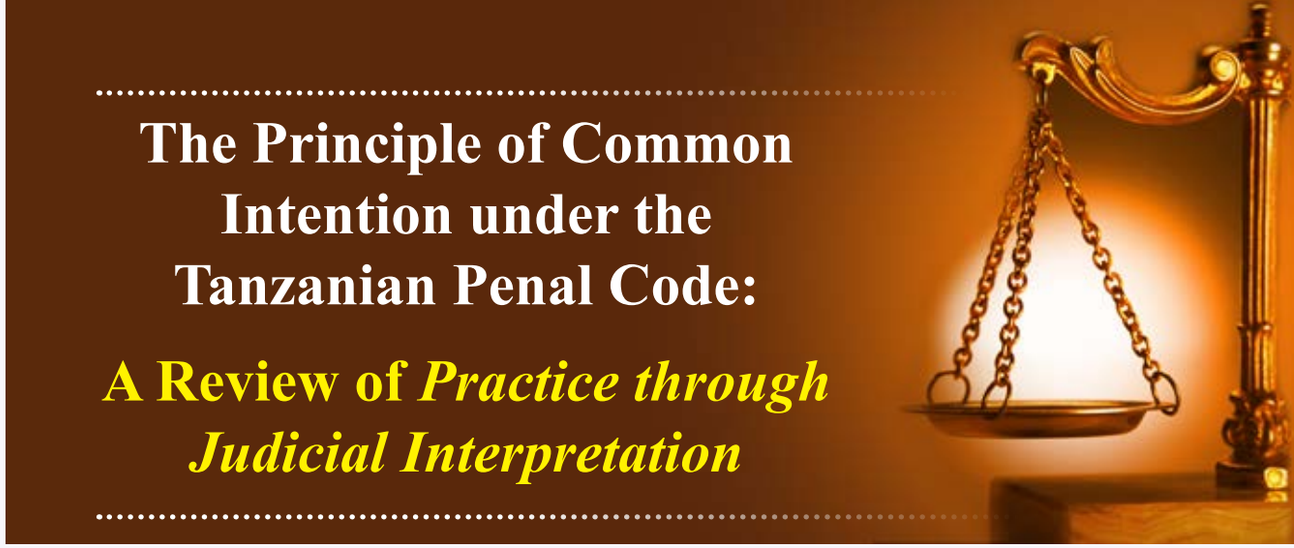
87 African Union. 2000. Constitutive Act of the African Union. Addis Ababa: African Union

88 Institute for Security Studies, Implications of the AU decision to give the African Court jurisdiction over international crimes, issue paper 235, June 2012; see also Max du Plessis, A new regional International Criminal Court for Africa? South African Journal of Criminal Justice, 2, 2012, 286.

the ICC, raises questions about regional leaders' genuine commitment to fighting impunity and ensuring justice for the victims of international crimes. A mass walk-out by African countries would not only see African countries lose the moral ground on international justice discourses but would be a betrayal to its people. These withdrawals are a massive blow to the many victims of especially state-sponsored violence in the continent.

It is indeed a tough time for the court. And even though a good number of African countries have expressed confidence in it, the official position by the African Union calling for alternative dispute resolution mechanisms and African mechanisms of dealing with African problems puts the future of the court in a precarious situation, and this is a huge loss for victims of the many African conflicts especially those that are state-sponsored.





# The Principle of Common Intention under the Tanzanian Penal Code:

## A Review of *Practice through Judicial Interpretation*

*Fahamu MTULYA* *

**Abstract**

*This article analyses the principle of common intention under section 23 of the Tanzanian Penal Code. According to the principle, when a number of persons engage in a criminal act with a common intention, each person is made liable as if he alone did the act. However, decided cases have shown that there are uncertainties and inconsistencies in interpretation of the principle. This article therefore, examines the uncertainties and inconsistencies regarding the application of the principle. In addition, it provides the ingredients and circumstances to aid courts when interpreting and applying the principle.*

**Keywords** : *Penal Code, Common Intention, Practice, Judicial Interpretation.*

### 1. Introduction

In Criminal law, intention is generally taken to mean the accused's purpose[2] to commit the forbidden act. The Penal Code,[3] (Cap. 16) is silent on criminal intention, yet section 23 of the law deals with *common intention*.[4] Again, common intention itself has not been defined in Cap. 16. Judicial practice has nonetheless, interpreted it to mean that intention made among several persons in pursuance of criminal offence.[5] The offence so committed is done in a manner that it comes under the sanction of section 23 of Cap. 16.[6] Section 23 deals with a situation, where an offence requires a specific criminal intention or knowledge and is committed by several persons. Each of them who join the act with such knowledge or intention is liable as if it were done by him alone with that intention or knowledge. The liability of individuals under this circumstance is called *Joint Liability*. The principle of Joint Liability is defined in section 23 in the following words:

> *...when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.*

The leading feature of common intention is *participation* in the action. Therefore, if two or more persons intentionally commit an

1 (*LL B (Dar Es Salaam), LL M ( Oslo); Lecturer, Institute of Judicial Administration Lushoto)

2 *Card, Cross and Jones: Criminal Law,* Thirteenth Edition, Butterworth, London, 1995, at p. 62

3 The Penal Code, [Cap. 16 R.E. 2002].

4 The term common intention used in section 23 is also not defined anywhere in Cap. 16. It is also argued that the term is contentious one among different principles in criminal law studies.

5 *R v. Alex and Seven Others* (1971) HCD 197, *R v. Sangi Manyenyi* (1968) HCD 47 and *Shene Kimboka v. R* (1968) 52. Still, there are inconsistencies and uncertainty in judicial opinion with regard to the degree of involvement and intention sharing in common intention.

6 Section 23 does not create any specific offence but only lays down the principle of Joint Criminal Liability.

offence jointly it is just the same as if each of them had done it individually. Everyone must be taken to have intended the *probable and natural results* of the combination of acts in which he joined.[7] All become guilty of the principal offence. The fundamental factor in common intention is a pre-arranged plan to execute the plan for the desired result.[8] Common Intention does not mean the similar intention of several persons. To constitute common intention, it is necessary that the intention of each one of them must be *known* and *shared* to all of the offenders.[9] It has been further stated that common intention may develop in course of the commission or omission of the criminal act.[10] The essence of liability to be found in existence of common intention is that the criminal act complained against was done by one of the accused persons in furtherance of common intention of all, if this is shown, then the liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone.[11]Therefore, section 23 of Cap. 16 is intended to meet cases in which it may be difficult to distinguish between the acts of the individual members of a party or to prove exactly what part was taken by each of them in furtherance of the common intention of all. In essence, section 23 of Cap. 16 lays down only a rule of evidence and does not create a substantive offence.

7 *R v. Usumau Mpangani* (1967) HCD 390, Cross, J., (as he then was) held *that since death or grievous bodily harm was a probable consequence of the attack upon deceased and the attackers acted with a common purpose, accused is liable for the death even though he may not himself have struck the fatal blow.*

8 Common intention implies acting in concert and existence of pre-arranged plan.

9 *Salehe Selemani v R* (1972) HCD 23, Mzavas, J., (as he then was) held that *for the offence of common intention to apply, it must be shown that accused persons shared with actual perpetrators of the crime a specific unlawful purpose that led to the commission of an offence charged.*

10 *R v. Tabulayenka Kirya and Others (*1943) 10 EACA 51- The Court held that *...to constitute common intention... it is not necessary that there should have been any concerted agreement between the accused prior to the attack. Their common intention may be inferred from their presence, their actions and the omission of any of them*

11 *R v. Rukondo Kamano* (1968) HCD 48 - Mustafa, J., (as he then was) held that *the accused person and his company were all acting in concert and with common intention, and accused is therefore responsible for the injury even if he did not himself shoot the arrow.*

**2. Necessary Elements in the Principle of Common Intention**

To invoke the application of Section 23 of Cap. 16, certain necessary elements must be satisfied. The conditions as discussed below:-

**2.1 Existence of Criminal Act:-**

The criminal act under section 23 of Cap. 16 does not refer to individual acts where a group of persons commits a crime. Where the crime is committed by several persons in furtherance of common intention of all of them, each of them doing some act, similar or diverse, big or small shall be liable for that act. That act refers to the *criminal act* used in section 23, which means the unity of criminal behaviour that results in something for which an individual would be punishable if it were all done by himself alone in an offence.

In the case of *Juma Mkurasi v. R.,*[12] five people arrived in Bukoba, debarking from the S.S. Victoria, and went to a bus service booking station to buy tickets for Ngara. Being informed that the bus would leave the next day; they were attracted by an offer by a man, later identified as the accused, to take them to a bus which was leaving that night from a place some distance away. He took them in two groups to a dark place in his small car. While they were there, two other men appeared claiming to be police officers looking for Ugandan currency, which they said was prohibited in Tanzania. These other two men took money from the passengers and gave it to the man identified as the accused. The passengers, believing that they were police officers, allowed the search and seizure of the money; they subsequently went to a house with the police officers, who went off. The accused was convicted of robbery.

The Magistrate construed section 285 of Cap. 16 to mean that when more than one person commit the offence, the use of actual force is not necessary. Their being more than one is enough to create the fear of such a nature intended to overpower the party robbed. On appeal Bramble J., (as he then was) held that section 285 of Cap. 16 merely provides for greater punishment where more than one person acting together commits a robbery. The use of actual force, or the threat of immediate actual force, is nonetheless a necessary element of the offence. His Lordship continued and stated that:

> *The evidence clearly discloses a common intent between the accused and the other men and each is responsible for what was done in furtherance of that intent.*

In conclusion, his Lordship distinguishes the *criminal act* actually committed by stating that the evidence supports a case of stealing, not robbery.

2.2 Criminal Act Done by Several Persons:-

Under common intention, the criminal act in question must have been done by several persons. In other words, the number of offenders should be two or more persons. In the case of *R v. ACP Abdallah Zombe*,[13] Massati J.K (as he then was) stated that common intention is a doctrine formulated in section 23 of Cap. 16 where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another.[14] Most importantly, if the criminal act was fresh and independent act springing wholly from the mind of the offender, the others are not liable merely because when it was done they were intending to assist the offender in a different criminal act.

1.2 Common Intention in Doing the Act:-

The words *in conjunction with one another* in section 23 of Cap. 16 mean that the accused persons must have prior concert to do an offence. In this case, the burden lies on prosecution to prove that actual participation of more than one person for commission of criminal act was done in furtherance of common intention at a prior concert. Case law have shown that where there is no indication of premeditation or of a pre-arranged plan, the mere fact that the two accused persons were seen at the spot or that the accused persons fired an arrow as a result of which a person died could not be held sufficient to infer common intention. In the case of *Salehe Selemani v R.*[15], where the two accused persons followed a fourteen-year schoolboy who had one hundred Tanzanian shillings to buy items in a shop. Along the way, one of the accused persons grabbed the money from the boy and ran away. Both accused persons were arrested and prosecuted for robbery with violence contrary to section 255 and 256 of Cap. 16. The first accused argued that the complainant did not mention him as one of the robbers. The second accused gave his defence on oath and denied committing the offence. In the High Court, Mzavas, J., (as he then was) held that for the offence of common intention to apply, it must be shown that accused persons shared with actual perpetrators of the crime a specific unlawful purpose which led to the commission of an offence charged. His Lordship concluded that:

> *...in this case, there is no evidence whatsoever showing that the first accused shared with second accused who was the actual perpetrator of the crime, a specific unlawful purpose which led to the commission of the offence of robbery with violence.*

Prior to Salehe's case, Mustafa J (as he then was) in the case of *R. v. Sangi Manyenyi*,[16] had held that in the absence of evidence as to

12 (1969) HCD 72.

13 *R v. ACP Abdallah Zombe and 12 Others*, Criminal Sessions Case No. 26 of 2006, High Court of Tanzania, at Dar Es Salaam, p. 14.

14 *Ibid,* p. 13.

15 (1972) HCD 23.

16 (1968) HCD 47.

which accused fired the arrow, they both can be convicted of attempted murder only if the prosecution could show a common intention. To make his statement clear, His Lordship states that:

> *...the prosecution sought to find the requisite common intention intent in the joint attack on the complainant moments before he was wounded*.

The facts of this case were that: complainant was shot with an arrow, whereupon he turned around and saw only the two accused persons. There was no evidence adduced to show which one had shot the arrow. Just before the shot, the accused had attacked complainant and taken the bow and arrow with which he was shot. It is because of this, His Lordship reasoned that:

> *...the arrow was shot, the assault on complainant had already been terminated, and there was no evidence adduced to show that accused were still acting in concert*.[17]

1.3 Participation in Doing the Criminal Act:-

The participation in a criminal act of a group is a condition precedent in order to fix joint liability and there must be some overt act indicative of a common intention to commit an offence. Cap. 16 require that an accused must be present on the spot during the occurrence of the crime and take part in its commission. It is also enough if he is present somewhere nearby. Court practice has shown that the essence of section 23 of Cap. 16 is that a person must be physically present at the actual commission of the crime. He must be physically present at the scene of the occurrence and must actually participate in the commission of the offence in some way or another at the time crime is actually being committed. Again, where two or more persons embark on a joint unlawful enterprise each is equally liable for the *probable consequences* of such acts of the other person as are done in pursuance of the agreement. The abettor is then, liable for unforeseen consequences of the same extent as the principal offender.

The first leading case on the point is *R v. Mughuira and Others,*[18] where nine appellants formed a *common intention* during a period of famine of burgling a house and carried the plan. During the burglary one of the appellants, who was armed with a spear killed the owner of the burgled house. The appellants were arrested and prosecuted for murder. The other eight appellants denied any intention of murder. The court held responsible for murder all nine appellants. On appeal, the Court of Appeal held that even though only the first appellant who had formed the intention of committing burglary was armed, the enterprise of burglary and the resistance by the owner of the premises burgled was a probable consequence. The Court of Appeal reasoned that: the overcoming of such resistance by violence was necessary by the burglars and would probably be resorted to violence and this bring all of the accused persons within the doctrine of common intention, thus making them equally responsible in law for the act of the first accused alone.

However, the existence of common intention does not necessarily mean that there should be a previous agreement. Common intention may be formed at the spot of the event. Case law shows that the very important thing is participation in the commission of criminal offence. In the case of *R v. Tabulayenka Kirya and Others,*[19] a suspected thief one Mikairi, was discovered sitting near the door of a hut at night. An alarm was sounded and several persons came rushing to the spot and at once proceeded to beat the said Mikairi with all necessary available weapons at hands. The result was death from multiple injuries to Mikairi. In discussing the issue of *common intention*, the court said:

> *...to constitute common intention... it is not necessary that there should have been any concerted agreement between the accused prior to the attack. Their common intention may be inferred from their presence, their actions and the omission of any of them.*

This practice has been shown in other common law legal tradition. For instance, the practice in India and England show similar interpretation. In the known *Shankari Tola Post Office Murder Trial*,[20] the High Court of Calcutta and the Privy Council both agreed with the findings of the trial court and held the accused guilty of murder. Giving his judgment Lord Sumner stated that:

> *...even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things they also serve who only stand and wait..... Section 34* ***(Section 23 of the Tanzanian Penal Code)*** *deals with doing of separate act, similar or diverse by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all as if he had done them himself. (Emphasis supplied)*

In England, in the case of *R v Betts and Ridley,*[21] it was stated that to be convicted of a crime under *the doctrine of common intention* it was not necessary for an accessory to actually be present when the offence was carried out. The reasoning of Mr Justice Avory in the Court of Criminal Appeal is very clear that:

> *...where common design to commit robbery with violence and one participant caused death while another present aiding and abetting as principal in second degree, both guilty of murder although latter had not specifically consented to such d egree of violence as was used*.[22]

Court practice, however, has shown that the same or similar intention does not necessarily mean that there is common intention. Sometimes, the circumstances may be such as to show that each person had acted independent of another. A good example is the case of *R v. Okute and Another,*[23] where the deceased died from shock resulting from injuries received in two separate and independent assaults. The first appellant and three others who were convicted of manslaughter made the first assault. The trial court held that in the first assault was intended to cause grievous harm, and the second independent assault upon the deceased was one of the injuries from the cumulative effect of which the deceased died. On appeal, the Court of Appeal stated that the second appellant, having intent to cause grievous bodily harm, inflicted an injury on one who was already in a weak state. The Court of Appeal entered conviction for the second appellant and allowed appeal for the first appellant.

17 Read: *Dracaku Afia and Another v. R* (1963) E. A 363.

18 (1943) 10 EACA 105.

19 (1943) 10 EACA 51.

20 *Barendra Kumar Ghosh v. King Emperor*, AIR 1925 PC 1.

21 (1930) 22 Cr App R. 148.

22 *Ibid*, at p. 155.

23 (1941) 8 EACA 78.

### 3. Basic Intention and Specific Intention in the Principle of Common Intention

In criminal law, a distinction is always made between an offence of basic intent and an offence of specific intent. Offences requiring basic intent specify a *mens rea* element that is no more than the intentional or reckless commission of the *actus reus*. The criminal offender either knew (intended) or deliberately closed his mind to the risk (recklessness) that his action (actus reus) would result in the harm suffered by the victim. A limited number of offences are defined to require a further element in addition to basic intent, and this additional element is termed specific intent.

At common law specific intent has been defined, in the case of Mohan[24] to mean that *aim or purpose – a decision to bring about, insofar as it lies within the accused's power, the commission of the offence…no matter whether the accused desired that consequence of his act or not*. In Tanzania the case of ACP Abdallah Zombe and 12 others,[25] the High Court stated that *specific unlawful purpose* is a condition necessary in *common intent*. In this case, ACP Abdallah Zombe and 12 others were jointly charged with four counts of murder contrary to section 196 of Cap. 16. It was allegedly by the prosecution that accused persons jointly and together unlawfully killed the four victims with malice aforethought. During the trial, all accused persons pleaded not guilty to the charges. Before deciding the case, Massati JK, (as he then was) had to address his mind to two principles which he thought are of relevance to the case.[26] The first one is on criminal participation or principal offender and the second principle is on common intention.[27] His Lordship concluded the application of common intention in relation to specific intent by stating that:

> *…for section 23 to apply it must be shown that an accusedperson shared with the actual perpetrators of the crime a specific unlawful purpose which led to the commission of the offence charged.*[28]

Therefore, for section 23 of Cap. 16 to apply it must be revealed that an accused person shared with the actual offenders of *the crime a specific intention*, which led to the commission of the offence charged. The requirement for specific intent in common intention has been long stated in the case of *Salehe Selemani v R,*[29] discussed herein above.

### 4. Proving Existence of Common Intention in Criminal Offence

The principle of common intention refers to the common design of two or more persons acting together.[30] The burden lies on prosecution to prove that actual participation of more than one person for commission of criminal act done in furtherance of common intention at a prior concert.[31] In *R v. Salehe Selemani and Another*,[32] Mzavas, J., (as he then was) held that it is settled law that where two or more persons are charged with an offence, the prosecution has to prove the actual guilt of each accused or alternatively the prosecution must prove that the accused persons were acting in pursuance of a common purpose when one of them committed the alleged offence. For the principle of common intention to be proved the prosecution must show that an accused person shared with the actual perpetrators of the crime a specific unlawfully purpose which led to the commission of the offence charged.[33]

In the case of *R v. Sangi Manyenyi*,[34] Mustafa J., (as he then was) held that both accused persons can only be convicted of attempted murder if the prosecution could show a common intention. In this case, complainant was shot with an arrow, whereupon he turned around and saw only the two accused. No evidence was adduced to show which one had shot the arrow. Just before this, the accused had attacked complainant and taken the bow and arrow with which he was shot. His Lordship reasoned that: the prosecution sought to find the requisite common intention intent in the joint attack on the complainant moments before he was wounded. When the arrow was shot, the assault on complainant had already been terminated, and there was no evidence adduced to show that accused were still acting in concert.

It must be noted that it is the reason for doing the acts forming the criminal act. This is different from the intention to commit the offence, which is the result of the criminal act committed.[35] The case of *R. v Alex and Seven Others*[36]is very illustrative of this point. In this case, the eight accused persons were originally charged with murder and subsequently called upon to answer a charge of manslaughter. They were alleged to have participated in the beating of a suspected thief. The trial judge convicted seven of them for manslaughter and one for assault. The Judge provides his reasoning:

> *…I convict Aloys of simple assault which he has been proved to have committed. As for the rest of the accused the only reason why they beat the deceased without even stopping others from doing so after his condition had become critical was because they commonly intended punish him. As such, they were particeps criminals and I have no hesitation in finding them guilty of manslaughter as charged.*[37]

The jurisprudential history and conclusion in the case of *ACP Abdallah Zombe* in respect to section 23 of Cap. 16 is well settled.[38] In the earlier days, to infer common intention, one had to prove that the criminal act was done pursuant to a pre-arranged plan.[39] As the cases developed, the view was that common intention could also be formed: only a moment before the commission of the offence;[40]

24 *Rex v. Mohan* (1975) 2 All ER 193.
25 *R v. Abdallah Zombe, Op. cit,* p. 14.
26 *Ibid*, p. 3.
27 *Ibid,* p. 11.
28 *Ibid,* p. 14.
29 (1972) HCD 23.
30 *Amon v. R* (1970) HCD 251, Bramble, J., (as he then was) held that: *if the prosecution's case is believed he (accused) was seen running away from the scene together with four other men… (then) the evidence should then have been examined to see whether there was anything connecting the appellant with the crime… it must be proved that he took part in the execution of it by some overt act or that by his words or behaviour identified himself with the perpetrators, that he had a common intention with them… there was no evidence to support any of these facts.*
31 *Wanjiro Malerio and Another v. R, Ibid.*
32 (1972) HCD 23.
33 *Wanjiro Malerio and Another v. R, Op. Cit.*
34 (1968) HCD 47.
35 Read: *Mwakabuku and Another v. R* (1972) HCD 89, where Duffus P; Law and Mustafa, JJ, held that: we cannot find sufficient evidence to show that *the accused acted with a common intention* in accordance with section 23 of Cap. 16. What does appear much more likely is that these three brothers quarrelled and abused each other; the deceased on one side and the two appellants on the other; but that both appellants acted separately in hitting the deceased so that *the second appellant's use of the stone was an individual act* for which he alone should be held responsible.
36 (1971) HCD 197.
37 *R v. Ngereza Massaga* (1962) EA 766, where Reide, J., (as he then was) acquitted one accused for an offence of murder because she struck a blow and retreated, leaving the others beating the deceased. The Judge went as far as to suggest that common intent can only be inferred where the victim is attacked by *all members of the crowd simultaneously.*
38 *R v. Abdallah Zombe*, *Op cit*, pgs 13 -16, His Lordship Massati, J.K., (as he then was) gives four important principles in application of the common intention, namely: (i) it must be shown that an accused person shared with the actual perpetrator(s) of the crime a specific unlawful purpose which led to the commission of the offence charged (ii) the offence committed must be a probable consequence of the prosecution of the unlawful purpose (iii) it is not necessary that there should have been any concerted agreement between the accused persons prior to the commission of the offence, and (iv) Mere presence at the scene of crime is not enough to infer common intention.
39 Read: *R v. Usumau Mpangani* (1967) HCD 1967 390, *R. v. Sangi Manyenyi*, (1968) HCD 47, R. v. *Rukondo Kamano* (1968) HCD 48, *Shene Kimboka v. R* (1968) HCD 52, *Juma Mkurasi v. R* (1969) HCD 72.
40 *R v. Sangi Manyenyi* (1968) HCD 47, where Mustafa J., (as he

on the spot; or during the course of the commission of the offence.[41] The court noted, however, that in most situations, it is virtually impossible to directly prove a pre-arranged plan between the parties. While the usual circumstances that can lead to the inference of common intention are the conduct of the parties, the weapons used and the nature of the wounds inflicted, these circumstances are non-exhaustive.[42] The totality of the circumstances must be considered in determining whether there was a common intention. At the same time, an inference of common intention should not be made unless it is a necessary inference deducible from the circumstances of the case.[43]

However, reasonable care must be taken not to confuse same or similar intention with common intention.[44] The partition, which divides their bounds, is often very thin, nevertheless, the distinction is real and substantial and if overlooked will result is in justice. The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, but there must be pre-arrangement and premeditated concert.[45]

## 5. Circumstances and Judicial Interpretation of the Principle of Common Intention

The principle of Common Intention as is provided under section 23 of Cap. 16 and through judicial interpretation can have the following ingredients:

### 5.1 Prior Meeting of Minds of Accused Persons:-

In order to bring a case under section 23 of Cap. 16 it is not necessary that there must be a prior pre-meditation. The common intention can be formed during the course of the commission of the offence. It has been stated by the Eastern African Court of Appeal that to constitute common intention to prosecute an unlawful purpose, for instance to beat a so called thief, as a result of which he died, it is not necessary that there should have been any concerted agreement between the accused person prior to the attack of the so called thief. When asked how common intention can be determined in that circumstance, the court replied that: *their common intention may be inferred from their presence, their actions and omission of any of the accused person to dissociate himself from the assault.*[46] The Eastern Court of Appeal has recognised this opinion prior to the *Tabulayenka decision*. In the case of *Okute Kaliebi and Another v. Rex,* the court stated that:

> *...in our opinion the fact that two people have the same intention does not necessarily mean that they have a common intention, for, the circumstances may be such as to show that each has acted independently of the other. Where several persons together beat another, then though each may have a different reason, and though some may join in the beating later than others it is plaint that all have what the law calls common intention, which does not necessarily connote any previously concerted agreement between them.*[47]

This line of thinking was adopted by His Lordship Kwikwima J., (as he then was) in the case of *R. v Alex and Seven Others*,[48]where he stated that:

> *I convict Aloys of simple assault which he has been proved to commit. As for the rest of the accused the only reason why they beat the deceased without even stopping others from doing so after his condition had become critical was because they commonly intended punish him. As such, they were particeps criminals and I have no hesitation in finding them quality of manslaughter as charged*.

This holding suggests that common intent can only be inferred where the victim is attacked by all members of the crowd simultaneously. It is therefore established principle that for section 23 of Cap. 16 may apply in circumstances where there is no prior concert of the criminal act.

### 5.2 Presence of Accused Person at the Scene of the Crime:-

It has been established by the courts that the requirement of section 23 of Cap. 16 is that mere presence at the scene of crime is not enough to infer common intention. Massati JK, in the case of Zombe,[49] stated the following words:

> *I agree with the principles stated in numerous authorities cited by the learned counsel and others that mere presence at the scene of crime did not constitute one a party to the offence, or that he had common intention with the actual offenders. I also agree that from the evidence on record, the 12th accused did not have a gun and so he could not have been the one that killed the victims. Prima fade therefore, he could not be a principal offender. He could only be taken in as an aider or abettor counsellor or procurer, either by an act or by omission (encouragement) if there was evidence to that effect*.[50]

His Lordship concluded that:

> *Mere presence at the scene of crime does not make one a party to an offence. To constitute an aider or abettor, or countanancer, there must be evidence of action or omission from which the court could infer that the person who did so, intended to aid, abet, or encourage the commission of that offence by the principal offender. Evidence could be direct or by conduct, and it is a question of fact in each case whether such evidence exists*.[51]

This position was clearly stated in 1962 by the Eastern Africa Court of Appeal, Reide J., (as he then was) in the case of *R v. Ngereza Massaga*,[52] where one of the accused persons was acquitted of murder because she struck a blow and retreated, leaving the others beating the deceased. Reide J, went as far as to suggest that common intent can only be inferred where the victim is attacked by all members of the crowd simultaneously. His Lordship reasoned that:

> *...it is impossible to say which of the assailants' struck the fatal blow or blows...It could not be said that when Kwigema struck the deceased the first blow or blows. She had a common intention with others, nor that fatal blow or blows was or were struck by any of the assailants when carrying out a common intention with others.*

It is therefore settled principle that for application of section 23 of Cap. 16, that mere presence at the scene of crime does not make one a party to an offence. To convict an accused person the evidence should support existence of common intention.[53] The court should examine the evidence to see whether there was anything connecting the accused person with the crime.[54]

then was) stated that the prosecution sought to find the requisite common intention intent in the joint attack on the complainant moments before he was wounded

41 *R v. Tabulayenka Kirya and Others* (1943).
42 *Ibid.*
43 R. v. *Rukondo Kamano* (1968) HCD 48.
44 *R v. Okute and Another* (1941) 8 EACA 78.
45 Y V Chandrachud at al (eds.) *The Indian Penal Code,* Thirty-first Edition, Wadhwa & Company, 2006, at p. 134.
46 *R v. Tabulayenka Kirya and Others* (1943), also read the judgment in *R v. Abdallah Zombe, Op. cit,* at pages 14 and 15.
47 *Okute Kaliebi and Another v. Rex* (1941) 8 EACA 78.
48 *R v. Alex and Seven Others* (1971) HCD 197.
49 *R v. Abdallah Zombe, Op. cit,* p. 15.
50 *Ibid*, p. 194.
51 *Ibid*, pp.194 -195.
52 (1962) EA 766
53 Read: *Tindira Chiru and Another v. R* (1951) EACA 180 where their Lordship stated that: *we do not find in the records any evidence to support common intention in the minds of the two appellants to attack the deceased. There is nothing to suggest that when either of the appellants struck his blow, it was in pursuance of a pre conceived plan.*
54 *Amon v. R* (1970) HCD 251, Bramble, J., (as he then was) stated that: *...presence in the neighbourhood of crime does not necessarily make a person a party. It must be proved that he took part in the execution of it by some overt act or that by his words or behaviour identified himself with the perpetrators, that he had a common intention with them.*

5.3 Suspicion of Existence of Common Intention:-

It is established, in criminal law, that an accused person cannot be convicted of an offence on a mere suspicion alone.[55] Samatta J., (as he then was) once quoted to have stated that suspicion, however grave it may be, cannot be a substitute for proof in a court of justice.[56] Courts of law have shown that even in common intention a mere suspicion alone cannot held a person to have common intention with others. In the case of *Amon v. R*[57], it was stated that a person cannot be convicted of crime on suspicion alone. In his words, Bramble, J., (as he then was) stated the following words:

> *If the prosecution's case is believed he was seen running away from the scene together with four other men. At its highest, there was very suspicion but a person cannot be convicted of crime on suspicion alone.*

For better understanding of the issue of suspicion in common intention, the facts of the case are provided hereunder. The appellant, Amon, was convicted of shop breaking and stealing contrary to sections 296 and 265 of Cap. 16. At about 3.15 am one morning a watchman heard as though a glass window was being broken and he raised alarm. Another watchman from neighbouring premises hastened to the spot and saw five persons running in different directions, one of whom was running towards where he was. He told him to stop and when he failed to do so he struck him twice on his head with stick, but the person escaped. By following the blood stains they found the appellant with fresh injuries on his head. The appellant's story testified by a prosecution witness – appellant's relative, was that on the night of the incident he had attended a dance and as he had to go on safari the following morning he decided to go to his relative. While he was passing in a path where he was stopped by an unidentified man and he refused whereupon the man struck him on he fell down. He managed to escape and went to his relative, who gave him a change of clothes. The latter suggested that they should make a report to the police and while they were on the way they met the police and he was arrested. It was established beyond doubt that the appellant was the person to whom the watchman referred and the only question was whether he was a party to the breaking. On this point the trial magistrate held that:

> *...it is clear that none of the prosecution's witnesses testified as to the accused's identity at the time the offence was committee, but the over-all evidence particularly the clothes... irresistibly connects the accused with the said crime. The accused in his defence...said that he was attacked by an unknown man for an unknown reason. This* ***I am unable to accept as truthful.*** (Emphasis supplied)

The High Court on its part stated that the evidence should have connected the appellant with the crime. The defence ought to have been carefully examined. It is not enough for a magistrate to say *I am unable to accept it as truthful*. Some reasons must have been given as to why it was rejected so that an appellate court can say whether the conclusion is justified from the evidence. The appellant's story could possibly be trued and as such it should have raised a reasonable doubt. In its conclusion, the High Court warned that:

> *...at its highest there was very suspicion but a person cannot be convicted of crime on suspicion alone. Presence in the neighbourhood of crime does not necessarily make a person a party. It must be proved that he took part in the execution of it by some overt act or that by his words or behaviour identified himself with the perpetrators, that he had a common intention with them. There was no evidence to support any of these facts.*

It is therefore important for the court to see to it that the evidence connects the accused person with the crime and that he had common intention with other offenders.

5.4 The probable consequence of the offence:

For the principle of common intention to apply, the offence so committed must be *a probable consequence* of the prosecution of the unlawful purpose.[58] Under section 23 of Cap. 16, each of the accused persons in the application of the principle is convicted of the same offence. In the case of *R v. Usumau Mpangani*,[59] Cross, J., (as he then was)held that:

> *....since death or grievous bodily harm was a probable consequence of the attack upon deceased and the attackers acted with a common purpose, accused is liable for the death even though he may not himself have struck the fatal blow...*[60]

In this case, the accused person, Usumau Mpangani, was charged with murder of a woman. There was evidence that accused and many others responded to an alarm, found that deceased had assaulted a woman, and possibly harmed her child. The crowd followed deceased to another house where accused and others beat him. Accused was armed with a large stick.

Before Usumau decision, the Eastern Africa Court of Appeal had already in *R v. Mughuira and Others,*[61] started that even though only the first appellant who had formed the intention of committing burglary was armed, the enterprise of burglary and the resistance by the owner of the premises burgled was a *probable consequence*.

The decision in *Mathias Mhyen and Another v. R*[62] is a good illustration on the subject. In this case, the first appellant enlisted the second appellant in assaulting the deceased with whom he suspected of having an affair with his former concubine. On the material date the second appellant held the deceased's hands to prevent the deceased from fleeing and from defending himself against the assault. The court stated that where a person is killed in prosecution of common unlawful purpose and death was a *probable consequence* of that common purpose, each party to the killing is guilty of the murder. The court gives its reasoning in the following words:

> *...the second appellant was active participant in the vicious assault of the deceased by holding deceased's hands. He not only made it impossible for the deceased to flee from his assailant but also ensured that the first appellant in carrying out his evil deed would meet no resistance from his victim. In the circumstance, we are satisfied that the second appellant's conduct at the material time brings him within the ambit of provisions of section 23 of Cap. 16...*[63]

However, the courts of law have been very conscious to set a rule of law that always convict each and every individual involved in the prosecution of the offence from probable consequences. The courts always examine

55 See: *Hakimu Mfaume v. R* [1984] TLR 102, Maina, J., (as he then was) stated that: *Although there may be strong suspicion against the appellant, suspicion however strong is not sufficient evidence to convict*; *R v. Ally Said Kiubatyo* [1990] TLR 137, where it was stated that: *the defence of provocation is not open to a mere suspicion by an accused person of existence of adultery*; *Mathias Mhyen and Another v. R* (1980) TLR 290 – *mere suspicion that one's woman is carrying an affair with another is not sufficient ground for defence of provocation to reduce murder to manslaughter.*

56 Samatta, J., in *Ally Fundi v. R* [1983] TLR 210, at ps. 214 -215. Also read the judgment in *Erasimu Daudi v. R* [1993] TLR 102, by Mroso, J., (as he then was) when stated, at p. 109, that: *suspicion, however strong, cannot form the basis for conviction of theft*. His Lordship added that: *The law is that no amount of suspicion, however strong, can found a conviction.*

57 (1970) HCD 251.

58 *R v. Abdallah Zombe, Op. cit,* p. 14.

59 (1967) HCD 390.

60 *Ibid.*

61 (1943) 10 EACA 105.

62 (1980) TLR 290.

63 *Ibid,* at p. 294.

circumstances of each case. In the case of *R v. Alex and Seven Others*,[64] where eight accused persons were originally charged with murder and subsequently called upon to answer a charge of manslaughter. They were alleged to have participated in the beating of a suspected thief. The trial judge, Kwikima Ag. J, (as he then was) convicted them of manslaughter, except one accused person.[65] Therefore, courts are advised to determine each individual case on issues of common intention in probable consequences of the offence.

5.5. To Share Common Intention with Actual Perpetuator:-

In order to bring section 23 of Cap. 16 into play, it must be shown that the accused shared with the actual perpetrators of the crime, a common intention to execute an unlawful purpose.[66] In the case of *Adam Yusufu v. R*,[67] Othman J., (as he then was) stated that:

> *...from the evidence of prosecution witnesses, I have highlighted earlier the **agreement** and the appellants actions and conduct there is sufficient evidence of common intention under Section 23 of Cap. 16 it is immaterial whether the money was received by one or the other. (Emphasis supplied)*

In the case of Zombe, His Lordship Massati, JK., stated that: *for section 23 to apply it must be shown that an accused person shared with the actual perpetrators of the crime a specific unlawful purpose which led to the commission of the offence charged*.[68] In absence of the shared specific knowledge of criminal intent, accused persons of murder may be convicted of assault occasioning actual bodily harm. In the case of *Dracaku Afia and Another* v. R[69] the court reasoned that in the circumstances where the crime of the first accused is complete before the second accused struck, the two incidents must be regarded as separate offences. In this case, Dracaku and another accused person were charged of murder. The evidence produced before the court was that Dracaku struck the deceased one blow on the head with a stick and deceased fell down to the grounds. The second accused person picked up the stick and hit the deceased on the head as he lay on the ground. The medical evidence did not establish which blow caused the fatal injury or that both blows were fatal but the Judge in convicting the two accused persons of murder concluded that they had acted in concert to beat the deceased person and that the case fell within the definition of *common intention*. On appeal, it was held that the case did not support a finding of *common intention* so as to invoke-section 23 of Cap. 16 nor could the second accused be regarded as an aider and abettor of the first.

It is therefore established law that for the doctrine of common intention to apply it must be shown that an accused person shared with actual perpetrators of the crime a specific unlawful purpose which led to the commission of the offence charged the accused person.[70] Therefore, if there is no evidence showing that one accused person shared with another, who is actual perpetrator of the offence, a specific unlawful purpose that led to the commission of an offence, there is no common intention.[71]

5.5 Hiring a person to commit an offence:-

For the common intention to be established there must be two or more persons who form a common intention to commit an unlawful act together. But when one hires another to commit an unlawful act on his behalf he does not form a common intention with that other person. In the case of *Shija Luyenko v. R,*[72] the Court of Appeal stated that the appellant, Shija Luyenko did not form a common intention with Lifa Nkinga by hiring him to commit the murder of the deceased.[73] In its own words, the Court of Appeal states that:

> *As can be seen from the cautioned statement, the appellant's intention was to kill the deceased. So, Lifa Nkinga killed the deceased for payment as agreed. In that situation, we are unable to see any common intention in which case section 23 of Cap. 16 was inapplicable on the facts of the case*.[74]

In this case, Shija was convicted of murder and sentenced to death. The facts disclosed that Shija suspected that the deceased, his mother, had bewitched his son who died while at primary school. So, Shija hired Lifa Nkinga to murder his mother. Lifa Nkinga made a cautioned statement in police station and conviction was entered solely on the strength of the cautioned statement. On appeal the appellant, Shija argued that the conviction was bad because it based on cautioned statement without corroborative evidence. The prosecution replied that there was common intention in killing the deceased. From this decision, it is quietly clear that when one person hires another to commit an unlawful act on his behalf he does not form a common intention with that other person

**6. Conclusion:**

This article intended to reveal judicial practice on the interpretation of common intention. It has been shown that the interpretation invites uncertainties and inconsistencies. To reduce or get rid of the uncertainties and inconsistencies, the article has provided ingredients and circumstances to be considered in interpreting and applying the principle. It is intended that courts should use the ingredients and circumstances to address and avoid conflicting interpretations.

64 *R v. Alex and Seven Others* (1971) HCD 197.
65 The reasons provided by His Lordship were that: *...in this case, all the accused stayed long at the scene and their purpose could not have been other than to punish the thieves in the customary way of their tribe. For this reason, I feel bound to acquit Aloys Paulo of the charge as his purpose and intention may have been to take the deceased to justice as he himself alleges. I convict Aloys of simple assault, which he has been proved to have committed. As for the rest of the accused the only reason why they beat the deceased without even stopping others from doing so after his condition had become critical was because they commonly intended punish him. As such, they were particeps criminals and I have no hesitation in finding them quality of manslaughter as charged. See: R v. Alex and Seven Others* (1971) HCD 197.
66 *Wanjiro Wanello and Another v. R* (1955) 22 EACA 521; see also: *Zuberi Rashid v. R* (1951) EA 455 and *R v. Cheya and Another* (1973) EA 500.
67 *Adam Yusufu v. R,* Criminal Appeal No. 75 of 2014, High Court of Tanzania, at Dar es Salaam, at p. 5.
68 *R v. Abdallah Zombe, Ibid,* p. 14.
69 *Dracaku Afia and Another v. R* (1963) EA 363.
70 *Salehe Selemani v. R* (1972) HCD 23.
71 *Shene Kimboka v. R* (1968) HCD 52 – Duff, J., (as he then was) held that: *it is not clear that they themselves (accused persons) committed any robbery directly nor is it clear that all of the accused persons shared the intention to steal. In absence of such proof the conviction for robbery must fail.*
72 [2004] TLR 254.
73 *Ibid*, at p. 264.
74 *Ibid*, at p. 263.

# THE BANKERS' DUTY OF CONFIDENTIALITY: ITS ORIGINS AND PRACTICAL APPLICATION IN TANZANIA

**Kevin Mandopi** *

**ABSTRACT**

*The officials of the bank have the duty to respect the principle of confidentiality in their daily banking activities. The principle of confidentiality binds the bank not to disclose the affairs of the customer of the bank to a third party. But in practice this is not the case. In the circumstances the law requires the Bank of Tanzania, commercial banks and financial institutions to disclose the affairs of a customer's account. However, in case the bank discloses such information under the compulsion of law, the customer cannot challenge the disclosure. The disclosure of the customer's information to a third party, despite the compulsion by law, still is veiling the customers' information to unintended person within the banker-customer relationship. The banker has to disclose with consciousness because its abuse may entitle the customer to take legal action against the banker.*

**Key words:** ***Banks; Bankers' duty; Confidentiality, customer.***

## 1.0 Introduction

This article examines the principle of the banker's duty of confidentiality. It points out the meaning of the duty of confidentiality as stipulated by the statutes in Tanzania. It scrutinises the operation of the banker's duty of confidentiality at different stages of the banker-customer relationship. It gives the rationale of the principle and the circumstances through which banks and financial institutions can disclose the affairs of the customer's account as an ambit of compulsion of law. The article concludes that, banks and financial institutions discloses customers information but do not violate the principle of the bankers duty of the confidentiality as they are doing so through the frame-work of the law.

* PhD (SAUT), LL.M, LLB (Dar), Lecturer, Institute of Judicial Administration – Lushoto- Tanga; Advocate of the High Court of Tanzania; Commissioner at the Commission for Human Rights and Good Governance - Tanzania.



## 2.0 The Origin and Meaning of the Bankers' Duty of Confidentiality

The principle of the bankers' duty of confidentiality[2] originated from the common law-banking system. The principle was elaborated in the well-known case of *Tournier v National Provincial and Union Bank of England limited*[3] where it was held that:

> *"A bank owes a duty of confidentiality to its customers. The duty extends at least to information concerning account transactions and extends beyond the date of the termination of the banker-customer contract."*

The facts of this case were that Tournier had an overdraft with the defendant, which is the bank. He had made arrangements to make payments towards the reduction of the overdraft. After only three instalments he ceased to make further payments. Tournier was the payee of a cheque drawn by Woldingham Traders Ltd. Instead of depositing the cheque in his account with the defendant (bank), he indorsed the cheque to a customer of the London City and Midland Bank. The defendant came to know about the cheque by virtue of the fact that Woldingham was a customer. Upon seeing the cheque presented for payment, the manager phoned the branch of the London City and Midland Bank to inquire as to the identity of their customer. It was learned that the endorsee was a bookmaker. The branch manager of London City and Midland bank then replied the employers of Tournier and had conversations with two of the directors on the same issue. The actual contents of that conversation are not clear. But, it was alleged that the manager informed them that Tournier had dealings with a bookmaker. Consequently, the employer refused to renew Tournier's contract of employment. Tournier sued both in defamation and for breach of contract. He lost the case at first instance and appealed on the grounds that the Judge had instructed the Jury erroneously. He succeeded in the Court of Appeal. The Court ordered a new trial. The Court of Appeal held that; there was a legal duty of confidentiality limited to the banking transaction with the customer. Bankes L.J., held that the duty arose out of contract. His view on the nature of the contract was revealed upon when he came to consider whether the divulged information derived from other sources was information that was subject to the duty. The court further stated that:-

> *"The privilege of non-disclosure to which a client or a customer is entitled may vary according to the exact nature of the relationship between the client or the customer and the person on whom the duty rests. It needs not be the same in the case of the counsel, the solicitor, the doctor and the banker, though the underlying principle may be the same."*

This makes it clear that Bankes L.J., was relying on a general principle of confidentiality created through contractual relationships, rather than on a purely banker-customer contract. He went on to note that the relationship of banker and customer is one in which the confidential relationship is indispensable because the credit of the customer depends indeed on the observance of confidentiality.

Atkin L.J., found in favour of a duty of confidentiality on the basis of an implied term in the contract. He reached this conclusion by a consideration of the way in which banks actually act. They bind their staff to confidentiality, they communicate to their clients in the passbook and he was satisfied

2 Banker's duty of confidentiality is the banking principle that prohibits any member of the board or staff of the Bank to disclose any information relating to the Bank or to any transaction or customer of the Bank acquired in the course of employment or the discharge of his duties. The duty covers more than customer's information received from normal banking activities. The duty further, prohibits banks and financial institutions to reveal information shared between them. The concept of customer's account in this context includes also customer's affairs such as where a customer is nearly penniless.

3 *[1928] All. ER 550.*

that they would claim to be under obligation of duty of confidentiality.

The legal position stated in *Tournier's case* applies in Tanzania when it comes to the banker's duty of confidentiality. Hence, the banker is required to protect the balance of the customers account, names and all other particulars of the account holder. The bank is also required to do the same to all sources of the income of the customer which are within the knowledge of the bank and any transactions executed by the customer relating to his account. The duty extends to information concerning any transactions made by the customer which relates to his account. The principle of the bankers' duty of confidentiality binds banks and financial institutions not to disclose the information acquired during the banking business. The same duty exists beyond the date of termination of banker and customer contract. In banking practice, the duty extends to cover different situations such as the balance of the customer's account; overdraft advanced by the customer; names and other particulars of the customer; and any other information relating to customer's account which is within the knowledge of the bank. However, there are certain exceptions to this general rule since customer's information may be divulged whenever the law allows.[4]

## 3.0 The Bankers' Duty of Confidentiality under Statutes in Tanzania

The principle of the banker's duty of confidentiality is statutorily provided in Tanzania. The duty of confidentiality arises in any banking contractual relationship in respect to information gathered before and after the banker-customer contract came into being. However, banks and the financial institutions require operating by abiding to the principle of confidentiality even after the termination of the banker-customer relationship.

4 The Banking and Financial Institution Act, No. 5, 2006.



## 4.0 Bankers' Duty of Confidentiality at the Stage of Establishment of the Banking Relationship

Staff of the Bank of Tanzania, Commercial banks and the Financial Institutions are required to operate the banking business[5] in accordance with the principle of the banker's duty of confidentiality.[6] The principle begins to operate at the stage of establishment of the banker-customer relationship.

Banks and financial institutions are obliged to develop procedures of identifying particulars of customers who intend to open the accounts with the bank. Such procedures should provide for adequate evidence of the identity of potential customers.[7] The particulars of the intended customer must be established and verified for the satisfaction of the bank or financial institution concerned at the time when the banker-customer relationship is about to be established.[8] The banks and financial institutions must check and verify the authenticity of the submitted documents together with the information tendered to the institution for the purpose of opening the account.[9] At the time of establishment of the banker-customer relationship the bank and financial institution must take reasonable measures to satisfy itself as to the true identity of any applicant seeking to enter into a business relationship with the bank.[10] The banker must register with the bank the following particulars, namely, true name(s), date of birth, nationality and the national identity number, passport number (if any), passport size photo of the customer(s), minimum of two referees known to the covered institution and permanent address.[11] In case the customer is a business organisation and/or is any other legal entity, the bank and financial institution must register the following particulars; identity of the directors or owners, the account signatories, nature of the businesses, certificate of the incorporation certified by the registrar of companies or of business names and the organisation mandate, signed application form or an account opening authority containing specimen signatures.[12]

Banks and financial institutions are duty bound to keep and protect the particulars registered by their customers.[13] By maintaining the information of the customers, banks are obliged to abide to the principle of the banker's duty of confidentiality.[14] The principle stands valid immediately after the customer has registered with the bank and it subsists for all material time the customer continues to be the customer of the bank and even after the customer has ceased to be the customer of the said bank or the financial institution.

5 Section 3 of the Bank of Tanzania Act, Cap, 342 and the Banking and the Financial Institution Act, 2006 defines the term "banking business" to mean, "the business of receiving funds from the general public through the acceptance of deposits payable upon demand or after a fixed period or after notice, or any similar operation through the frequent sale or placement of bonds, certificates, notes or other securities, and to use such funds, in whole or in part, for loans or investments for the account of and at the risk of the person doing such business."

6 The Bank of Tanzania Act, Cap, 342, Section 16 and *the Banking and the Financial Institution Act, 2006* Section 48.

7 The customers' identification procedures are given by *the Circular No. 8* which is based on section 71 of *the Bank of Tanzania Act, 2006* and section 71 of *the Banking and Financial Institution Act,* Cap, 342. The direction laid by this Circular (No. 8) is very powerful. If any bank or the financial institution breaches the direction, which has been stipulated shall be penalised to pay fine equivalent to not less than one million Tanzanian shillings per each day in which the default persists resulting from failure by such institution to abide to this circular as stipulated in regulation 24.

8 Circular No. 8 Regulation 4 (d) and 5.

9 *Ibid.,* Regulation 6.

10 The Anti-Money Laundering Act, 2006, section 15.

11 Circular No. 8 Regulation 7 and the First schedule Paragraph 1.

12 *Ibid.,* Regulation 7 and the First schedule Paragraph 2.

13 The Anti-Money Laundering Act, 2006, section 16(1) states that, "Every reporting person shall establish and maintain records of all transactions of such amount of currency or its equivalent in foreign currency..."

14 The Anti-Money Laundering Act, 2006 at section 16(2).

## 4.1 Bankers' Duty of Confidentiality at the Stage of Banking Business Transaction

One of the most important obligations of a banker is to take conscientious care to conceal the state of customer's account. Breach of this obligation may cause considerable harm to its reputation and banking business. In Tanzania, this duty is made statutorily and it binds all officials of the central bank, commercial banks and financial institutions. According to section 16 of the Bank of Tanzania Act:[15]

> *"Except for the purposes of the performance of his functions when or required by law or authorized by the Board, no member of the Board or the staff of the Bank shall disclose any information relating to the Bank or to any transaction or customer of the Bank acquired in the course of employment or the discharge of his duties."*

The provision actually lays down the general principle of the banking activities. It prohibits members working with the board of the Bank of Tanzania or other staff from divulging information of the Bank or his customers received in the course of banking business. This duty further extends to the Commercial banks and Financial Institutions. Section 48 of the Banking and Financial Institutions Act, 2006[16] reveals the principle of the banker's duty of confidentiality under the umbrella of fidelity and confidentiality. The Section states that:-

> *S.48 (1) "Every bank or financial institution shall observe, except as otherwise required by law, the practices and usages customary among bankers and in particular, shall not divulge any information relating to its customers or their affairs except in circumstances in which, in accordance with the law or practices and usages customary shared among bankers, it is necessary or appropriate for the bank or financial institution to divulge such information.*

15 Act No. 4, 2006.

16 Act No. 5, 2006.

*S. 48 (2)…*

*S. 48 (3) Except as otherwise required by law, nothing in this Act shall-*

*Authorise an enquiry to be made into the affairs of any individual customer of a bank or financial institution; Prevent the Bank or financial institution from releasing information to credit reference bureau, in accordance with regulation issued by the Bank; or Prevent a licensed credit reference bureau from providing to any person upon a legitimate business request, a credit report in which case a copy may be to the customer concerned in accordance with regulation issued by the Bank."*

Generally, section 48 cited above prohibits bank officials of the Bank of Tanzania, Commercial banks and the Financial Institutions to reveal the customer's information to third parties.[17] The law also prohibit any officer of the bank to authorise an enquiry to be made into the affairs of any individual customer of a bank or financial institution.[18] However, banks and financial institutions are not prevented from releasing information to credit reference bureau, in accordance with regulation issued by the Bank.[19] The law allows a licensed credit reference bureau to provide to any person upon a legitimate business request, a credit report in which case a copy may be given to the customer concerned in accordance with regulation issued by the Bank.[20]

The law binds directors and every member of the banker's committee, auditors, advisors, managers, officers and every staff of a bank or financial institution to protect the information of the customer's account. In order for every officer of the bank and financial institution to abide to such condition the law requires them to make written declaration of fidelity and confidentiality. The declaration must be completed before entering into the employment contract with the bank. The Chief Executive Officer or the Secretary of the bank or financial institution concerned shall witness the declaration. This is the commitment that at all the material time the personnel of the bank or financial institution will work in accordance with the principle of the banker's duty of confidentiality as provided under the law.[21]

The law makes it mandatory for the banks and financial institutions to maintain the principle of the bankers' duty of confidentiality. Any person contravening the provisions of maintaining the principle of the bankers' duty of confidentiality commits an offence. The penalty for contravention of the duty of confidentiality is a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding three years or to both.[22]

The principle of the banker's duty of fidelity and confidentiality is also recognised by the Evidence Act, 1967 of Tanzania at its section 78 (1) which provides that:-

> *"A copy of an entry in a bankers' book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank and that the entry was made in the usual and ordinary course of business and that the book is in the custody or control of the bank."*

The Evidence Act prohibits production of bankers' books of account to the court as evidence. The law allows the banker's book of account to be produced as evidence only if is first proved that the entry was made in the usual and ordinary course of banking business and that the book is in the custody or control of the bank.[23] In case a copy of an entry in a bankers' book is received as evidence by the court, an officer of the bank must prove that such a copy comes from the bankers' book. Such proof may be given orally or by an affidavit sworn before any commissioner for oaths or person authorised to take affidavits.[24]

Commonly, the copy of an entry in a banker's book shall not be received as evidence under the Evidence Act unless it is proved that the copy has been examined with the original entry and it is seen to be correct. A person who has examined the copy with the original entry shall give such proof in court.[25] However, a banker or officer of a bank shall not be compellable to produce any banker's book in any legal proceeding to which the bank is not a party.

The contents of the banker's book can be proved under the Evidence Act only by order of a court made for special causes.[26] It is important to note that sometimes a court may order inspection of the entry of the banker's books. This is provided under section 81 of the Evidence Act, which states that:-

> *"On the application of any party to a legal proceeding a court may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party and shall be served on the bank three clear days before the same is to be obeyed unless the court otherwise directs."*

Generally, the banker's duty of confidentiality is statutorily provided in Tanzania. The duty of confidentiality arises in any contractual relationship with respect to information gathered before the banker-customer contract came into being. However, banks and financial institutions are obliged to abide to the duty of confidentiality during the banking transaction and after the termination of the banker-customer relationship.

## 5.0 Rationale for Bankers' Duty of Confidentiality

The law requires banks and financial institutions to protect the information relating to the customer's account. The relationship between the customer and the bank is regarded as being of pecuniary private and therefore it is considered that a bank should not divulge to third parties the state of customer's affairs.[27] This principle protects the privacy of the customers of the bank. Therefore, the bank is duty bound to protect the affairs of the customer's account and by doing this, bank secures the privacy of the account holder.

The principle of the banker's duty of confidentiality assists to protect fraud over the accounts of the customers with large sum of money. This is because if a third party receives information relating to the affairs of somebody's account a deal may be made to steal such amount from the account of the customer. If a third party lacks such information to a larger extent it reduces the possibility to a third party to make fraud or stealing money from someone's account. However, where information on customer's account is not protected then the lives of customers with larger sums of money will be endangered.

When officials of banks and financial institutions honour the principle of bankers' duty of confidentiality they create confidence

17 *Ibid.,* Section 48 (1).
18 *Ibid.,* Section 48 (3) (a).
19 *Ibid.,* Section 48 (3) (b).
20 *Ibid*., Section 48 (3) (c).
21 *Ibid.,* Section 48(2).
22 *Ibid.,* Section 48(6).
23 The Evidence Act, 1967 section 78(1).
24 *Ibid.,* Section 79(2).
25 *Ibid.,* Section 78.
26 *Ibid,. Section* 80.
27 HR Sheldon, Practice and Law of Banking, 9th Edition, Macdonald and Evans, London, 1962 at page 21.

among the customers. The confidence arises due to the fact that customers believe that their money is in safe custody. This encourages more people to deposit their money to the bank.

In this era of privatisation and diversification of economy, Tanzania needs a strong banking system, which adheres to, among other things, the principle of banker's duty of confidentiality. By adhering to this principle banks may be promoting the sound monetary system and banking conditions that are more reliable and conducive to the economic development of the country. In recognition of this principle Tanzania has enacted legal provisions that require the Bank of Tanzania,[28] Commercial banks and financial institutions[29] to conduct banking business by abiding to such principle of confidentiality. However, the Prevention of Terrorism Act, 2002, through the compulsion of law as exception, allows police in Tanzania to receive the financial information of the customers of the bank .By so doing it assists the government to fight terrorist's activities. The Act requires the bank to disclose the affairs of the customer's account to police for the purpose of fighting against the terrorist's financial networking. In the subsequent part we shall see some justification for disclosing the customer's information to police officers for the purpose of fighting terrorists' activities in Tanzania.

## 6.0 The Banker's Duty of Confidentiality: Practicability and Exception

The general principle of law makes it mandatory for the banks and financial institutions to maintain the duty of confidentiality. The duty is the product of statutes and case law. In Tanzania this duty is statutorily provided for. In view of the principle, the Bank of Tanzania Act, 2006 prohibits any member of the Board or the staff of the Bank to disclose any information relating to the Bank or to any transaction of customer of the Bank, which he has acquired in the course of his duties.[30]The principle again has been stated in the Banking and the Financial Institutions Act, 2006. The Act prohibits every bank or financial institution to divulge any information relating to its customers. However, the customers' information may be disclosed if it is necessary or appropriate for the bank or financial institution to divulge such information.[31] Hence, this duty is not absolute. There are exceptions to the general principle of the banker's duty of confidentiality. Section 16 of the Bank of Tanzania Act, 2006 states that:-

> *"Except for the purposes of the performance of his functions, when so required by law or authorized by the Board, no member of the Board or the staff of the Bank shall disclose any information relating to the Bank or to any transaction or customer of the Bank acquired in the course of employment or the discharge of his duties."**(Emphasis Added)***

Therefore, according to section 16 cited above, the Bank of Tanzania may disclose the information relating to the customer's account when one of the three circumstances exists namely;-

(i) If the performance of his functions so requires;

(ii) When so required or authorised by the Board of the Bank of Tanzania;

(iii) When so required by law.

This means that, any member of the Board or the staff of the Bank of Tanzania will only disclose the affairs of the customer's account if the performance of his functions so desires disclosure. The disclosure may be also made when is required or authorised by the Board of the Bank of Tanzania that the customer's information which is within the hands of the Bank be disclosed. Further, the affairs of the customer's account may be disclosed when the law expressly compels the officers of the bank to disclose such information. The Banking and Financial Institutions Act, 2006 reiterates these exceptions. Section 48 (1) of Banking and Financial Institution Act, provides that:-

> *"Every bank or financial institution shall observe, except as otherwise required by law, the practices and usages customary among bankers and in particular, shall not divulge any information relating to its customers or their affairs except in circumstances in which, in accordance with the law or practices and usages customary shared among bankers, it is necessary or appropriate for the bank or financial institution to divulge such information **(Emphasis added)**.*

The Banking and Financial Institution Act, 2006, allows disclosure of such information only under three circumstances, firstly when required by law, secondly, if the banking practices allows and thirdly when it is in accordance with the practices and usages customarily shared among bankers. Thus, on the bases of the above quoted provision of law, in case the disclosure is vital, the bank and financial institutions can reveal the affairs of the customer's account obtained in the exercise of its regulatory and supervisory functions to any person or organ directed.[32]

Banks and financial institutions can divulge a record of the customer's information that contains trade secretes commercial or financial information that relates to the business, personal or financial affairs of any customer.[33]The Bank of Tanzania is empowered under the law to disclose any information to another agency responsible for regulating or supervising bank or financial institutions consequent upon information sharing agreement made between them whether in the United Republic or abroad,[34] provided the information is in need and is to be used for supervisory purposes and that its confidentiality will be maintained.[35]

Banks and financial institutions further are not prevented from releasing information to credit reference bureau, in accordance with regulations issued by the Bank. The licensed credit reference bureau also are not prevented from providing to any person upon a legitimate business request, a credit report in which case a copy may be given to the customer concerned in accordance with regulations issued by the Bank.[36]

According to the Anti-Money Laundering Act, 2006 banks and financial institutions are at liberty to disclose the information of its customers relating to terrorists finance. Section 21 of the Act states that,

> *"The provision of this Part shall have effect, notwithstanding any obligation as to secrecy or other restrictions, upon the disclosure of information imposed by any law or otherwise".*

28 The Bank of Tanzania Act, No.4, 2006, Section 16 states that, "Except for the purposes of the performance of his functions when so required by law or authorized by the Board, no member of the Board or the staff of the Bank shall disclose any information relating to the Bank or to any transaction or customer of the Bank acquired in the course of employment or the discharge of his duties."

29 The Banking and Financial Institution Act, No. 5 of 2006 under section 48 requires banks and financial institutions to observe the practices and usages customary shares among bankers, and banks shall not divulge any information relating to its customers or their affairs except in accordance with banking principles. The same section prohibits any bank or financial institution to reveal the information as to the affairs of any individual customer of a bank or financial institution without any order of the competent court.

30 The Bank of Tanzania Act, No.4, 2006, Section 16.

31 The Banking and the Financial Institutions Act, Cap, 342 at section 48(1).

32 The Banking and the Financial Institutions Act, Cap, 342 at section 48(4) (a).

33 *Ibid.,* section 48 (4) (c)

34 *Ibid.,* section 35(b) provides that "To supervise the organisations that operate both within the United Republic and in any other country, the Bank may enter into arrangements for sharing supervisory information on a reciprocal basis with the appropriate supervisory authorities within or outside the United Republic". This means that, the Bank of Tanzania can only disclose the information to another bank provided that there is the agreement between the banks that they will share such information.

35 *Ibid.,* section 48 (5).

36 *Ibid.,* section 48 (3) (a) and (b).

This means that, banks and financial institutions can disclose the information of its customers to the anti-financing terrorism through the exception of compulsion of law as stipulated by the above cited provision of law.

The case law allows banks and financial institutions to disclose the affairs of the customers banking information. *The case of Tournier v National Provincial and Union Bank of England limited*[37]stated that: the banker's duty of confidentiality is not absolute. In Tournier's case, Bankes L.J. has classified the circumstances where the banker can disclose the affairs of the customer's account especially on the following circumstance; where disclosure is under compulsion of law, where there is a duty to the public to disclose, where the interests of the bank require disclosure, where the disclosure is made by the express or implied consent of the parties and where disclosure is made under normal sharing banking information among Bankers. The police responsible to curtail the terrorists' funds are allowed to receive the terrorists' financial information from the bank under the ambit of compulsion of law. Through this exception of principle of bankers' duty of confidentiality, banks and financial institution are allowed to disclose the affairs of the customer's account to anti terrorists' officers.

### 6.1 Disclosure under the Compulsion of Law

In case the law makes or requires the Bank of Tanzania, commercial banks and financial institutions to disclose the affairs of the customer's account it must do so.[38] If the bank discloses such information under the compulsion of law the customer cannot challenge the disclosure.[39] The Prevention of Terrorism Act, 2002 of Tanzania compels banks and financial institutions to disclose the affairs of the customers' account to the police officers for the purpose of countering the terrorist's financial network. When the bank officers discloses the banking information to the anti-terrorists group for the purpose of suppressing the terrorist massive funds they are so acting in compliance with the anti-terrorist law.[40] Such disclosure is also made in observance of the banking law. Hence, bank officials will be considered upon as operating in accordance to the law governing banking business in Tanzania.[41]

Banks and financial institutions are also duty bound to disclose the affairs of the customer's account for public interest. This obligation to the bank comes in when there is a danger to the nation. For example, suppose our nation is at war with a neighbouring country. In such a situation, the bank is required to stop doing banking business with an enemy country. When a bank has a customer from such an enemy country the bank will be justified in disclosing the facts to proper authorities. At the same time, when a banker comes to know some criminal intent of a customer, the bank has a duty to disclose the facts to the appropriate authorities.[42] When suppressing the terrorists' funds, banks and financial institutions are also dragged into the war hence, compelled to disclose to the police officers any financial information or property of the terrorists which is within its hand.[43] When banks and the financial institutions disclose the information of the customers' account they are so doing for the public interest of protecting the public and at the same time complying with the banking law of Tanzania.[44]

Sometimes banks and financial institutions require disclosing information relating to the customer's account for banker's interest. This arises if there is a dispute between the bank and the customer especially when one party disputes on the advances executed with the bank or financial institution. In such circumstances, banks and financial institutions can disclose such information to advocate for initiating legal proceedings in a court of law or may disclose such information to the responsible authority in order to scrutinise the matter for the purpose of settling the same.[45] This disclosure clears the doubt existing against the bank or financial institution. Hence, creates confidence among the subsequent customers of the bank. Banks and the financial institutions may also disclose the affairs of customers relating to the property that are in his possession or control.[46] The disclosure may contain particulars relating to customer's account and transactions involved and the total value of the property which has connection with the terrorist's group.[47]

Furthermore, banks and financial institutions are also compelled to disclose the customers' information among banks themselves. This is normally known as common courtesy among the bankers. Through this practice bankers are sharing banking information among themselves relating to the financial status of a customer. Information given in response to such inquiries is given under confidential condition. This information must be worded with care so as to disclose no more than the general position of the customer and it must be used only for the purpose requested for. The sharing of such information by one bank with another bank is considered to be permissible in view of the implied consent of the customer, derived from a well-known practice of sharing financial information among banks.[48]

In Tanzania the principle of disclosure of the customer's information under common courtesy among bankers is statutorily provided. The Banking and Financial Institutions reiterate the principle under section 48 (1) by stating that:

> *"Every bank or financial institution shall observe, except as otherwise required by law, the practices and usages customary shared among bankers and in particular, shall not divulge any information relating to its customers or their affairs except in circumstances in which, in accordance with the law or practices and usages customary shared among bankers, it is necessary or appropriate for the bank or financial institution to divulge such information."*

In Tanzania sharing the banking information among bankers is not an automatic exercise. There must be executed an agreement between the two banks to such effect in order the two banks and financial institutions to share customer's financial information.[49] Pursuant to such agreement, when the banker decides to disclose affairs of a customer's account to third parties the banker is required to take due care. The irrelevant information should not be given. Only relevant facts should be given and must be given in general terms such as good, fair or satisfactory. Whenever information is given to another banker, one of the conditions of disclosing is that of secrecy which

37 [1928] All. ER. 550.

38 For instance in Tanzania and as elsewhere shown in this article, the Bank of Tanzania Act, 2006 and the Banking and Financial Institution Act, 2006 and the Evidence Act, 1967 recognise the disclosure under the compulsion of law. Section 48(1) of the Banking and Financial Institution Act, 2006 points out that: "Every bank or financial institution shall observe, except as otherwise required by law, the practices and usages customary shared among bankers and in particular, shall not divulge any information relating to its customers or their affairs except in circumstances in which, in accordance with the law or practices and usages customary shared among bankers, it is necessary or appropriate for the bank or financial institution to divulge such information."

39 HR Sheldon, *Practice and Law of Banking*, 9th Edition. Macdonald and Evans, London, 1962 at page 50 and ***the*** Ant-Money Laundering ,Act, 2006 at section 22.

40 The Prevention of Terrorism Act, 2002 Act No. 28, 2002 at section 41(2).

41 The Bank of Tanzania Act, No.5, 2006, Section 16 and the Banking and Financial Institution Act, No. 5 of 2006 at Section 48.

42 HR Sheldon, Practice and Law of Banking, 9thEdition, Macdonald and Evans, London, 1962 at page 51.

43 The Prevention of Terrorism Act, 2002 Act, 28, 2002 at section 41(2).

44 The Bank of Tanzania Act, No.5, 2006, Section 16 and the Banking and Financial Institution Act, No. 5, 2006 at Section 48.

45 HR Sheldon, Practice and Law of Banking, 9th Edition, Macdonald and Evans, London, 1962 at page 51.

46 The Prevention of Terrorism Act, 2002 Act No. 28, 2002 at section 41(2).

47 The Bank of Tanzania Act, No.4, 2006, Section 16, the Banking and Financial Institution Act, No. 5 of 2006 at Section 48 and the Prevention of Terrorism Act, 2002 Act No.28, 2002 at section 41(3) (4) and (5).

48 Ibid., page 51.

49 Banking and financial institution Act, 2006 under section 35(b) provides that "…, the Bank may enter into arrangements for sharing supervisory information on a reciprocal basis with the appropriate supervisory authorities within or outside the United Republic". This means that, the Bank of Tanzania can only disclose the information to another bank provided that there is an agreement between the banks that they will share such information.

must be maintained by the recipient of the information.[50]The information must be given to the exact person responsible to collect the information from the bank and not otherwise. The disclosed information must be restricted only to the context under which is required. Generally, by the presence of the terrorists activities banks and the financial institutions are required to suppress the terrorists' fund. Banks and the financial institutions are now commanded to disclose terrorists' financial information for the purpose of fighting against the terrorists' financial system intended to operate in favour of the terrorists group.[51]

## 7.0 Conclusion

Banker's duty of confidentiality is the banking principle that prohibits any member of the board or staff of the Bank to disclose any information relating to the Bank or to any transaction or customer of the Bank acquired in the course of employment or the discharge of his duties. The duty covers more than customer's information received from normal banking activities. The duty further, prohibits banks and financial institutions to reveal information shared between them. The concept of customer's account in this context includes also customer's affairs such as where a customer is nearly penniless. This principle has been developed in the well-known case of *Tournier v National Provincial and Union Bank of England limited*[52] to the effect that, a bank owes a duty of confidentiality to its customers and extends to information concerning account transactions until to the date of the termination of the banker-customer contract. To date this principle is the creature of statutes in Tanzania.[53] The principle binds banks and financial institutions to protect the affairs of the customer's account.[54] However, this duty is not absolute. There are exceptions. Through the exceptions the banker can divulge the information of his customer's account. The exception is much explained under compulsion of law. Through the exception, for instance, the suppressors of terrorists' financial network may receive the terrorists' financial information from the bank and financial institution. Despite such information being disclosed, still there is no legal violation of the principle of confidentiality within the banking business in Tanzania.

50 HR Sheldon, Practice and Law of Banking, 9th Edition. Macdonald and Evans, London, 1962 at page 51.

51 The Prevention of Terrorism Act, 2002, Act, No. 28, 2002, section 41(2).

52 [1928] All. ER. 550.

53 The statures are the following; The Bank of Tanzania Act, No.5, 2006, The Banking and the Financial Institution Act, 2006, and The Anti-Money Laundering Act, 2006, The Bank of Tanzania Circular No. 8

54 The Bank of Tanzania Act, No.5, 2006, Section 16.



**Philemon Raulencio** *

# THE UNION IN TANZANIA: CHALLENGES AND OPPORTUNITIES AS TANZANIA STRIDES TOWARDS A NEW CONSTITUTION

**ABSTRACT**

*It is now 53 years since Tanganyika and Zanzibar united to form Tanzania. Local legal scholars have been always attending the call to address the Union nature, its challenges and legal implication. According to the literature, the Union formation was characterized by absence of public consultation and participation, personal interests, lack of constitutionalism and structural ambiguity. There are Union muddles rooted in anomalies characterizing the Union formation and operation. The Union muddles are posing challenges on the survival of the same. In the year 2014/2015 the constitutional review process was inaugurated. Constitution reforms in Tanzania may offer remedies against Union challenges. Through the review process, there are several opportunities and solutions to the Union problems. All these are addressed in this article.*

**Key words:** *The Union, Challenges, Constitutional review and, Opportunities.*

* LLM (Mzumbe University), LLB (UDSM), Assistant Lecturer, President Academic Association, Institute of Judicial Administration Lushoto, Advocate of the High Court

## 1.0 INTRODUCTION

Two and half years after independence of Tanganyika,[2] and three months after Zanzibar Revolution,[3] the two independent sovereign states enjoyed a legal marriage in terms of the Union on 26th April 1964. The merging of the two states resulted into establishment of international person called the United Republic of Tanzania. The Union formation is surrounded by myths fused and confused in social, historical, political and legal paradoxes. From the day of its cerebration to date, the Union is subjected to debates, complaints and discontent levelled against both its nature and utility. In extreme cases even the legality of that partnership is questioned.[4] The discussion is yet to be closed and seemingly endless pending solutions to the Union challenges. This article recaptures salient challenges of the Union by comparative analysis with available literature on state formation and its constitutional principles. The article covers historical foundation of the union, its legality, structural ambiguity and jurisdictional challenges of member States. The article also recalls constitution reforms in Tanzania and available opportunities towards a new constitution. Through constitution review process, there are solutions for the perennial muddles which have characterised the Union.

## 2.0 THEORETICAL PERSPECTIVES ON THE NATURE OF THE STATEAND ITS FORMATION

Nature of state is a broad concept and jurisprudential aspect in law. There are divergent philosophical views on the concept. They may be grouped into interrelated groups sharing similar outlooks at different intervals in terms of time. The naturalists' outlook on the concept is different from that of the positivists' outlook. For instance, Thomas Hobbes among the naturalists viewed the concept as any political entity organised as per the wishes of its constituent people in order to form consensus on the form and nature of the state.[5] John Locke joins hands with Hobbes at different perspective. For him the nature of state is a state of perfect freedom and equality. The common idea to draw is that the agreements by the society determine the form of state, laws and its order whether natural or manmade towards ensuring justice.[6]

Contrary to natural law theorists, the positivists; John Austin; and Bentham developed more paradox. The two believed that the nature of state and law has nothing in connection with morality. What is important is the peoples' desire and agreement to its nature. This perspective develops new idea of sovereignty that, any form of state and its law should establish and encourage sovereignty to itself and its nationals.[7] Therefore the general idea to be grasped from both naturalists and positivists is that the form of state has to be adopted to reflect peoples' desire through their agreements. The state formed and laws established are authoritative with unquestionable binding nature and sovereignty.

### 2.1 Forms of United States

Daniel J. Elazar in his article on "*Forms of State*"[8] distinguishes forms of state and government. He says that, there are two common forms of states namely; federal state and unitary state. On the other hand, there can be many forms of government such as republic, democratic and monarchy.[9] Although there is no scholarly consensus on the matter, the submission by Daniel J. Elazar seems to be relevant for distinguishing between the two, State and government. The federal and unitary forms will be the base of this article to scrutinize concisely in order to grasp the form of state the Union in Tanzania is subjected to.

The unitary state may simply refer to a situation where two independent sovereign states competent to enter into international relations unite to form a single state. Through contracts the two states voluntarily venture their dominion and state affairs into one government commonly referred to as union government. Friedmann, defines unitary state as joint ventures of power and authority between two independent sovereign states.[10]There are several principles constitutionally marked to be the bases of this form of state. These principles are traced back from the social contract theory, which developed during the 17th and 18thcenturies.[11] The theory is rooted in the development of the commodity economy wherein people entered into contractual relationships as equals be it at the level of production or exchange as well as from the theories on nature of state. Generally, the theory develops two major assumptions on the features that any social contract shall possess.

Firstly, the source of political power resides in the people as opposed to the divine theory which provides on the source of any power, authority and law to be God. Secondly, the source of Government (State) is by the mandate of the people through their consent. These propositions were later supported by John of Salisbury in 1159, John of Paris in 1302, and St. Thomas Aquinas 1226-1276.[12]

Subsequently the social contract theory paved way for the development of other theoretical concepts including unionism in the nature of unitary and federal forms of state. The Unitarists conceptualize the form of state in which all the powers are vested on the central government and the local governments exist and do operate as desired by the central government. It involves the creation of a single integrated system of government which is vested with all the powers.[13] On looking at the constitutional principles, the Unitary State puts all power and executive authority to a single sovereign state and ruler[14] and such sovereign state shall have full mandate on all administrative powers within its jurisdiction and abroad.[15] More precisely Montesquieu opines that, Unitary State and unitary form of government shall be held with single legitimate authority having acquired its authority from people. This is to say "*In every Unitary State, it is held with single legitimate authority.*"[16]

Generally the Unitary State has five major characteristics namely;- a single central all-powerful Government, local Government exist at the will of the Central Government, Constitution can be written or unwritten, flexibility of the Constitution and Administration and a single uniform administration system as practiced in Britain, France, Japan, Italy and China. Such a single Government is well centralized to hold the responsibility, it should also be stable and strong enough to run and administer the affairs of the State.[17]

The federalists conceptualize the matter differently. According to them in a Federal State, the governmental power and authority are split between a Central Government and its constituent States. Usually, an overriding law of the land is the Constitution which allocates duties, rights, and privileges to each level of Government and its departments. The Constitution defines how power is shared between the central government and the component states. Traditionally, in a federal

2 Tanganyika became independent on 9th December 1961
3 The revolution took place on the 12th January, 1964
4 Mandopi K, "44 years of Union and its legal complications" A Discussion paper presented to the Institute of Judicial Administration Lushoto on 4th April, 2008 Marking the Union Day on 26th April, 2008 P.5, 2008
5 M. Lacewing, *State of Nature*, Routledge Taylor & Francis Group; www.olevelphilosophy.co.uk, 1989
6 J. Rosceque, *State of Nature*, Routledge Taylor & Francis Group; www.olevelphilosophy.co.uk, 1886
7 J. Austin, *A Theoretician of Law*, Weybridge Law Review, Surrey Stanford, New York., 1970
8 EJ. Daniel, *Forms of State*: Federal, Unitary or ... Jerusalem Center for Public Affairs Volume 2, 2010
9 Ibid
10 W. Friedmann, *Legal Theory*, 5th Edition, Stevens & Sons, London, 1967
11 KC. Mtaki, *Constitutionals and Legal Systems of East Africa* (General Principles of the Constitution) Open University of Tanzania, Dar es Salaam, 1996
12 Harlow C. & R. Rawling, *Constitution and Administration*, 3rd Edition, Cambridge University Press, London, P 212, 1970
13 Harlow C. & R. Rawling (1970) Ibid also quoted by Mtaki K. C., (1996), Loc.cit
14 H. Phillips, *Constitutional and Administrative Law*, 7th Edition, London, 1987
15 ECS. Wade, *Constitutional Law*, 6th Edition, New York, 1960
16 KC. Mtaki, (1996), Infra.
17 Freidman K., 'Theories and Constitutional Principles,' Analysis of State and Nature of Government, Vol 6 Law Review Journal, Harvard, 2002

state the powers reserved to the central government includes; security and defense, the union legislature and judiciary, foreign affairs and monetary issues. The component states retain autonomous on the rest of state affairs. The United States of America is considered the first modern federation. After declaring independence from Britain, the U.S. adopted its first Constitution, the Articles of Confederation in 1781. This was the first step towards federalism by establishing the Federal Congress. U.S.A is a Government with strong central powers while residing some authority and responsibilities to Constituent States.[18] Generally, the federal form of state is featured by one Central Government identified in the supreme law but with recognition of governments to the other constituencies constituting the federation.[19]

## 3.0 CHALLENGES OF THE UNION

### 3.1 Nature of Tanzanian Union

There is no doubt that unitary state is held by one central government, basing on this analysis two major legal issues is inevitable, that whether Tanzania is held by a single legitimate authority; and whether survival of Zanzibar is within the discretion of the Union Government. The two questions are negatively answered. The Union Constitution is acknowledging existence of two legitimate authority as it entails that, '*all state authority in the United Republic shall be exercised and controlled by two organs....*'[20] The spirit of this provision signifies and acknowledges the existence of two entities vested with authoritative power in a single sovereign State. Also, in the latter question before the Union, Zanzibar and Tanganyika each had competent features of any sovereign State; hence they were able to enter into international contractual relations. Today's legal concern is whether the two States are still sovereign state? This constitutional issue over-whelmed the proceedings in the case of *S.M.Z. vs. Machano Khamis Ali and 17 Others*[21], where the court had to consider if treason can be committed against Zanzibar. Apart from several constitutional issues to be addressed on the matter, of interest to consider was whether Zanzibar is a sovereign state hence treason can be committed against it and their Lordships at page 8 of the type – written page inferred that:-

> *After the above exposition, we have no difficulty at all to answer that question in the negative. The International Person called Tanganyika and Zanzibar ceased to exist as from 26th April, 1964 because of the Articles of Union. The two states merged to form a new international person called the United Republic of Tanzania.*

Therefore, it was ruled out that a person cannot commit treason to non sovereign state. The position was later approved in the case *Mtumwa Said Haji and 49 others v. Attorney General,*[22] when it was stressed that:

> *The constituent states of Tanganyika now Tanzania Mainland and Zanzibar have long (sic) since lost their legal personality; they cannot negotiate a treaty, nor can they negotiate to amend the Treaty of Union.*

It should be noted that although with the adoption of the Articles of Union, Tanganyika lost structural existence in total, Zanzibar is alive with her original fixed territorial boundaries, the Constitution and Government. It is from this stance, debates and legal forums have been witnessed on the nature of the Union. Two schools of thoughts have developed on the issue, namely, the unitarists, who maintain that the created person after 26th April, 1964 is a Unitary state. Federalists on the other side consider the nature of a legal person created to be a Federal State. There is also a neutral group standing in between unitarists and federalists. The latter maintains that Tanzania is characterized by both unitary and federal features therefore, is a semi federal and semi unitary state.[23]

### 3.2 The Motives and Foundations of the Union

The foundations and reasons for the Union are questionable. The Union formation was featured by lack of transparency.[24] The secrecy on its foundation may reveal lack of peoples' participation on both, the need for the Union and its structural formula. The propositions that the Union has both unitary and federalist features are within the mind of many scholars. Much labour may not be devoted to substantiate a need for unity. Historically, unity was categorized as the only means of success as it was even encouraged among workers by establishing the Tanganyika Federation of Labors which ventured with Federation of Zanzibar for strengthening workers unity.[25]

Rarely do academic and legal corners consider the question on whether or not a union was needed. Scholarly treatises, in particular, local ones have been sparingly addressing the matter.[26] Did the people express the need for the union or it was just a leaders' affair? Overwhelming legal and historical evidence presents the Union as a leaders' personal designation.[27] For example Mvungi had this to say:

> *'...the political leaders of the two states first met secretly in Zanzibar and agreed to unite their two countries before the public was made aware of the union.'*[28]

This observation is squarely correct for nowhere is the idea for the Union recorded to have ever been made the subject of public discussion before signing of the Union treaty. It is unconceivable that such an important matter and of far reaching consequences to the two states missed public awareness and debate. It is beyond dispute that the current union challenges are traced from its original form and nature. According to Shivji for instance:

> *The Articles of the union were a masterly piece of legal draftsmanship guided by immediate requirements of power sharing rather than, any grand principles of constitutionalism.*[29]

Again, that is absolutely true. That proposition is supported by the personal interests of the two leaders secured under the Articles of the Union, as it reads;

> *Art (vi) (a) The first president of the United Republic shall be Mwalimu Julius K. Nyerere.....*
>
> *(b) The first vice president from Zanzibar ...shall be Sheikh AbeidKarume.*[30]

18 Ibid
19 MC. Thomas, *Constitutional Law in United States of America*, The Lawbook Exchange Ltd, Northcalorina – America p. 67 2004 (available through www.ebooksdowloads.xyz/principles-of-constitutional law as accessed on 8th Sept. 2017
20 Article 4 of the Constitution of the United Republic of Tanzania, 1977
21 Criminal Application No. 8 of 2000 Court of Appeal of Tanzania at Zanzibar (unreported)
22 [2001] TLR 425
23 Makaramba V, 'The State of Constitutional Development in Tanzania' Eastern Africa Law Review vol. 258 - 274, December, 2003
24 Mvungi S., 'Legal Problems of the Union between Tanganyika and Zanzibar' Eastern Africa Law Review vol. 213 - 257, December, 2003
25 F. Kamughisha, African Advanced History, 2nd Edition, Mkuki na Nyota Publishers, Dar es Salaam, p. 301, 1994
26 Kabudi P. K., 'The United Republic of Tanzania after a Quarter of a century:' A legal Appraisal of the state of the union of Tanganyika and Zanzibar pp.313-315, 1993
27 The idea for a union was rooted from Nyerere and Karume
28 Mvungi S., (2003) Infra.
29 Shivji I. G., 'Problems of constitution making as consensus building:' The Tanzania experience in the state & constitutionalism in southern Africa (1998), owensichone (Ed.) (Harare Southern African Printing House (SAPPHO) Ltd pp. 126 -144, 1998)
30 The Articles of union between the Republic of Tanganyika and the peoples Republic Zanzibar

The recording and approval of the two names in the articles of the Union addressed the personal interests of the leaders. This move epitomised their ambitions in the process. While on other hand with political ambitions by the leaders, security and ideological reasons backed the union[31]. The union intended to enhance security as against external and internal political upheavals, and ideological tensions. The minister for foreign affairs at the material time was recorded saying that;

> *Our first concern was the growing communist presence, and second the danger of cold war coming in…….the problem was how to isolate Zanzibar from Eastern countries yet not to be used by the west for its own purposes.*[32]

That being the case, the argument by J. K. Nyerere that the Union was a step towards African Unity is an eye wash.[33] It is submitted here relatively in affirmation to Kabudi that factors like geographical proximity; common historical, cultural and political heritage; and the long standing friendship between the people, leaders and the nationalist movements which led the two countries to unite,[34] are subsidiary if at all had anything to influence on formation of the Union.

Indications that the union was in principal activated by personal interests of the leaders are axiomatic; hast in union making, overstepping of the people in the process, suspension of the Zanzibar Attorney General at the material time,[35] personal inclusion of J. K. Nyerere and Sheikh. A. Karume as parts of the Articles of the Union and, the Union ambiguous structure. From the foregoing, justification for constant political and legal voices against the nature and utility of the Union is realised.

Nevertheless, despite the fact that the union celebration was influenced and characterized by the personal interest, once Mwalimu Julius Kambarage Nyerere, issued the following statement at the conference of independent African states in Addis Ababa, Ethiopia, in 1960:

> *Many of us agree without pretences or inhibitions that the East African Federation will be a good thing. We have stated this, and it remains true, that the borders separating our countries were put in place not by ourselves but by imperialists. Therefore, we should not allow them to be used against our unity ... we must persistently knock at the offices of the colonialists not to demand the independence of Tanganyika, then Kenya and Uganda and finally Zanzibar, but we must do it to demand the independence of East Africa as one political federation.*[36]

Thus, the following were the reasons for Union according to union founders:-

i. The people of Tanganyika and Zanzibar have historically enjoyed very close relations in various areas, including family ties, trade, culture, language and political interactions.

ii. A strong spirit of African unity has prevailed, especially with the formation of the East African Community as a building block for the establishment of the proposed United States of Africa. Even before Tanganyika achieved its independence, Mwalimu Nyerere and other leaders in East Africa who were fighting for the liberation of the continent from colonialists were determined to achieve African Unity.

iii. Mwalimu Nyerere personally advocated for African unity starting with the formation of regional economic groupings as the building blocks, following consultations with various leaders from the then Pan-African Freedom Movement for East and Central Africa (PAFMECA).

Therefore, it was the elite's mission that charity begins at home. By virtue of the union of Tanganyika and Zanzibar, it was believed that the Union will be the foundation for East African Unity, Central Africa and African Unity. One of the prominent leaders and founders of Pan-African Freedom Movement in the New World, Marcus Garvey said;

> *....the liberation of Blacks resides on their hand, but with unity may be achieved either abroad or in their home land.*[37]

However, there are several averments from both scholars and activists against above reasons for the Union formation. They are said to be subsidiary if at all hold anything to do with the Union.[38] Also once Hon. Pius Msekwa commented that:

> *... many present day Tanzanians are presumably aware of the current challenges facing the Union of Tanganyika and Zanzibar, which are known in Kiswahili as 'kero za Muungano'. Party leaders who were in the Revolutionary Council at that time, have confirmed that the matter was discussed in the Council, and that while there were reservations on the part of some members, as were inclined by Abdallah Kassim Hanga who made an emotional appeal in support of the Union.*[39]

However, it must be acknowledged that this Union was secretly negotiated in favour of founders' mission.[40]It is from this base, that the whole process was featured by personal interest; other than constitutionalism principles leading to its ambiguous structure which now hits the mind of legal and political practitioners.

### 3.3The List of Union Matters under the Articles of Union

Articles of union are the foundation of the Union. They provide for the basic structure and essentials of the Union. The Union dance was to be tuned and played within the Articles parameters. Item (IV) of the Articles is a fundamental one. The Union Matters listed in the Articles of Union are: The Constitution and Government of the United Republic; External Affairs; Defense; Police; Emergency powers; Citizenship; Immigration, External Trade and Borrowing; The Public service of the United Republic and Income Tax, Corporation, Tax, custom and Excise; Harbours, civil Aviation, posts and Telegraphs.

Original version and spirit of the Union was limited to those eleven items. No doubt that the framers of the Articles of the Union had paid the necessary consideration on the matter. The list of union matters according to the Constitutional Bill (Second version) tabled before the Constitutional Assembly were reduced to 7 items.[41]This was according to the views collected from the electorate. It should be noted that the list was expanded up-to 16 union matters by the Constituent

31 Kabudi (1993), Infra. and Shivji (1998), Infra.
32 WE. Smith, *Nyerere of Tanzania* Gollancz London, pp. 176 -177, 1973
33 JK. Nyerere, *Freedom and Development Dar Es Salaam*, Oxford University press p. 293, 1973
34 Kabudi (1993), Infra.
35 Mandopi K. (2008), Infra, p.4
36 The Tanganyika Standard Newspaper, November 1964
37 F. Kamughisha, *African Advanced History, 2nd Edition*, Mkuki na Nyota Publishers, Dar es Salaam, 1994
38 Jumbe's speech, 1994: Quoted by Shivji(1998), Infra, p. 133
39 Msekwa's comment, 1993 Quoted by Kabudi (1993), Infra, p. 23
40 The Msemakweli (News paper) Issued No. 211 of October, 2 1993
41 The schedule of the Constitutional Bill (second version) of January, 2014

Assembly.[42] This trend also expands both legal and political debate on the sustainability of Union. The Union matters presented by the commission for constitutional change included; [43]

i. The constitution of the United Republic of Tanzania

ii. Security and Military base of the United Republic of Tanzania

iii. Nationality and Immigrations

iv. National currency and the Central Bank of Tanzania

v. International relations

vi. Political Parties and its registration process

vii. Union goods revenues and any revenues collected.

The alterations of these union matters from those provided in the Articles of Union were evidencing the theme of establishing a federal state as opposed to the unitary state. However, those propositions were altered by the Constituent Assembly as the list was enlarged up-to sixteen (16) Union Matters whereas five (5) items were added to the list recorded in the Articles of Union. Modification made to the nature of the Union provided for in the report of the Commission for Constitution change and the proposed Constitution by the Constituent Assembly add to the confusion and legal debate on the nature of the Union.

### 3.4 Extension of the Union Matters in the List

Amendments to the constitution adopted after formulation of the Articles of Union increased the powers of the Union Government through enlargement of the Union matters in the list. Today; the list is hitting on twenty two items.[44]

The legality of the extension of the list is another fertile ground for debates. According to Mvungi extension of the list does not bring any problem. He states:

> *It is now pertinent to conclude that, in a union of states with strong unitary characteristics like the one of Tanzania has adopted, powers are given to the parts of the union as long as they are not required and necessary to the union. Therefore, the exclusiveness of non-union matters is as a matter of fact only a question of degree to which a matter is of importance to the existence of the union. Once matter is deemed to be of importance to the union, then its surrender to the union becomes only a matter of course and cannot be denied on grounds of "belonging or not, belonging to the list of union matters*[45]

The position by Mvungi is supported by the school of thought he subscribes to on the nature of the union. He believes that the union is structured in a semi – federal character with strong unitary characteristics. For federalists, the contrary is the position. Shivji forcefully submits:

> *That scheme was implicitly made immutable and a 'fundamental condition' of the association of the two states. To tamper with those provisions is the surest way to destroy the legal foundations of the union so carefully laid down by framers and signatories of the Articles of union (embodied in the Acts of union). Additions to and subtle alterations of the reserved list on union matters is like hammer – blows delivered at the core of those foundations…*[46]

42 The 1st Schedule of the Proposed Constitution by the Constitution Assembly October, 2014
43 Ibid.
44 The first schedule to the Constitution of United Republic of Tanzania, 1977
45 Mvungi S., (2003), Infra, p.235
46 Shivji I. G., (1998), Infra.



Once again, this debate must be resolved by importing explicit meaning of the Articles of union. A thorough reading of the Articles brings no doubt that there is no ambiguity on the matter. The Articles means what they provide. Nothing in the Articles indicates possible extension or deduction from the list. Any attempt to construe the contrary is unattainable and is just like opening the Pandora's Box.

### 3.5 The Legislative Relations under the Union

Article 64 of the Union Constitution[47] read together with Article 78 of Zanzibar Constitution[48] appears to govern legislative relations in Tanzania. It is provided that the parliament has legislative powers over union matters and all other matters concerning Mainland Tanzania. Legislative powers in Tanzania Zanzibar over non-union matters are vested in the House of Representatives.[49] This article subscribes to the tenet that union in Tanzania has some strong features of a federal State. That being the case, the two legislative bodies are at per. Shivji submitted rightly that:

> *The Zanzibar legislature is not subordinate to the union parliament. Its powers are not devolved or delegated. Its powers are plenary in all respects bound only by the instrument that creates it….*[50]

That is the position. Each organ is competent in its own sphere. Loudly, the union constitution is self- illustrative:

Article 64(3) of the Constitution provides to the effect that any law enacted by the House of Representatives concerning any matter in Tanzania Zanzibar which is within the legislative jurisdiction of parliament, that law shall be null and void and likewise if any Law enacted by parliament concerning any matter which is within the legislative jurisdiction of the House of Representatives that law shall be null and void.

Necessarily, it must be inferred that, since the above relations have their root in the agreement by the two parts of the Union any change on the terms of agreement is subject to consensus. Nothing can be imposed without such consensus. Indeed, this is the spirit of Article 98(1) (b) of the Union Constitution which requires two – third majority consent by members of parliament from both parts of the Union for alteration of the Union Matters.

### 3.6 Autonomous of Zanzibar

One of the most controversial issues on the debate of the Union has always been on the autonomy of Zanzibar. The issue is whether Zanzibar remained a sovereign state internally although it exists as an integral part of the United Republic of Tanzania. The subject became more complicated by the Zanzibar Constitution Amendment of 2010 which declared Zanzibar to be a state with fixed territorial boundaries. It has her own constitution, government though still claimed to be an integral part of the United Republic of Tanzania.[51] Despite the Union, Zanzibar retains unlimited freedom in discussing and addressing internal affairs which are not in the Union Matters list. The confusing fact is the continuous and endless extension of the items in the Union list. Unless the trend is curbed, it may lead to total absorption of the Island into the Union. Nevertheless the latter may not be the fact because of the legal hurdle which calls for Zanzibar's consent for any proposed constitution amendment affecting matters in the Union list.[52]

47 The Constitution of the United Republic of Tanzania of 1977
48 The Constitution of Zanzibar of 1984
49 Section 106 (3) of the Constitution of Zanzibar of 1984
50 Shivji I. G. (1998), Infra.
51 Section 2 of the Constitution of Zanzibar, 1984
52 Article 98(1) of the Constitution of United Republic of Tanzania, 1977

### 3.7 Subsumption of Tanganyika

Critics to the federal state in Tanzania stand centrally on the proposition maintaining absorption of Tanganyika in the Union. That, since the Union Government discharges all functions and deal with all matters over Tanzania mainland, the latter had disappeared. It is further argued that continuous enlargement of the Union Matters list is a step towards absorption of Zanzibar. This is also the view by the ruling regime in Tanzania that Tanganyika kissed the dust after the Union and it is no longer surviving.[53] That proposition is absolutely wrong. It is maintained here that in the absence of Tanganyika there can neither exist Union Matters nor matters concerning Mainland Tanzania in the constitution. Absorption of Tanganyika might implicate either that the Union Government is of Tanganyika or that Tanganyika is a Union Government. Irresistible inference in such a case may be that Zanzibar surrendered some of her powers to Tanganyika and that Tanganyika allotted nothing in exchange. Surely, such an inference is inconceivable be it in fact or law.

Ambiguous structure of the Union and its absurd operation does not imply non-existence of Tanganyika. Truly, structural anomalies invite fair critics to the Union. It is the living fact that Zanzibar's members of the Union parliament do legislate over Non – Union Matters for Tanganyika. Mainland counterparts are not availed in equal terms for Zanzibar. Further confusion arises from the fusion of Union Government with that of Tanganyika. Zanzibari holding administrative posts in the Union Government have automatic jurisdiction and powers over all Tanganyika affairs. But to the isles, there is no avenue for a Non – Zanzibari to exercise powers over Zanzibar in non-union matters. In the current constitutional structure, it is possible and has happened for the supposed three governments in Tanzania to be headed by Zanzibari.[54] More difficulties are created with establishment of the special Constitutional Court.[55] The court's jurisdiction is limited to the dispute between the Union Government and Revolutionary Government of Zanzibar. What will be the case if the dispute is between Tanganyika and Zanzibar or Tanganyika's interests with the Union? It must be noted that the *Locus stand* by a necessary implication is limited to the union and Zanzibar Governments. Where it is possible for Zanzibar interests to conflict with those for the Union or Tanganyika why not the vice versa for Tanganyika? Or do the Government of the United Republic of Tanzania means also the Government of Tanganyika? If the latter is the case, the confusion will go deeper. For the union will imply Zanzibar surrendering some of its powers (Union Matters) to Tanganyika.

### 3.8 Union Challenges and Judicial Dilemma

Before launching a move for Constitutional change courts had time to comment on the challenges of the Union and suggested some possible solutions. This is well explained in the case of *S. M. Z. Vs. Machano Khamis Ali* (supra), where the Court while referring to the case of *Sheik Sharif Hamad vs. SMZ*[56] had the following to comment;

> *We mused over a number of incongruent provisions of the two constitutions and after we had this to say on page 18 of the type-written judgment: We recommend to the relevant authorities on both sides of the Union, to take necessary steps to harmonize these conflicting sections and other sections of the two constitutions which are potentially irreconcilable.*

In the two above cases the court noted serious conflicts between Zanzibar and the Union Constitutions. Strangely, the court departed from its traditional adjudicatory role and it ventured and trespassed into the advisory chamber. This is a new and interesting innovation by the court which attracts critical discussion. Since the inherent function of the judiciary has been adjudication, it is not clear on the weight to be accorded on the advice of the court when acting in the position of advisory committee or organ. Nevertheless judicial intervention albeit in advisory capacity is additional proof on the confusion on the form and operation of Union in Tanzania. More interesting on judicial practice is that while the provisions of item 21 of the First Schedule of the Constitution[57] provides the Court of Appeal of the United Republic of Tanzania to be among the Union Matters, in the case of *Mwajuma Ali Mtipula v. Shomarali Mtipula*[58] his Lordship Mroso J. A. held that;

> *Since the Court of Appeal has no jurisdiction to interpret the Constitution of Zanzibar, one cannot go into the question if a revision case is or is not included in the words "kesizozote" (in article 96(2) of the Constitution of Zanzibar, 1984.*

The Court of Appeal which is a union matter is vested with limited jurisdiction in Zanzibar. It has neither power to interpret the constitution of Zanzibar nor to attend appeals originating from Chief Kadhi's Court. Worse still, doors are still open for other laws limiting the jurisdiction of the Court of Appeal to be made.[59] Apparently, the Court is lamenting against her limited jurisdiction. In the case of *Mohamed Rafiki Ishak Ayoub and Others v. Anwar Hussein Jaffar and Others*,[60] when the Court was moved to invoke its power to entertain matters originating from Zanzibar it stated;

> *... the Court of Appeal stepped into the shoes of the High Court of Zanzibar to quash decisions of Kadhi's Courts which had been obtained by fraud... If leave to appeal is granted therefore, the Court of Appeal will be called upon to act in similar manner as in Civil Appeal Number 35 of 1994. The Court of Appeal would have jurisdiction notwithstanding the provisions of article 96(2) of the Constitution of Zanzibar 1984.*

and in its '*obita'* had this to comment:-

> *This practice is so embarrassing that the Court has vested with power but limited,(sic) the regulatory authority should find the alternative to solve these existing challenges.*

This muse by judiciary of incongruent provisions of the two Constitutions should not be left isolated which has turned the judiciary from law interpretation and implementation to advisory board of the executive, all being the legal incongruent of Union presenting structural and operational paradox. Inevitably, this presents an urgent call for solution. An opportunity for remedies is within the process for Constitution review.

53 Kabudi P., (1993), Infra.

54 That was a position from 1985 -1995 where a Zanzibar President (President A. H. Mwinyi) headed the Government of United Republic of Tanzania with powers over both union matters and non-union matters for Tanzania Mainland. Zanzibar at the material time had its own Government. As a result, all matters (union and non-union matters) in Tanzania were under the Governments headed by Zanzibar's

55 Established chapter five part seven of the Constitution of United Republic of Tanzania

56 Criminal Appeal No. 171 of 1992 (Unreported)

57 The Constitution of United Republic of Tanzania, 1977

58 [2005] TLR 245

59 Art 117(1) of the United Republic of Tanzania, 1977 read together with Art. 99 of Zanzibar Constitution, 1984.

60 Court of Appeal of Tanzania, Civil Appeal Number 35 of 1994 (Unreported)

## 4.0 TOWARDS ADOPTION OF A NEW CONSTITUTION

The Union founded in the Articles of Union is now featuring in the current Constitution.[61] Its structural ambiguity and incongruent practices has not only been a political issue but also a legal debate. The Union is characterized by challenges and as part of the solution efforts to adopt a new constitution is now ongoing. The Constitutional Review Act,[62] was enacted by the Parliament to bridge the process as its long title provides

> *An Act to provide for the establishment of the Constitutional Review Commission for purposes of co-ordination and collection of public opinions on the Constitution; to examine and analyze public opinions; to provide for **fora** for constitutional review; to provide for preparation and submission of report on the public opinions; to provide for the procedure to constitute the Constituent Assembly, the conduct of referendum and to provide for related matters.*

In ensuring fulfillment of the purposes, the Commission for Constitution Review was established and commissioned to initialize the process pursuant to section 5 of the Act (Supra) and was responsible to adhere to its establishment Act.[63] This marked the beginning of Tanzanian Constitutional Review process.

### 4.1 Opportunity through Constitutional Review Process

Now it is over fifty three (53) years of the Union survival, but due to internal pressure generated by the current challenges, Constitution review process was ongoing. Indeed, this was and still is the golden opportunity to formalize the Union as per public consensus and constitutionalism principles. Section 8 of the Constitution Review Act[64] provide for terms of references during the process whereas sections 9 and 17 of the Act (supra) are cementing on the matter. Much attention of legal scholars was placed on the terms of references. It is unfortunate to the Union that the Act provided for the Commission to adhere to the national value and ensure safeguard of the existence of the United Republic but further provided for ensuring the existence of the Revolutionary Government of Zanzibar divorcing the realization of the other side of the Union, the Republic Government of Tanganyika. This being the fact, the said opportunity was also subjected to criticisms worth of consideration for the public interest.

Once the late Mvungi S., (Constitutional Review Commission's member) was quoted saying that;

> *... this is an ample time to solve the long experienced challenges of the Union, but unfortunately the provisions of section 9(2) of the Constitution Review Act, (Supra) challenges if not to bar at all the entire theme. The spirit of its provisions restricts the commission to address much on the nature of the Union.[65]*

However, the provisions of section 8(2) of the Act (supra) opened the door to the Commission to add or operationalize any matter not within the terms of references if it considers fit and appropriate to do so during the process of the Constitution review. This provision bridged the bar and the Commission had the First Version of Constitutional Bill presented and among many other things, the Bill touched the Union and its nature.

61 The Constitution of the United Republic of Tanzania, 1977
62 Cap. 83 R.E. 2014
63 Ibid
64 Ibid
65 Mwananchi Newspaper, ISSN.0856-7573NO. 5125 of August 4th, 2014.



#### 4.1.1 Constitutional Bill (First Version) of 2013

The spirit of Article 57(1) & (2) of the Constitutional Bill (first version), 2013 which provides for adoption of three independent authorities that is, the Government of the United Republic of Tanzania, the Revolutionary Government of Zanzibar and the Government of Tanzania Mainland,[66] revealed the citizens' desire on the matter. It was recommended that just like in Zanzibar, the Tanganyika autonomy should be recognized and legally established in the Constitution. This observation paves way to Federal government. It is believed by some scholars that the Bill (first version) simply introduced the new approach regarding the Union. Robert Makaramba earlier before had this to say:

> *Opposed to the unitarists' view are the federalists who argue that the system of government envisaged by Articles of the Union is one in which there was a clear-cut dichotomy of powers between the centre and the units. According to the federalists, the Articles of the Union gave birth to a sovereign Federal Republic of a triangular system in nature, consisting of three governments, namely the Government of the United Republic, Government of Tanzania Mainland and Government of Zanzibar.[67]*

Over all, the first draft of the Commission for Constitutional Review process may simply be construed that it is nothing than introducing federal state made out of the sovereign States of Tanganyika and Zanzibar. However, the Bill was criticized for addressing more on the nature of the Union than scrutinizing the constitutionalism principles on the matter.

66 Constitution Bill tabled by the Commission for Constitution Review, June, 2013.
67 Makaramba V. R., (2001), Infra.

#### 4.1.2 Constitution Bill (second version), 2014

In nutshell, the Constitutional Bill (second version) stressed much on what was already covered by the first version. The spirit of Chapter Six of the Bill (supra) envisages the subject; pure Federal State was addressed and the recognition of federal member States was legally addressed. Of interest to note, this version addressed much on the Union challenges experienced in Tanzania. Several issues like legislative authority was addressed under Part II of Chapter six of the Bill, nationality matters under chapter five of the Bill, Executive authority and its authoritative execution under chapter seven of the Bill, and the Judiciary under chapter ten of the Bill (supra). Indeed, the Constitutional Bill (second version)[68] to a large extent addressed much on the long existed challenges of the Union including the wealth distribution, and constitutionalism principles.

While presenting the Constitutional Bill before the Constituent Assembly, the chairperson of the Commission for Constitution Change, retired Judge Warioba stated:

> *All over the surroundings and circumstances of this Constitution is centered on the nature of union, the citizens' view are divided on this matter, there are some who maintain that we shall proceed with the current structure (two governments in a single international person – Tanzania), others maintaining that three government shall be established and be the solution of the existing union challenges, that is to say, Republic Government of Tanganyika, Revolutionary Government of Zanzibar, and the Government of the United Republic of Tanzania which will be the core on all union matters; while others maintaining that only one government (the Government of the United Republic of Tanzania) is the solution to union muddles.[69]*

68 Constitutional Bill tabled before the Constituent Assembly by the Commission for Constitutional Review, 2014
69 www.bungetanzania.go.tz/hotubayamwenyekitiwatumeyamaba-

However, the report was criticized for its insufficient statistics especially on the exact number of citizens who opined for radical reforms on the nature of Union.[70]In his introductory remarks to the Constituent Assembly when discussing the Constitution Bill (the second version) the President of the United Republic of Tanzania, addressed some of the union muddles including the status of Zanzibar and International recognition of the Union member States, total merging of Tanganyika in the Union, distribution of wealth, insufficient and ambiguous government structure and extension of Union matters. On the structural ambiguity, the President denounced its negative impacts on the sustainability of the Union. The President preferred some minor modifications as a solution for the alleged muddles. He was of the view that adoption of Federal state with three governments as proposed in the Constitution Bill will weaken the Union which has been in existence for many years. The president maintained that the Union has more advantages than challenges.[71]

### 4.1.3 The Proposed Constitution, 2014

This is the final version as per section 28A of the Constitutional Review Act,[72]after being discussed and adopted by the Constituent Assembly established under section 22(1) of the Act, (supra). The said proposed Constitution differed with the Constitutional Bill (Second Version) submitted by the Commission in respect of the nature of the Union. The Constituent Assembly proposed adoption of Unitary State with existence of two authorities. This is to say the Government of the United Republic and the Revolutionary Government of Zanzibar as provided for under section 73 of the Proposed Constitution.[73] This approach by the Constituent Assembly is not only legally challenged but also politically challenged for lack of involvement, political resolution and denial of some core aspects of constitutionalism principles. For example, the LHRC report on the Constitution review process was concisely against the political intervention in the process. It further reported noting that the proposed structure by the Commission for Constitutional Review was far better than the structure which was propsed by the constituent Assembly. The structure adopted by the latter is featured with absorption of Tanganyika in the Union.[74]

Despite the fact that the Union in Tanzania is characterized by some gray areas which are considered to be challenges on its survival, there are still some opportunities to be utilized for solutions. These includes:-

a) Constitution review process: this is a clear opportunity to be utilized as it follows the proper channel of gathering both legal and political approaches and solutions to existing challenges.

b) Public awareness, readiness and sensitization: these have developed nationalism enthusiasm among citizens hence psychologically motivated to the process.

c) Political will and economic capacity: despite power transfer from the former President to the current President which may signify different thoughts on the matter, still political will is witnessed among the actors and, finalization of the process cannot consume much cost compared to its initialization.

d) Peace, Unity and solidarity among the civilians: these are major core opportunities for development or for any other socio-political affair of the state. The more solidarity and peace in the state, the more likely to have better solutions on the existing Union challenges.

e) Clear chance for Constitutionalism principles adherence: It is time now to have a new constitution accommodating the desired structural formula of the union after taking into consideration existing constitutional principles governing state formation

In the upshot there is demand for reformulation of approaches to Union challenges; the Constitution review process channeled the matter but it was surrounded by political maneuver, political interventions, lack of publicity, less citizens' awareness on the process to *fora* among the many. Also, the guiding Act, (Constitution Review Act, (supra) surrendered the process to Politicians as opposed to constitutional law scholars. Apparently there is high call for the process to be insulated from political maneuver in order to have a national consensus. The new regime has much to do, and is indebted to the citizenry to revive the move for Constitution reforms.

### 4.2 Constitution Review Current Status

Despite the opportunities created by the Constitutional review process, the opportunities are still not well utilized as the process was grabbed by political differences, lack of common ideologies and consensus to the matter which have left the process in dilemma. No doubt that the process of Constitution review is pending and its revival is subjected to political power's mercy. This dismay is witnessed by the Tanzanians as the process consumed much resources and energy. The existing challenges and opportunities are available for the revival of the process which should be utilized by the decision maker to by amending the Constitutional Review Act, to suit for further progress and recasting the weaknesses that existed.

### 4.3 Union Challenges: The Way Out

Based on aforementioned challenges and opportunities which are available for rescuing the process and addressing the long standing discontents and disillusion of Union, the following may be considered to form part of the solutions:-

i. A need for a civic monitored constitutional review process addressing the general will of the populace. The review process should be insulated from political hijack and manoeuvre. The civic will must prevail as against political impulses.

ii. The Constitution review process shall address properly the nature of Union by clearly identifying the form of government established based on internationally recognized principles of Constitutionalism. This will abolish the structural paradox featuring the current Union formula.

iii. The list of union matters should be subjected to the citizenry approval. The union matters need to be part of the basic structure of the constitution entrenched as against flexibility calling for frequent derogation through amendments.

iv. The new constitution should address Legislative authority succinctly. If the Legislative Assembly of Tanzania enjoys its full mandate in the Union there is no need for ratification of Acts made in Tanzania by the House of Representatives of Zanzibar since the Zanzibaris are represented in Legislative Assembly or otherwise there is no essence for representatives in the Legislative Assembly constituted in Tanzania.

dilikoyakatibabungemaalum la Katiba, 2014 as accessed on 27th January, 2016

70 President Dr.Jakaya Mrisho Kikwete Opening remarks to Constitutional Assembly, 2015

71 Ibid

72 Cap. 83 R.E. 2014

73 The proposed Constitution by the Constituent Assembly, October, 2014

74 Http//www.lhrc.go.tz/recommendation of LHRC to the Commission and constitutional assembly towards president's speech on its commencement. Accessed 26th January, 2016

v. Article 4 of the Constitution of the United Republic of Tanzania vests power of Executive, Judiciary and Legislature to two organs established in Tanzania. This imply that the two organs are those established in Tanzania Mainland and Zanzibar however the Tanzanian Court of Appeal is among the Union matter. This adds practical challenges in the field that judicial system in the United Republic of Tanzania is vested to Court of Appeal only and other tertiary system serve for State members in the Union. The Union government should have a judicial system with jurisdiction fostering the Union essence.

vi. Survival of Zanzibar with her partial autonomous, in the absence of the other partner in the Union 'Tanganyika's fairly calls for the latter resurrection and recognition. Disappearance of Tanganyika and the lone survival of Zanzibar after the Union is the reason behind structural ambiguity of the United Republic of Tanzania.

## 5.0 CONCLUSION

In this discourse we have sketched both the legal and political challenges of the Union since its formation. The Union formation was not only speedy but also characterized by high degree of secrecy. Hasty and secrecy in the process were arguably influenced by personal interests. This marks the first glaring weakness of the Union. The weakness is rooted in the lack of people's consultation and participation in the formation of the Union. Such features divorced constitutionalism principles which led the Union to have a unique structure. While there is unexplained disappearance of Tanganyika as party to the Union, Zanzibar exists with questionable autonomous and ambiguous state armies' jurisdiction. The Union is unique and alone in the global systems of States and governments. The structural form of the Union is featured with semi-federal and semi-unitary characteristics. The initialized Constitutional change was the available opportunity to address these challenges though the process seems abandoned which attracts a need for a rescue. Yet, the problem is being surrounded with several opportunities including, public awareness, readiness and sensitization; political will, less costing as compared to its implications; social peace, unity and solidarity and the available Bills, and earlier Commission's report if all utilized effectively acts as strategic drivers and opportunities to meet the desired ends.



# JOURNAL POLICY, 2016

**Introduction**

This document may be cited as the *IJA Journal Policy and Guidelines of 2016*.

**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 papers from judges, academics, students, legal practitioners and other professionals in interdisciplinary works of relevance to law and practice in Tanzania.

1.3 The Journal shall be publishedin *print* and *electronic f*orm (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 of the Journal.

2.2 The Editorial Board shall comprise of members from IJA, Judiciary of Tanzania, external members from institutions of higher learning and legal practitioners.

2.3 The Editorial Board shall comprise of Chief Editor, Secretary and other members that shall not exceed eight.

2.4 The Editor in Chief, Secretary and other members of the Editorial Board shall be appointed by the IJA Deputy Rector – Academic, Research and Consultancy after consultation with the Principal.

2.5 The Advisory Board shall comprise of Chairperson, Secretary and not more than six members who shall be appointed by the Editorial Board.

2.6 The tenure of both the Editorial and Advisory Boards' members shall be the term of three years from the date of the appointment. Where necessary, members' tenure may be extended for the other two terms. 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.

2.7 The Editor in Chief shall be responsible for the day to day running of the Journal.

2.8 Each member of the Board shall be entitled to a copy of every issue of the Journal and to have online access to its electronic copy. Provided that it shall be the discretion of the Principal to determine and vary this entitlement.

2.9 The Editorial Board shall be responsible for:

(i) Overseeing the administration of the Journal,

(ii) Receiving, discussing and approving management and production reports of the Journal submitted by the Chief Editor,

(iii) Advising on matters pertaining to quality improvement and circulation,

(iv) Determining and directing all forms of subscriptions to the Journal.

2.10 The Secretary of the Editorial Board shall be responsible for distribution and circulation of the journal whose tenure shall be three years.

## 3.0 Editorial Policy

3.1 The Journal shall address a wide range of important issues on law and other related subjects.

3.2 A submission will be considered for publication only on the understanding that it has not been published elsewhere in whole, in part, or in substance; and above all it is submitted exclusively to the *IJA-JOURNAL*.

3.3 Any form of plagiarism detected in any manuscript will disqualify a submission from further consideration.

3.4 The *IJA-JOURNAL* Invites authors to submit manuscripts based on the following:

*(a) Comment on articles*

Manuscripts for comment articles, analysing 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:-

(v) Title (descriptive)

(vi) Name/Citation of relevant case/legislation/material

(vii) Legal context

(viii) Facts

(ix) Analysis

(ix) Practical significance

(b) ***Full-length articles***

Manuscripts for full-length articles must range between 5000 and 10,000 words (including footnotes). Each submission must be accompanied by an abstract of between 100- 200 words indicating briefly the overall argument of the author. Three key words must be written immediately below the abstract and footnotes must be kept to the minimum.

(c) ***Book Reviews***

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:-

Author/Editor Name, Book Title, Publisher, Year of Publication, ISBN, Number of Pages, Price.

Book reviews should be clear and objective and particularly address these points:-

(x) The intended audience of the book

(xi) The main argument and objective of the book

(xii) The soundness of the argument and the research methods used

(xiii) The strength and weakness of the book as a scholarly piece of work

3.5 While authors shall retain the copyright in their work, they will execute agreements to grant *IJA-JOURNAL* an exclusive licence to publish their work in print and in electronic form and distribute it. Authors should also confirm that they have obtained permission from copyright owners of any third party material included in their work.

## 4.0 Submission guideline

4.1 All manuscripts to *IJA-JOURNAL* must be word-processed, double-spaced, with wide margins written using *Times New Roman* style in an A-4 format.

For fonts in the main body text, use font size 11 point, font in the header 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, finalised by page number.

  Example: Peter, C. M., Human Rights in Tanzania: Selected Cases and Materials, RudiigerVerlag, Koln, 1997, p. 11.

- A chapter in an edited book should be cited in the following format: Author's name followed by title of chapter in italics then the names of editor (s), title of the book, publisher, place and year of publication followed by pages of chapter.

  Example: Mtulya, F.H., *The State of Constitutionalism in Tanzania 2008* in KhotiChilombaKamanga, Constitutionalism in East Africa 2008, Fountain Publishers, Kampala, 2010, p. 99-137, at p. 116

- A journal article should be cited starting with the name of the author as in books, followed by article title in italics, then journal's name, year of publication, volume and issue number, followed by page numbers of journal covering the article.

  Example: Makulilo A.B, *Likelihood of Confusion: what is the yardstick? Trademark jurisprudence in Tanzania*, Journal of Intellectual Property Law and Practice, 2012, Vol.7, No.5, pp.350-357

- The use of *'op cit'*, *'loccit'*, or other such abbreviations, other than *'ibid'* (next to the work cited immediately above) are not acceptable.

- Cross-references should be done in either of the following manner 'Makulilo (no. 2 above) p.14' or Makulilo (2012) p. 14.

- Citation of internet based materials should always indicate the name of the author, tittle of the work, link or webpage and the date when it was accessed.

4.3 Quotation marks should always be avoided. Quotation from any source should be in italics, indented both side with 1.5cm. Longer quotations should be avoided, where necessary authors should paraphrase them.

4.4 Name (s) of author (s), academic title and/or professional qualifications, main appointments, and email addresses must be footnoted at the first page of the manuscript.

4.5 Information regarding contribution to the Journal shall appear on the first pages of the journal.

4.6 All manuscripts shall first be reviewed. In order to ensure a fair review, authors shall be advised to avoid information within the text that discloses their identity.

1.7 All manuscripts shall further be subjected to editorial review for style, arrangement, literary quality and scholarly contents. The Editorial Board reserves 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 issue. 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 IJA-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 Secretary, *IJA-JOURNAL* in the following address:


**The Secretary**

The Institute of Judicial Administration Lushoto Journal
P.O Box 20, Lushoto
Tanzania.
Tel: + 255 (0) 27 264 0133
Mob: + 255 (0) 713 486 053
Fax: + 255 (0) 27 264 0287
e-mail: juma.mshana@ija.ac.tz; cc: jumamshana@gmail.com



**Institute of Judicial Administration Lushoto**
**P.o.Box 20 Lushoto**
**Tel: (+255)-27- 2660133**
**Email: info@ija.ac.tz / Website: www.ija.ac.tz**