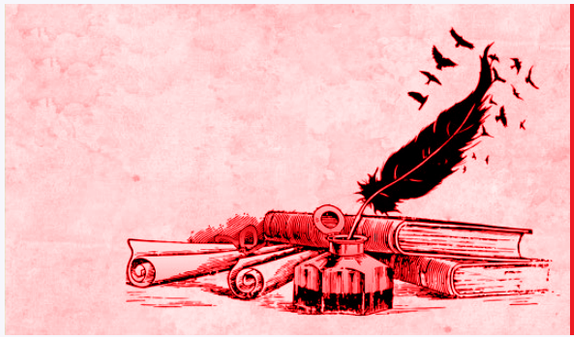
INSTITUTE OF JUDICIAL ADMINISTRATION LUSHOTO

Journal

Volume II, *Issue No. I,* **November 2019, ISSN** *2467-4680*

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

Contents



JOURNAL POLICY, RE: 2019

101

Editorial

EDITORIAL

This is the first issue of Volume II of the journal. It comprises a total of seven (7) articles. All seven articles are purely legal. I am sure readers will find the articles in this issue interesting, informative and inspiring.

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 in- house style. The Publication Office was instrumental in ensuring that there were no errors introduced during the production process.

Dr. Kajiru and Dr. Isabela describe challenges in the practical implementation of Tanzania's disability law, arguing that some of these challenges arise because judges, magistrates, lawyers and advocates lack a background in disability law. They argue that there is need to include disability law and human rights frameworks as compulsory courses at universities in Tanzania, as a means of strengthening practical implementations of the law in future.

In the second article, Mr. Raulencio observes that tribunal members lack, firstly, necessary knowledge and skills to administer justice; and secondly, security of tenure and remuneration. As a solution to the above mischief, the article recommends for abolition of land tribunals. The author argues that land disputes should be resolved under the judicial system. The latter should as such be empowered and facilitated to administer justice timely and efficiently.

The Fair competition Act, (No 8 of 2003) establishes the Fair Competition Commission (FCC) and the Fair Competition Tribunal (FCT) to enforce competition law in Mainland Tanzania. Mr. Edward argues that, although powers of the FCC were unsuccessfully challenged in two cases of the *Tanzania Cigarette Company* and the *Tanzania Breweries*, such concentration of powers to one organ impairs the principles of natural justice (rule against bias) as suggested by the experience from other jurisdictions.

Ms. Norah examines the issue of preference for sons as a pernicious violence inflicted on women in Tanzania. She highlights on how preference for sons reflects and fuels a culture of discrimination and violence, and should be addressed as a matter of human rights.

Ms. Tundonde and Ms. Rose look at some underlying legal challenges of taxing informal sector in Tanzania. The authors provide an insight into characteristic features of the sector. They then outline how those features pose difficulties in bringing petty businesses engaged in this sector in tax base through presumptive taxation system used as a way of taxing the sector. Against the backdrop of the characteristic features of the sector and efforts that had been taken in the past, the authors suggest what needs to be done to bring the sector into tax net.

The sixth article is by Dr. Isabela and Dr. Ines. The authors argue that despite Tanzania being a party to international treaties which guarantee access to justice and guaranteeing access to justice in its laws, the reality on the ground is that child victims of sexual violence face so many hurdles to the extent that they decide to abandon the justice system in favour of out of court agreements which may not necessarily provide justice in favour of the victims. The article recommends some measures that need to be taken to improve access to the justice system for child victims of sexual violence in order to protect them from being double victimised.

The last article by Ms. Mwanabaraka and Mr. Kiwango underscores that whilst domestic work was recognized in a 1983 landmark decision as one among the basis for contribution in acquisition of matrimonial property, there is a *lacuna* in its implementation which is associated with the use of discretionary power by the courts. The discretion is in relation to determining percentages or value that attach to domestic work. The authors examine the lacuna in the use of discretionary power from a gender perspective. The article argues that the discretion hinders fair and reasonable distribution of property. The authors offer recommendations on how best the courts may adjudicate cases by incorporating gender issues.

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

Mr. Archibald Aristarch Kiwango

The Chief Editor

ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES:

Challenges and Barriers to the Implementation of the Persons with Disabilities Act of 2010 in Tanzania

*Dr. Ines Kajiru[1**] & Ms. Isabela Warioba[2*]*

Abstract

It is indisputable that persons with disabilities (PWDs) are still facing several challenges, including discrimination and the denial of their rights. In 2006 the United Nations adopted the Convention on the Rights of Persons with Disabilities to address these challenges. The right to access to justice in the context of disability is specifically addressed under articles 12 and 13 of the Convention as well as the Constitution of the United Republic of Tanzania. Tanzania ratified the Convention in 2009 and domesticated it a year later through the enactment of the Persons with Disabilities Act of 2010.

Despite this legislative development, PWDs in Tanzania still face barriers including inaccessibility of information and communication and inappropriate access to physical environments such as courtrooms, buildings, counsel tables, and public service offices. This paper describes challenges in the practical implementation of Tanzania's disability law, arguing that some of these challenges arise because magistrates, judges, lawyers and advocates lack a background in disability law. The authors conclude that there is need to include disability law and human rights frameworks as compulsory courses at universities in Tanzania, as a means of strengthening practical implementations of the law in future.

Key words: Disability, Access to justice, Barriers and Human rights.

1 ** PhD in Law (University of KwaZulu-Natal), LL.M in Commercial Law (M.U), LL.B (M.U). Lecturer, Faculty of Law, Mzumbe University. Email: inkajiru@mzumbe.ac.tz and ikajiru@gmail.com.

2 * PhD in Law candidate (University of Antwerp), LL.M in Human Rights and Democratisation Africa (Centre for Human Rights, UP), LL.B (M.U). Assistant Lecturer, Faculty of Law, Mzumbe University, Advocate of the High Court and Subordinate Courts thereto save for Primary Courts. Email: imwarioba@mzumbe.ac.tz and belawarioba@gmail.com.

1 Introduction

Internationally, people with disabilities are more likely to be victims of crime than other people without disabilities.[3] The extent to which people with disabilities' reports of crime and abuse are dealt with effectively by the criminal justice system has increasingly come under enquiry. Skinnider argues that individuals with impairments must be given every opportunity to obtain legal assistance when required and must have unhindered access to the courts and due legal processes.[4] Fina, Cera and Palmisano define access to the justice system as a process that encompasses people's 'effective access to the systems, procedures, information, and locations used in the administration of justice'.[5] Such a broad definition ensures that the conceptualisation of access to justice is framed to address 'a wide range of scenarios in which persons with disabilities, and others, make claims about their rights, seek to enforce their entitlements, or claim justice'.[6] This article addresses the problem of access to justice for persons living with disabilities in Tanzania. Impairment and handicap are included in the definition of disability as it is indicated later below in this article.

In 2006 the United Nations adopted the Convention on the Rights of Persons with Disabilities (CRPD) which addresses access to justice for PWDs in articles 12 and 13. Article 13 of the Convention specifically addresses access to justice, directing State parties to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of specified accommodation, in order to facilitate their effective role as direct and indirect participants.[7] It further prescribes positive measures to be taken for the fulfilment of the rights of persons with disabilities in relation to justice. For example, State parties are to promote appropriate training for those working in the field of administration of justice, including police and prison staff.[8] As a signatory to this Convention, Tanzania is obliged to incorporate and adhere to this provision in its Constitution and related laws. Therefore, to ensure that PWDs are accommodated in the national legal framework, the Tanzanian government ratified the Convention in 2009 and domesticated it a year later through the enactment of the Persons with Disabilities Act of 2010. Despite these legislative developments, evidence exists that the rights of PWDs are still being denied in Tanzania.[9] This article illuminates some of the specific challenges that PWDs face in their efforts to gain access to justice regardless of legislative efforts in Tanzania. These include denial of access to physical environments such as courtrooms, state buildings, and counsel tables.[10] PWDs are also not afforded easy access to legal information and communication and to public service officers. As this article demonstrates, government officials such as the police, magistrates, judges, lawyers and advocates who are responsible for the implementation of the law seem to have no knowledge or background of disability law.

3 Hoong Sin, C., Hedges, A., Cook, C., Mguni, N., et al *Disabled People's Experiences of Targeted Violence and Hostility* 2009 Research Report 21, Manchester: Equality and Human Rights Commission.

4 Skinnider E., *The Responsibility of States to Provide Legal Aid* A paper presented at The International Centre for Criminal Law Reform and Criminal Law Policy Beijing, March 1999, pp. 14-15.

5 Fina Cera & Palmisano (eds) The United Nations Convention on the Rights of Persons with Disabilities − Commentary 2017, p. 282.

6 *Ibid*

7 Art.13 (1) CRPD.

8 Art. 13(2) CRPD.

9 Shughuru, P. J., *Sexual Violence and Access to Justice for Persons with Disabilities in Tanzania and South Africa* A dissertation submitted in partial fulfilment of the requirements for the degree of Master of Law University of Pretoria 2012, pp 17-19.

10 *Ibid*

It is argued that there is a need to pay greater attention to improving access to justice for PWDs, including the need to provide training for all public and private officials that provide services to a population that may have significantly different needs. Targeting those delivering services may be a more efficient and effective way to improve access to justice than by attempting to draft laws and regulations that seek to address all possible circumstances. Most importantly, there is still much work to be done when it comes to designing educational programs that train persons with disabilities to access and navigate justice systems independently.

1.1 Definition of terms

As far as disability is concerned, there is three folded distinction into it, just to mention, impairment, disability and handicap.[11] To start with **"an impairment":** is defined as any loss or abnormality of psychological, physiological or anatomical structure or function.[12] A **"disability"** is defined as any restriction or lack that results from an impairment of the ability to perform an activity in the manner or within the range considered normal for a human being.[13] However, **"a handicap"** is defined as a disadvantage for a given individual, which can result from impairment or a disability, which prevents the fulfilment of a role that is considered normal for that individual.[14]

Activists in the disability movement argues that there is a developed confusion between the term 'disability' and 'impairment'. According to the disability movement activists, impairment refers to physical or cognitive limitations that an individual may have, such as the inability to walk or speak, whereas, disability refers to socially imposed restrictions, that is, the system of social constraints that are imposed on those with impairments by the discriminatory practices of society'.[15] Based on the above definitions, therefore, one can be in the position to conclude that; albinism should fall under disability category.

The United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities is of the view that, the term 'Disability' is given a great number of different functional limitations occurring in any population, in any country of the world.[16] While the term 'Handicap' means the loss or limitation of opportunities to take part in the life of the community on an equal level with others; it describes the encounter between the person with a disability and the environment. The purpose of this term is to emphasize the focus on shortcomings in the environment and in many organized activities in society, for example, information, communication and education, which prevent persons with disabilities from participating on equal terms.[17]

Considering the above arguments, this article first presents a discussion on existing international conventions, regional treaties and legislation that protect PWDs and allow them access to justice. It then moves on to deal with barriers that PWDs are facing in access to justice.

11 Barbotte E, Guillemin F, Nearkasen C et al., *Prevalence of impairments, disabilities, handicaps and quality of life in the general population: a review of recent literature* Bulletin of the World Health Organization, 2001, Vol 79, pp 1047–1055.
12 Barbotte E (note 9 above).
13 *Ibid*
14 *Ibid*
15 *Ibid*
16 UN Standard Rule available at https://www.un.org/.../disabilities/standard-rules-on-the-equalization-of-opportunities-. (accessed on 10 September 2018).
17 Hill., *Country Disable Group. What is disability*? Available at http://hcdg.org (accessed on 24 February 2017).

2 Acknowledging the Human Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities (CRPD)[18] is an international human_rights treaty of the United Nations that is intended to protect the rights and dignity of PWDs. The Convention requires all State Parties to protect, promote and ensure full enjoyment of human rights by persons with disabilities and urges their recognition everywhere as persons before the law with the right to enjoyment of their legal capacity on an equal basis with others in all aspects of life.[19] The CRPD is a key instrument in the global movement to view persons with disabilities as people with a right to medical treatment, charity and social protection and to acknowledge them as equal members of society.

Article 13 of the CRPD specifically addresses the right of PWDs to have access to justice and State Parties are required to guarantee this right on an equal basis with others in order to ensure that PWDs fulfil their role as fully acknowledged participants in society.[20] Thus, State Parties are to provide appropriate training for those working in the justice administration field with specific reference to prison staff and the police to help ensure that PWDs have effective access to the justice system.[21] Article 7 of the UDHR urges effective remedy for all people whose fundamental human rights have been violated in any way and it states that this right should be granted in the constitution of a country and its laws and that it must be entertained by competent national tribunals. Article 8 of the UDHR strengthens article 7 by stating that, in all legal matters, effective remedy must be entertained by a competent authority. Similarly, article 2 of the International Covenant on Civil and Political Rights (ICCRP) sets out a range of procedural due processes for unhindered access to justice for all. This Covenant provides for non-discrimination, particularly on the basis of status or social origin. It is also articulated in article 26 that all persons are equal before the law and entitled to equal protection of the law without favour or discrimination.[22]

According to the Human Rights Committee (HRC), State Parties have the obligation to ensure the effective protection of people's rights against violations.[23] Commenting on article 2(3) of the ICCPR, the HRC requires that State Parties should 'adopt judicial, legislative, educative, administrative and other appropriate measures in order to fulfil their legal obligations'.[24] Thus, State Parties are required to take steps across a wide range of government control measures to ensure that all human rights are appreciated and protected. In this regard, State Parties must ensure that individuals have accessible and effective remedies to vindicate those rights that have been violated'.[25] The term 'accessible' underpins the context of equal and effective protection and remedies that the UDHR provides and is reinforced in the ICCPR.

As far as the administration of justice is concerned, article 14 of the ICCPR recognises the importance of fair trials,

18 CRPD Landmark UN Convention on the rights of Persons with Disabilities, entered into force May 2008.
19 Schulze M., *A Handbook on Persons with Disabilities: Understanding the UN Convention on the Rights of Persons with Disabilities* (2009), 30.
20 CRPD Art. 13(1).
21 *Ibid* Art 13(2).
22 ICCPR Art. 26.
23 United Nations 'General Comment No. 31' Human Rights Committee, CCPR/C/21/Rev.1/Add. 13 (2004) para. 8.
24 *Ibid* 7.
25 *Ibid* 15.

the right to equality before the courts, and tribunals.[26] According to the HRC, article 14 of this convention covers all matters related to civil law[27] and reiterates that a State is obliged to give effect to these rights. The State is therefore under obligation to establish effective channels for information dissemination about its laws and citizens' rights. It should provide assistance to all people who wish to pursue a legal matter and it should thus establish an overarching affordable legal system.

The ICCPR contributes significantly to a rights-based access to justice context, particularly as article 2 obligates State Parties to provide judicial remedy for the violation of human rights.[28] Moreover, the International Covenant on Economic, Social and Cultural Rights (ICESCR) endorses access to justice in the preamble which reads as follows:

> *in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights which includes appropriate means of redress,or remedies…and appropriate means of ensuring governmental accountability.*[29]

According to the HRC, the ICESCR provides guidance on interpretations concerning the application of domestic remedies for human rights violations, stating that remedies may be judicial or administrative. However, in terms of the latter, remedies must be 'accessible, timely, affordable and effective.'[30] In this regard, the ICESCR contributes to the international framework of access to justice. Moreover, article 5 of Convention on the Elimination of all form of Racial Discrimination (CERD) clearly elucidates the need for the equal treatment of all people before tribunals and in the administration of justice. The Convention on the Elimination of Discrimination against Women (CEDAW) refers to equal treatment 'in all stages of procedure in courts and tribunals' in article 15(2). Likewise, the African Charter on Human and People's Rights (hereafter the African Charter) entitles every individual in a ratifying state to have their cause heard and tried within a reasonable time by an impartial court or tribunal.

In Tanzania, the Person with Disability Act of 2010 defines accessibility to the justice system under section 3 as 'the process of enabling or allowing a person with disability to have access directly or indirectly to benefits of public social services in all spheres of society'. The definition includes access to information, communication and the physical environment such as tactile and sign language, interpretation for deaf and deaf-blind persons, audio tapes, Braille, large print, low vision facilities, computerized information and programmes and making the physical environment in buildings, public transport, roads and streets accessible for PWDs.[31]

26 ICCPR
27 United Nations 'General Comment No. 32' Human Rights Committee CCPR/C/GC/32 (2007) section III.
28 United Nations 'General Comment No. 31' Human Rights Committee CCPR/C/21/Rev.1/Add. 13 (2004) para. 7.
29 United Nations 'General Comment No. 9' Committee on Economic, Social, and Cultural Rights E/C.12/1998/24 (1998) para. 8
30 Ibid para. 9
31 Section 3 of the 2010 Act

The Act adds that the word 'inclusion' means 'the process whereby people or society value and respect diversity as part of life, hence [it minimizes] barriers to accommodate PWDs to participate in and contribute to that society'.[32] The Act endorses principles that guide the right of PWDs to the provision of services and goods. This right includes accessibility, full and effective participation, the inclusion of persons with disabilities in all aspects of society, equality of opportunity, non-discrimination, and the recognition of their rights and needs.[33]

However, regardless of the fact that international human rights instruments as well as the Tanzanian legal framework create a vigorous rights-based approach and give recognition to the principles of equality, accessibility, affordability, timely and effective access to the justice system,[34] PWDs in Tanzania remain the most disadvantaged minority group as they live on the margins of Tanzanian society and face numerous barriers in accessing justice. [35]

3 Barriers in accessing the justice system in Tanzania

Discrimination based on disability occurs when those with disabilities are treated less favourably in the process of access to justice.[36] According to section 3 of the Tanzanian Disability Act 'discrimination' means any distinctions, exclusion or restriction on the basis of disability which has the purpose, effect or impairing or nullifying the recognition, enjoyment or exercise on equal basis of human rights and fundamental freedom in the political, economic, social, cultural, civil or any other field and includes all forms of discrimination and denial of reasonable accommodation.[37]

Such treatment involves, among other things, arbitrary denial of access to justice for PWDs or restriction of reasonable physical accommodation and communications.[38] Barriers to justice often involve combined forms of inaccessibility and other forms of discrimination.[39] In this section, this article unpacks the most predominant barriers to the justice system that PWDs experience with specific reference to: (1) legal barriers; (2) physical barriers; (3) information and communication barriers; (4) economic barriers; and (5) attitudinal barriers.

3.1 Legal Barriers

Legal barriers to justice for PWDs include gaps in legal frameworks as the rights of PWDs may not be enshrined in the law, or policies or practices may be contrary to the provisions of the CRPD.[40] Additional barriers may be created where a state's legal framework is confusing or complicated, or where there are overlaps or incompatibilities between national laws and their implementation.[41] The Tanzania Parliament took a step forward by enacting its disability anti-discrimination law in 2010. The Persons with Disabilities Act of 2010 of Tanzania implicates all forms of discrimination and mistreatments against PWDs, while at the same time provides for the rights and

32 *Ibid*
33 *Ibid*
34 Curran L, & Noone MA., *Access to Justice: A New Approach Using Human Rights Standards* International Journal of the Legal Profession 2008 Vol 15, No 3, p. 203.
35 LHRC Human rights Report 2016, p.133.
36 UN-DESA. From exclusion to equality: Realizing the rights of persons with disability, Handbook for parliamentarians on the convention on the rights of persons with disabilities and its optional protocol. Geneva: SRO-Kundig, 2007.
37 2010 Act.
38 UN-DESA (note 34 above).
39 Boshe P., *Accessibility for Persons with Disability in Tanzania: An Assessment of Policy and Legal Frameworks* Open University Law Journal 2013 Vol 4, No. 1, pp. 100-114.
40 Holness W, & Rule S., *Barriers to Advocacy and Litigation in the Equality Courts for Persons with Disabilities* Potchefstroom (2014) Vol17, No. 5, p. 187.
41 *Ibid*

duties of the same. Despite the existing law, PWDs in Tanzania still encounter legal barriers and this has remained unattended for quite sometimes with no proper mechanism to curb them. There is a lack of proper implementation and enforcement of the law. Thus, PWDs in Tanzania are not able to participate fully in legal proceedings in court as many public officials are unable to deal effectively and appropriately with PWDs.[42] Moreover, anecdotal, primary and secondary evidence has shown that officials such as magistrates, judges, lawyers and other public officials are often incapable of dealing effectively and appropriately with PWDs when they seek recourse in the justice system.[43] For example it is very difficult to a Magistrate or Judge to communicate with a deaf person or a person with intellectual disability. Indeed, many lack the necessary knowledge about the special accommodation needs of PWDs, how to serve clients with disabilities, and how to interpret legislation, regulations and policies that refer specifically to PWDs.[44] This knowledge gap affects the quality of services rendered to PWDs which results in severely limited access to information and communications for this groups of people.[45]

Police officials who are part and parcel of the process to ensure that justice is obtained are often not equipped with the knowledge or skills to deal with PWDs.[46] This problem is exacerbated because these public officials lack appropriate training which would enable them to understand the specific needs of PWDs.[47]

42 Tanzania 2017 Human Rights Report available at https://www.state.gov/documents/organization/277299.pdf (accessed on 27 December 2018).
43 Shughuru (note 7 above).
44 *Ibid*
45 UN-DESA (note 34 above).
46 Tanzania: The Justice System fails people with developmental disabilities; Daily News. Available at https://allafrica.com/stories/201103030896.html/> (accessed on 23 December 2018).
47 Ibid.

Additionally, PWDs are expressly barred from serving as witnesses or jurors in Tanzanian courts as information on how to serve their needs is not available in accessible formats.[48] For example, there is no court in Tanzania that is equipped with personnel who are proficient in sign language to assist people who are deaf, there is no easy-to-read material for persons with cognitive disabilities or large print for persons with low vision, and there are no assistive technologies to accommodate PWDs in the country's courts.[49] These omissions render the enforcement of the law to end discrimination against PWDs extremely difficult.

There is primary evidence such as newspaper reports that PWDs have experienced negative encounters with law enforcement.[50] It may therefore be argued that they may fear to report crimes committed against them as they may not be sure if they will be taken seriously.[51] Another obstacle is the limited dissemination of information regarding their rights to PWDs, and they are thus vague about their rights and are not sure when they should report an incident and what constitutes a crime.[52] While reporting a crime can be complicated, inconsistencies in police policies and practices have also been cited as barriers to the justice system for PWDs.[53]

The Act recognises that the denial of reasonable accommodation is a form of discrimination and it is thus highly

48 Tanzania Human Rights Report (LHRC) 2014. Available at https://www.humanrights.or.tz/assets/attachments/1504097078.pdf (accessed on 18 October 2018).
49 Shughuru (note 7 above).
50 UNICEF *Every Child's Right to be Heard* Available at https://www.unicef.org/french/adolescence/.../Every_Childs_Right_to_be_Heard.pdf. (accessed on 18 October 2018).
51 *Ibid*
52 Tanzania 2016 Human Rights Report available at https://www.state.gov/documents/organization/236626.pdf (accessed on 17 September 2018).
53 Ibid.

prohibited.[54] PWDs have right to be legally accommodated without any discrimination and failure to do so it is against this provision.

However, under article 13(2) , the State is under obligation to provide training to those who are working in the administration of the justice system so that they are equipped to ensure effective access to justice for PWDs.[55] In the same way, the 2010 Act requires access to the service by PWDs and non-disabled persons should be integrated and that persons with appropriate expertise and skills should be available to give advice to the body on means of ensuring that the service provided by the body is accessible to persons with disabilities.[56]

However, section 62 of the Persons with Disabilities Act of 2010 establishes legal remedies and sanctions to uphold the prohibition of disability-based discrimination in a way that cross-cuts across all rights and areas.

To this end, it can therefore, be argued that discriminatory practices against PWDs persist in the justice system in Tanzania as there is a lack of reasonable accommodation for them in various settings (such as the courts and prisons) and standard practices and procedures have not been adjusted to accommodate their needs. This is a travesty of justice as article 9 of the CRPD obliges all member states to take appropriate measures in ensuring that PWDs are afforded equal and non-discriminatory access to justice. Yet, PWDs in Tanzania are not accommodated in the courts and are exempted from other legal proceedings such as administrative hearings. This marginalisation of PWDs in Tanzania denies them their fundamental right to be heard.

54 Section 37 of the 2010 Act.
55 CRPD.
56 Section 36 (a) and (b) 2010 Act.

3.2 Attitudinal Barriers

Attitude is a complex term to define. However different researchers have tried to define it in different way.[57] According to Eagly and Chaiken, attitude is "a psychological tendency that is expressed by evaluating a particular entity with some degree of favour or disfavour".[58] Or it can be defined as a learned dispositions directing thoughts, actions and feelings".[59] Longoria and Marini define attitude as "any belief or opinion that includes a positive or negative evaluation of some target (person, event or an object) and that predisposes us to act in a certain way toward the target".[60] As if the above is not enough, Agnes and Laird describe attitude as one's bodily manner, posture, and nature that show feelings, thoughts, opinion and mood.[61]

In that regards, many researchers are of the same view that there is a significant relationship between attitude and behaviour.[62] Thus, Allport stated that *an attitude characteristically provokes behaviour that is acquisitive or generous, favourable or unfavourable, affirmative or negative toward the object or class of objects with which it is related*.[63] Therefore, numerous definitions of attitude implies that attitudes are built

57 Hsu, T. H., *Attitudes of Taiwanese Employees Toward Their Supported Coworkers with Intellectual Disabilities,* PhD Thesis University of Northern Colorado, 2012. p 45.
58 Eagly, A. H., & Chaiken, S. The psychology of attitudes, Fort Worth, TX: Harcourt Brace Jovanovich, 1993, p. 1.
59 Tervo R.C., Palmer G. & Redinius P., *Health professional student attitudes towards people with disability* Clinical Rehabilitation, 2004, Vol 18, No. 8, pp. 908–915.
60 Longoria, L., & Marini, I., *Perceptions of Children's Attitudes towards Peers with a Severe Physical Disability* Journal of Rehabilitation, 2006, Vol 72, No. 3, p. 540.
61 Agnes, M., & Laird, C., Webster's new World dictionary and thesaurus (2nd ed.), Cleveland, OH: Wiley Publishing, 2002.
62 Hsu (note 55 above).
63 Allport, G. W., *Attitudes* 2008 in Roberts, C & Jowell R., (Eds) Attitude measurement, Los Angeles, CA: Sage, 2008, at p. 21.

on and influenced by a wide range of factors. Arguably, attitude may guide and determine people's opinions or judgments, or may directly influence human behavior.

Thus, over the years, attitudes toward persons with disabilities were negative and served as invisible barriers for persons with disabilities to participate in society.[64] Negative stereotypes and mythology create deep-rooted injustice toward people with disabilities.[65] As such, negative attitudes contribute greatly on the success/failure of persons with disabilities as they pursue any opportunities and partake in community life.[66] There are indications that after the CRPD came into force attitudes towards disability are progressing. The CRPD places great importance on the inherent dignity of persons with disability and appeals to Nations to increase knowledge and understanding of the rights of persons with disability, and to encourage respect for the dignity and rights of persons with disability. It also challenges stereotypes, prejudices and harmful practices toward persons with disabilities and the need to promote awareness of the strengths, potential and contributions of persons with disability".[67] It is however worthwhile to note that negative attitudes toward disability persist globally as is the noticeable connection between personal experience of disability and attitude.[68] Thus, Nowicki stated that, as long as negative attitudes towards individuals with a disability persist, the absolute impartial acceptance of people with disabilities is unlikely.[69]

In Tanzania, attitudes that discriminate against PWDs are based on the misconception that their medical or physical disabilities also translate into social disabilities.[70] According to Shughuru, understanding people's medical challenges is not enough; in fact, it is essential to understand that PWDs have social and emotional needs that will be denied if environmental and attitudinal barriers are created that exempt them from natural and fully functional social participation.[71] Acknowledging the fact that PWDs can enjoy full and free participation in public and social life will remove these barriers.[72] The traditional approach towards allowing citizens to have free access to justice and the law is a process that involves several public officials.[73]

For example, in criminal cases it is the police that are involved in the very early stages of investigations and they play a very important role in determining the way in which alleged offences are handled and whether cases proceed further along the criminal justice system.[74] The police are thus the initial custodians of the justice system and they are required to uphold a disposition of fairness and equality when they deal with PWDs who have become victims of crime and who thus seek and require legal redress.[75] In dealing with PWDs, any successful case that is brought to the courts depends to a large extent on the thoughtful and insightful manner in which the police handled the case. In this context, their relations with the victims and perpetrators, the issuing of reliable reports, and their handling of witnesses are vital components in ensuring that justice is served.[76] It is unfortunate that, in Tanzania, police officers lack awareness of the needs of PWDs and that their handling of victims with disabilities often endorses the stereotypical attitude that persons with disabilities are vulnerable, incapable and lack the capacity to be competent and credible witnesses of crime.[77] Moreover, it is difficult for the police to distinguish between different disabilities, with particular reference to intellectual and mental challenges, and many are not able to recognize when persons with disabilities require additional support.[78]

It has also been argued that Tanzanian lawyers, magistrates, judges and other public officials still harbour negative attitudes and false beliefs or assumptions regarding the performance abilities of PWDs.[79] This has resulted in PWDs being treated as less credible during the legal process – for example when reporting a crime, serving as a witness, making legal decisions, and seeking remedies for alleged violations of their rights.[80] To a large extent society lacks a grounded understanding of PWDs and, predominantly because of harmful cultural beliefs, negative attitudes persist in surrounding the disability phenomenon.[81]

This article is of the view that, attitude is one of the hardest barriers to eliminate and yet, removing this barrier costs nothing. Ignorance about people with disabilities result in behaviours that interfere with creating societies that include everyone. As such, persons with disabilities are still exposed to and exploited by discrimination and prejudice. Thus, addressing the ignorance about PWDs may be the first step in reducing unfavourable attitudes. In pursuit of co- rectifying the deeds of the past, society as a whole needs to change its attitude towards persons with disabilities both at an individual and universal level. However, one can in be in the position to say that, PWDs first need to be categorized, described and identified before attitudes can be changed and improved.

3.3 Information and Communication Barriers

Communication barriers are things/ situations that make it hard for an individual with disability to receive or give information.[82] PWDs may encounter these barriers in several ways, for example, when they find small print size in information in application forms and brochures or when they cannot find a person whom they can communicate or when symbols are not clear or easy to comprehend.[83] In some cases, it can be voice announcements that are not also shown visually and lack of access to services such as captioning and sign language interpreting.[84] All the above-mentioned factors may deny PWDs right

64 Offergeld, J., *Inclusion & Civic Participation, Poverty & Exclusion, UN Convention on the Rights of Persons with Disabilities* 2012. Available at http://disabilityandhumanrights.com/2012/02/23/public-attitudes-towardspersons-with-disabilities-and-their-role-in-achieving-an-inclusive-society/. (accessed on 23 December 2018).
65 Shapiro, A.H., Everybody Belongs UK: Routledge 2000. p 78.
66 Ibid.
67 Offergeld (note 62 above).
68 *Ibid*
69 Nowicki, E. A., *A Cross-sectional Multivariate Analysis of Children's Attitudes Towards Disability* Journal of Intellectual Disability Research, 2006, Vol 50, pp. 335- 348.
70 Shughuru (note 7 above).
71 Ibid.
72 An understanding which has also been adopted by the Convention on Persons with Disabilities.
73 DeMarco, D.K., *Disabled by Solitude: The on the Rights of Persons with Disabilities Convention and Its Impact on the Use of Supermax Solitary Confinement* University of Miami Law Review 2012, Vol 66, pp. 523–65.
74 Gudjonsson, G., *Interviewing adults with intellectual disabilities* 2011. Available at https://www.emeraldinsight.com/doi/abs/10.5042/amhid.2011.0108 (accessed on 23 November 2018).
75 Ibid.
76 Holnes & Rule (note 38 above).
77 African Peer Review Mechanism *The United Republic of Tanzania Report No. 17*, 2013. Available at https://www.aprm-au.org/wp-content/.../admin_pdfFiles_CRR_No17-Tanzania_EN-1.pdf (accessed on 25 November 2018).
78 Ibid.
79 African Peer Review Mechanism (APRM) *Tanzania Country Self-Assessment Report* 2009. Available at www.aprmtoolkit.saiia.org.za/fr/component/docman/.../108-atkt_tanzania_csar_en-docx (accessed on 25 November 2018).
80 *Ibid*
81 Kajiru I., *The Clash Between Harmful Cultural Beliefs and Human Rights: A Case Study of Atrocities against People Living with Albinism in Tanzania* PhD Thesis, University of Kwa-Zulu Natal, South Africa 2018, p. 137.
82 Careerforce., *Describe communication with people with a communication disability in an aged care, health, or disability context.* Available at https://www.careerforce.org.nz/wordpress/wp-content/uploads/WB26982v1.pdf. (accessed on 23 November 2018).
83 Snyman, J. A., *Barriers and constraints faced by Travelers with disabilities* 2002. Available at https://www.nwu.ac.za/bitstream/handle/10394/6527/Snyman_JA_Chapter3.pdf (accessed on 23 November 2018).
84 *Ibid*

to communicate and receive information.

According to UNICEF, Communication and information obstacles to access to justice are evident in cases where PWDs do not speak the central language or the language used in justice system proceedings.[85] However, as stated earlier in this article, there is no doubt that CRPD focuses on addressing the root causes of the inaccessibility of the justice system, poor communication and lack of other services for PWDs as article 9 of this instrument requires State Parties to take appropriate measures to develop, disseminate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and other services for PWDs. Moreover, State Parties are obliged under the CRPD to eliminate all obstacles that hinder effective accessibility to communication and to take appropriate measures to promote other appropriate forms of assistance to support PWDs to ensure their access to information.[86]

In Tanzania, however, access to justice system for PWDs will only be achieved once physical access, sign language, legal aid, interpreters in courtrooms, and fair procedures that accommodate the needs of PWDs become a reality.[87] Should only one of the above features be omitted, the entire process will remain invalid.[88] Although article 21 of the CRPD recognises the right to information and communication, such opportunities are not available to all PWDs in Tanzania.[89] Section 3 of the Persons with Disabilities Act of 2010 recognises the need for accessibility and inclusion of PWDs in all matters of life.[90]

However, regardless of this provision in the Act, the reality has indicated that PWDs are still effectively excluded from seeking remedies against injustices.[91] Section 49 of the Act requires the accessibility informational and communicational, such as the provision of professional sign language interpreters, Braille and other procedural accommodations. However, such things are not available almost in all courts, police stations and other public places. It has equally been found that advocates lack an understanding of how to work with clients with disabilities whilst some of such advocate seem to hold negative perceptions against PWDs.[92] The lack of information dissemination to PWDs on an equal basis with other people has resulted in their ineffective and marginalised participation in legal proceedings. All people who are blind, deaf, or deaf and blind and people with intellectual and learning disabilities are isolated from the whole process.

The isolation occurs notwithstanding that State Parties are required to 'design [and] promote accessible ways of information and communications systems' in order to include PWDs as fully functional and recognized people of society.[93] However, PWDs in Tanzania remain excluded in communication services in the justice system. There are no interpreters to interpret sign language in any court, police station or other public or private office. Moreover, Section 55 (a)(b) of the Persons with Disabilities Act of 2010 requires all television companies to provide a sign language inset or subtitles in all newscasts, educational programmes and other programmes covering national events. However, the legal framework excludes other kinds of disabilities and does not embrace all access and usage issues associated with PWDs.[94] The worst scenario, which is generally evident, is the impractical implementation of these laws.

3.5 Physical Barriers

This part intends to discuss the issue of connectivity, usability and accessibility in the facilities that are used by people with disabilities such as in courtrooms, lawyers' offices and all public buildings that PWDs use in the process to find an access to justices. Notably, universal design requires an understanding and consideration of the broad range of human abilities throughout the lifespan. Creative application of that knowledge results in products, buildings and facilities that are usable by most people regardless of their age, agility, or physical or sensory abilities.[95] According to Yiing, Yaacob, & Hussein built environment should be designed to cater for Persons with Disabilities to promote universal accessibility. PWDs are persons who have long term physical, mental, intellectual or sensory impairments, which may hinder their full participation in society when such impairments interact with other barriers.[96]

Physical barriers can impede access to justice in instances where the offices of the courts, lawyers, service providers and police stations are physically inaccessible.[97] Persons with disabilities thus face legal barriers to justice in instances where their rights are not protected under domestic law[98] and where there is improper infrastructure to accommodate their special needs.[99] Inaccessibility of proceedings may also be experienced where measures have not been taken to ensure the accessibility of relevant physical environments.[100] For example a South African case of Ms Esther Muller,[101] which was instituted in the Equality Court in South Africa, is a case in point. Ms. Muller, a South African lawyer who used a wheelchair, filed a complaint under the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 against the Justice Department and the Department of Public Works because of the physical inaccessibility of the courthouses she needed to access to perform her job as a lawyer. The Equality Court reached a final settlement according to which the two government departments admitted that they had failed to provide proper wheelchair access and that this constituted unfair discrimination against Ms Muller and other people with similar accessibility needs.[102]

The case cited above, reflects the reality of PWDs in Tanzania as they still have no access to the courts and the legal environment does not support their needs. Almost all public and private buildings in Tanzania,−building entrances, courtrooms, counsel tables, and witness boxes, bathrooms, public service offices, and holding pens where criminal defendants may be held while awaiting court appearances−

85 UNICEF *Children with disability in South Africa: A situation analysis* (2001-2011). Available at https://www.unicef.org/southafrica/SAF_resources_sitandisabilityes.pdf (accessed on 13 November 2018).
86 CRPD Article 9.
87 Larson DA., *Access to Justice for Persons with Disabilities: An Emerging Strategy School of Law* Hamline University 2014 Vol 3, pp. 220-238.
88 Ibid
89 United Nations Committee on the Rights of Persons with Disabilities 'Communication No. 22/2014'. Available at https://www.ohchr.org/Documents/HRBodies/CRPD/CRPD-C-18-DR-22-2014.pdf (accessed on 14 December 2018).
90 Section 4 (e) of the Persons with Disabilities Act 2010.
91 Shughuru (note 7 above).
92 LHRC (note 40 above).
93 Article 9 CRPD.
94 LHRC (note 40 above)
95 The Centre for Universal Design Accessible environments toward universal design. Raleigh. NC: NC State University, 1991.
96 Yiing, C. F., Yaacob, N. M., & Hussein, H., *Achieving sustainable development: Accessibility of green buildings in Malaysia.* ProcediaSocial and Behavioral Sciences, 2013, pp. 101, 122.
97 The Danish Institute for Human Rights *Access to Justice and Legal Aid in East Africa* 2011. Available at https://www.humanrights.dk/files/media/billeder/udgivelser/legal_aid_east_africa_dec_2011_dihr_study_final.pdf (accessed on 14 December 2018).
98 Holness & Rule (note 38 above).
99 Ibid.
100 Ibid.
101 *Esthé Muller v DoJCD and Department of Public Works* (Equality Court, Germiston Magistrates' Court 01/03).
102 South Africa Human Rights Commission *Equality Court Victory for People with Disabilities* 24 Feb. 2004. Available at http://www.sahrc.org.za/sahrc_cms/publish/article_150.shtml (accessed on 14 December 2018).

are physically inaccessible for most PWDs.[103] Regardless of article 9 of the CRPD and section 3 of the Persons with Disabilities Act of 2010, there are limited measures to ensure the accessibility of relevant environments for PWDs. Many are unable to enter police stations, courthouses, and lawyers' offices and few have access to service providers whose work is relevant to the administration of justice.

3.6 Economic Barriers

There is a growing global body of evidence which suggests that a substantial link exists between PWDs and poverty.[104] Thus limited economic income can directly influence a person's access to justice in many ways.[105] For example, it can distress the capacity to engage and pay for quality legal counsel where it is not provided pro bono; it limits the capacity to engage in litigation which can be expensive and lengthy; it can stymie remedies for alleged violations of rights; and it can prevent a person from serving as an officer of the court when doing so will take the person away from gainful employment or the pursuit of a livelihood.[106] Legal aid services are expensive and many PWDs are not economically equated; therefore it is not easy for these people to engage a lawyer.[107] In Tanzania, many PWDs belong to the disadvantaged class and therefore, in many cases, they are not able to engage a lawyer or determine how a lawyer can be of assistance.[108] In many cases, PWDs also have no information and lack the facilities to identify suitable lawyers.[109]

Although the government is required under article 9 of the CRPD, to remove all barriers (economic barriers included) against PWDs[110] and although section 48 of the Persons with Disabilities Act of 2010 reflects what it is been provided for by the CRDP, there is seemingly no government intervention in devising mechanisms to ensure that PWDs have access to legal and other related services free of charge or at subsidised prices.[111] The government is obliged to ensure that laws and policies are properly strategised and that the intended recipients of these services are well informed.[112] This implies that a proper legal framework and human and financial resources should be in place to ensure that policies are monitored and regulated for their effective implementation.

4 Conclusion

This article has highlighted barriers that affect PWDs' ability to access the justice system, unlike other persons who do not live with disabilities. It has also shown that a gap exists between Tanzania's laws and effective legal practices in matters relating to access to justice to PWDs. The article made a particular reference to the plight that PWDs find themselves in when they need to access the legal system. It is argued that remedies and sanctions that have been designed to uphold the right of PWDs to non-discrimination are ineffective. Since Tanzania has ratified various human rights conventions, it is duty bound to adhere to the CRPD and other human rights instruments.

It is undeniable that the time has come for the Tanzanian government to address the debilitating issues that prevent PWDs from accessing the justice system without fear of discrimination. Consequently, appropriate mechanisms and policies should be put into practice to operationalise the country's comprehensive national legal framework so that the justice system will become equally accessible to PWDs and other citizens. Tanzania needs to fully implement the Persons with Disabilities Act of 2010 and the policies that flow from it. Disseminating information and providing education to persons with disabilities on how the justice system operates and their rights as survivors of crime should be prioritised. Moreover, there is an urgent need to train key agencies in disability awareness for their optimal functionality as representatives of the government. Thus, officials such as judges, magistrates, police officers, and other service providers such as court clerks should be sensitised to the plight and needs of PWDs. The government needs to make sure that there is accessible information for PWDs regarding the process of reporting a crime, that premises are accessible and that communication support such as interpreters in sign language are provided in police interviews and during court proceedings.

Clearly, a legal framework for the effective application of the laws that protect the rights of PWDs has not yet been fully developed in Tanzania. It is for this reason that some magistrates and judges may not be comfortable with rendering decisions on the basis of the CRPD, even though the CRPD has been ratified and domesticated. Thus, this article makes a strong call for the introduction of courses pertaining to the rights of PWDs in all universities as a core subject.

103 Shughuru (note 7 above).
104 Groce N *Poverty and Disability* 2011. Available at https://www.ucl.ac.uk/lcccr/.../WP16_Poverty_and_Disability_review.pdf (Accessed on 12 October 2018).
105 *Ibid*
106 *Ibid*
107 Tanzania Human Rights Report 2016 (note 33 above).
108 *Ibid*
109 *Ibid*
110 ITU Resolution 56 (Doha, 2006) Creation of a new question in Study Group 1 regarding access to telecommunication services for persons with disabilities, Cairo, Egypt, 2006, p. 9.
111 Tanzania Human rights Report 2016 (note 35 above).
112 Paul, L. F., *Enabling Mobile Communications for the Needy: An International Comparison of Solutions and Impacts (With Focus on Europe)* 1 November 2008, 5-6. Available at http://ssrn.com/abstract=1442828 or http://dx.doi.org/10.2139/ssrn.1442828. (accessed on 4 January 2019).

COMPETENCE AND INDEPENDENCE OF LAND TRIBUNALS IN ADMINISTRATION OF JUSTICE

Philemon Raulencio[1]

Abstract

The Land Law Reforms of 1999 came with separate machinery for resolution of land disputes which became operational on the 1st day of October, 2003. This machinery divorced the subordinates' courts from resolving land disputes and was replaced by land tribunals. The latter includes the Village Land Councils, the Ward Tribunals and the District Land and Housing Tribunals. The competence of the tribunals is questionable. Although the tribunals have to administer justice based on the Constitution and statutes, members of the first two organs are lay persons. Not only they are lacking legal knowledge but also the law does not register literacy as a necessary qualification for tribunal membership. Independence of the tribunals is also in issue. Executive authorities have exclusive powers on their formation and operation. This article discusses the above issues and observes that tribunal membership lack the necessary knowledge and skills to administer justice. It further observes that the members lack both security of tenure and remuneration. As a solution to the above mischiefs, the article recommends for abolition of land tribunals so that land disputes are resolved under the existing judicial system. Consequently, the existing judicial system should be empowered and facilitated to administer justice timely and efficiently.

Key words: Tribunals, Competence, Independence

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

1.0 Introduction

The Land Act[2] and the Village Land Act[3] establish and vest exclusive jurisdiction to resolve land disputes in specified courts and tribunals. These courts and tribunals are the Court of Appeal, the High Court, the District Land and Housing Tribunals (DLHTs), the Ward Tribunals and the Village Land Councils. The present land disputes settlement machinery reflects the spirit of the National Land Policy of 1995. The machinery also partly accommodates the recommendations of the presidential commission of inquiry into land matters of 1992. The old system had so many deficiencies of which the current one is aimed to curb. These included backlog of cases, multiple institutions for disputes resolution[4], case delay and lack of hierarchical arrangement.[5] The present machinery became operative since 2003. It has been in place for more than 15 years. It is high time now to have its adequacy and efficiency tested.

It is against the foregoing backdrop, that this article examines the competence and independence of the tribunals in the administration of justice. In so doing, the article considers the fact that the tribunals (save for DLHTs) are manned by non-lawyers; their operation is monitored and controlled by both, central and local government authorities; and the fact that they are detached from the judiciary. The discussion is epitomized by general recommendations and the conclusion.

2 Cap. 113 R.E. 2002
3 Cap 114 R.E. 2002
4 The National Land Policy of 1995 para 4.2.25 at page 20
5 *Ibid*

2. 0 The Meaning of Land and Land Disputes

2.1 The Meaning of Land

There are different perceptions for lawyers and laymen on reference to the term land. The latter might consider land to mean any piece of ground, physical substance or any soil whatsoever. But for lawyers, land means more than that, for example in Tanzania 'land' includes the surface of the earth and the earth below the surface and all substances other than minerals and petroleum, forming part of or below the surface, things naturally growing on the land, buildings and other structures permanently affixed to land.[6] Hence, the principle, *Quic quid Plantur Solosolo Cedit,* which means that whatever is attached to the soil, becomes part of it. At common law, land includes structures such as buildings and any other things attached to the soil, whether above or below the surface.[7]

Land transfer at common law includes not only physical soil but also all buildings permanently attached to soil. It can be construed further that mines and minerals below the surface of the earth go with the ownership of soil above them. Obviously, this is not in line with Tanzania's position in which case minerals and petroleum are not part of the land. Even the term 'ownership' of land is alien to Tanzania land laws. Land is acquired in our country for occupation and use.[8] It is the public in Tanzania which owns the land and the same has been vested in the President as trustee.[9] The concept of land ownership of which in some jurisdictions gives the owner the right to use (and abuse) land[10] is not

6 S. 2 Land Act Cap. 113 R.E. 2002
7 Commonwealth V.N.S.W (1923) 33 C.L.R. 1
8 S. 19 LA
9 S. 4 (1) LA
10 Roger J. S., Property Law (4th Edition) Longman, London, 2003 P. 6

applicable in our country. Not only that land is not owned in the real sense of ownership but also its occupation and use is subjected to some express and implied conditions[11] breach of which can attract fines, actions in court, or even revocation of the right of occupancy.[12]

2.2 The Meaning of a Land Dispute

A land dispute is a case arising from a conflict centred on clashing interests over the land upon which a land court or tribunal has jurisdiction. There is however a debate on the differences between a commercial and a contractual case on one hand and a land dispute on the other hand. The High Court has so far registered different opinions on the matter.

While the first school of thought provides that a mortgage transaction is a commercial dispute[13], the second school of thought vests concurrent jurisdiction in the commercial and land courts where the matter involves both commercial and land elements.[14] The third school of thought on the other hand dismisses the jurisdiction of the land courts on the basis of contractual relations.[15] This school of thought stands on the fact that since the cause of action is founded on a contractual relationship of a bank and a customer, land courts lack jurisdiction to deal with contractual disputes. The fourth and last school of thought maintains that the loan being in a form of a mortgage the claim is land related[16].

11 S. 34 LA, Also, G.N 77 of 2001
12 Part VI sub-part 4 LA
13 For example the case of *Britania Biscuits Ltd vs NBC Ltd et al Land case No. 4 of 2011 HC Land Division at DSM (unreported)*
14 For example the case of *Michael Mwailupe vs CRDB Bank Ltd, Land Case No. 7 of 2003 HC of Tanzania at DSM (unreported)*
15 For example the case *of Epimark S. Mbwani vs CRDB Bank Ltd and another, Land Division at DSM, Land Appeal No. 6 of 2010 (unreported)*
16 For example the case of *Anatoly J. Mushi vs Joachim Mwingira land case no.239 of 2004 HC of Tanzania at DSM (unreported)*

Generally, in deciding on the nature of dispute under discussion, the decisive controlling aspect is a landed matter. It can be said therefore that a land dispute includes; conflicts over occupation of land in its strict sense as defined in section 2 of both the Land Act and the Village Land Act. Disputes over leases, mortgage and security as covered under part IX and X are squarely within the domain of land disputes. The definition also should inevitably be extended to cover conflicts over easements and analogous rights which are created under part XI of the Land Act.

3.0 The Land Disputes Resolution Machinery

3.1 The Old Land Court System

Earlier, during colonialism, there was a dual court system consisting of Native Courts and Subordinate Courts. At that time the land disputes were resolved by courts under formal and informal systems of administration of justice. The latter included council of elders, office of chiefs and customary tribunals.

After independence, there was no specialised system for land disputes resolution. As a result, conflicts pertaining to land matters were part of civil disputes resolved by normal courts of law. The latter included the courts established under the Magistrates Courts Act[17], the High Court and the Court of Appeal of Tanzania. Jurisdiction of the courts depended on, whether or not the land is registered, [18] the law applicable[19], geographical location of the disputed land, and the pecuniary value of the subject matter.

17 Cap. 11 R.E 2002
18 The primary court had no jurisdiction to try a matter where the land the sub\ject of dispute is registered
19 The primary Court had jurisdiction where the applicable law is either Islamic or Customary law

3.2 A Need for Special Machinery to Resolve Land Disputes

Many complaints and discontents were levelled against the old systems of land dispute resolution. The first glaring weakness was multiplicity of authorities for land dispute resolution with overlapping powers.[20] These included both courts of law and administrative authorities. Again, as per the NyarubanjaTenure (Enfranchisement) Act,[21] and the Customary Leasehold (Enfrachisement) Act[22], the land tribunals enjoyed jurisdiction to entertain land disputes. The old system was so inefficient that it resulted to backlog of cases. Multiplication of bodies responsible for land disputes resolution caused jurisdiction overlapping which resulted into confusion and in some cases procedural uncertainties. Involvement of government authorities in resolving land disputes made the situation worse for in some cases, those authorities were parties to the conflicts.

In 1991 the government formed the Presidential Commission of Inquiry into Land Matters[23] popularly known as the "Shivji Commission". In its report the Commission proposed separate machinery for adjudication of land disputes. The proposed institutional structure had a setup from Baraza la Wazee la Ardhi (BWA), The circuit land courts (CLC) and the Land Division of the High Court. Deficiency of the old land dispute resolution machinery is also noticeable in the National Land Policy (NLP) which provides on the problem in the following terms:

20 A Report on the Review of the Legal Framework on Land Dispute Settlement in Tanzania: The Law Reform Commission 0f Tanzania. At page 7
21 No. 1 0f 1965
22 No. 1 of 1968
23 It started to work in June, 1991, produced its report volume I in January, 1992 and volume II in January, 1993

> *Efficiency in land Administration in the country has declined and now land has become a source of frequent disputes. There is no formal hierarchical arrangement among these different institutions involved in dispute settlement most of the disputes result from multiple allocating institutions, poor records keeping, lack of or failure to follow laid down procedures in both allocations, revocations and acquisitions.*[24].

The policy recalls further that:

> *Since the ministry of lands is involved in the land delivery system and might be involved in one way or another in these disputes, it would be improper for the ministry to deal with dispute settlement. The courts would be ideal for the job, but due to their work-load, most of the courts are loaded with other disputes and very little time is given to land disputes. Disputes remain in courts unsettled for more than 20 years.*

Because of increasing problems and challenges associated with the old system of land disputes resolution, it became imperative to have the new system in place.

3.3 The Present Land Courts System

Both the Shivji Commission and the NLP preferred separate machinery for resolution of land disputes. The system was to divorce government authorities from adjudicative roles. The new machinery was also to cure overlapping of jurisdiction and get rid of confusion and uncertainty among the dispute

24 NLP para 4.2.2.5

settlement organs.

It was the policy statement of the NLP to have in place well-established land dispute resolution machinery.[25] According to the policy, the existing quasi-judicial bodies were to be retained and strengthened. These were to start from *Mabaraza ya Wazee ya Ardhi* to quasi-judicial bodies at the district, regional and national levels with appeals to the High Court.[26]

The above policy statements were substantially accommodated under the Land Law Reform of the late 1990s and early 2000s. Accordingly, sections 167 and 62 of the Land Act[27] and the Village Land Act[28] respectively establish the land court system which consists of the Village Land Councils, the Ward Tribunals, the District Land and Housing Tribunal, the High Court Land Division and the Court of Appeal of Tanzania. The same institutional structure is recognized and covered under section 3 of the Land Disputes Courts Act[29]. The new system became operational from 2003 and has been active for fifteen years now.

4.0 The Land Tribunals

4.1 The Village Land Council

This is a land tribunal at the village level. It is composed of seven members out of whom three are women. Members are nominated by the village council and are approved by the Village Assembly[30]. Some persons are excluded from being council members. Those excluded are non-citizens and non-village residents, members of National Assembly, the convicts[31], persons under eighteen years of age, mentally unfit persons and a magistrate having jurisdiction in the district where the council has to function.

It should however be noted that there is a conflict of law on the composition of the Village Land Council. While section 5 of the Land (Courts Disputes Settlements) Act[32] provides:

The village land council shall consist of seven members of whom three shall be women.

The Village Land Act provides that:

> *S.60(2).....that council shall consist of not less than five no more than seven persons of which not less than two shall be women....*

Qualification for membership includes a person of standing reputation with integrity and possessing knowledge of customary land law. While the pecuniary powers of the council are unlimited, its territorial jurisdiction is within the village. The functions of the council are provided under section 7 of the Courts (Land Dispute Settlements)[33]. These includes: receiving complaints from parties in respect of land and mediating between them and assist parties to arrive at a mutually acceptable settlement of their disputes. Any person aggrieved by the decision of the tribunal has to refer the matter to the court having jurisdiction to entertain the same.

4.2 The Ward Tribunals

For every ward in Tanzania the Ward Tribunal is established.[34] The same tribunal is designated as a court under the Land Disputes Courts Act.[35] The Ward Tribunal is composed of not less than four and not more than eight members of whom three should be women.[36] Neither the Land Disputes Courts Act nor the Ward Tribunal Act provides for the qualifications for the members of the tribunal. However, some people are excluded from being nominated as members. The excluded persons are Members of the National Assembly, members of the Village Council and Ward Committee. The Ward Tribunal Act also excludes legally qualified persons and judicial employees, civil servants, mentally unfit persons, non-citizens, persons under eighteen years and those who have seriously been convicted of a criminal offence involving moral turpitude. Ward tribunal Members hold office for a term of three years and are eligible for re-election.

The ward tribunal has a secretary who should be sufficiently literate, educated and capable of satisfactorily discharging his duties. The secretary appointment is permanent staff in the service of the local government authority within which the tribunal is situated.

The primary function of the tribunal is mediation and reconciliation. In all cases, the tribunal must attempt to reach settlement of the dispute amicably. Upon failure of mediation the tribunal has to exercise its compulsive jurisdiction.

The territorial jurisdiction of the tribunal is within the ward upon which it is established. In so far as pecuniary jurisdiction is concerned, the tribunal has powers where the value of the subject matter does not exceed three millions Tanzanian shillings. The tribunal is empowered to enquire into and determine disputes arising under the Land Act and the Village Land Act. After determination of the case, enforcement of the orders of the tribunal is done by the District Land and Housing Tribunal (DLHT). An appeal from the ward tribunal is directed to the DLHT within forty five days from the date of the decision or order against which the appeal is brought.

4.3 The District Land and Housing Tribunal (DLHT)

These tribunals are established by the responsible Minister exercising the powers under the Land and Village Land Acts.[37] By exercising such powers, the Minister may establish the DLHT in each district, region or zone as the case may be. The DLHT is composed of a chairperson and is duly constituted when sitting with two assessors. The chairperson is appointed by the Minister amongst legally qualified persons. The tribunal chairpersons just like assessors have three years tenure but they are eligible for re-appointment.

The pecuniary limit of DLHT in proceedings for the recovery of possession of immovable property is three hundred millions Tanzania shillings. Where the subject matter is capable of being estimated at a money value the pecuniary limit is two hundred millions Tanzania shillings.

The subject matter of jurisdiction includes all proceedings under the Land Act, Village Land Act, the Customary Leaseholds (Enfranchisement) Act,[38] the Rent Restriction Act[39] and the Regulation of Land Tenure (Established

25 NLP para 2.2.6
26 *Ibid*
27 Cap. 113 R.E. 2002
28 Cap. 114 R.E. 2002
29 Cap. 216 R.E 2002
30 S. 5 of Cap. 216 R.E 2002
31 Convicted of a criminal offence involving dishonesty or moral turpitude
32 Cap. 216 R.E 2002
33 Cap 216 R.E 2002
34 S.3 of the ward tribunal Act Cap 206 R.E 2002
35 S.10 Cap 216 of R.E 2002
36 S. 11 cap 216 of R.E 2002
37 SS 167 and 62 respectively, see also s.22 of the Land Disputes Courts Act
38 Cap 377 R.E 2002
39 Cap 339 R.E 2002

Villages) Act.[40] According to section 33 (1) (b) of the Land Disputes Courts Act, the tribunal's jurisdiction is extended in all such other proceedings relating to land under any written law in respect of which jurisdiction is conferred upon it. The DLHT has original, appellate and revisionary powers.[41]

5.0 Literature Review on Adequacy and Efficacy of Land Tribunals

Efficacy and adequacy of the present machinery for resolution of land disputes in general, and land tribunals in particular has been covered by different authors. The Law Reform Commission of Tanzania in its Report on the Review of the Legal Framework on Land Dispute settlement[42] (LRC Report), observed that establishment of the present land court system is incompatible with our constitutional set up and violates the doctrine of separation of powers[43]. The same observation is made by Kironde[44] who maintains that the current institutional structure is against the doctrine of separation of powers and has accountability challenges. Kironde made further findings that the problem of case delay is still alive and is featuring the present land disputes resolution machinery. Olenasha[45] on the other side faults the tribunals on their geographical coverage. According to him the tribunals were only established in some parts of the country therefore many areas are still missing their services. Gaston[46] on his side made a comparative observation between the tribunals and the normal courts of law. As per his findings there are discrepancies in terms of services, remuneration and tenure. The study and findings by the authors above is general. They cover establishment, nature and operation of the land dispute resolution machinery. This article is specifically addressing competence and independence of land tribunals in administration of justice.

6.0 Competence and Independence of the Tribunals

6.1.0 Competence of the Tribunals

Both the village land councils and the ward tribunals have to transact their business as provided under the Land Act, the Village Land Act, the Constitution and some other laws. The tribunals must be guided by the written laws and some other settled binding legal principles. In the course of administering justice inevitably members have to read and have a clear understanding of the said land laws. Similarly, they need to engage into statutory interpretation. The latter therefore makes it necessary for them to have knowledge for legal methods, statutory interpretation and their application. Unfortunately, this is not the case and the contrary is the fact.

Looking at the Village Land Council and the Ward Tribunal composition, all of their members have no legal knowledge. Members of the tribunals are ignorant of the legal rules and principles which are relevant in matters that come before them. This is deliberately made for expediency and flexibility purposes. Indeed to be a legally qualified person is a disqualification for membership into those organs.[47] This is a serious mischief in the formation and operation of the tribunals. The two organs are presided over by lay persons[48], where some of them may even be utterly illiterate. It is practically impossible for these members to have a correct interpretation of the law and its application without having some basics of law and its associated principles. It should further be noted that most of these laws are in English language. This presents another problem of language barrier which is a significant obstacle in the administration of justice. Although the secretary of the tribunal must possess reading and writing skills, it is not necessary that he has to be good in English. After all, the secretary is not a member of the tribunal therefore he/she does not participate in decision making.

Another problem is arising from the fact that interpretation of statutes is backed up by judicial principles made out of precedents. Most of these principles are compiled in the law reports which are written in English. The law reports are not only that are written in the language foreign to the members; but also they are not accessed by them. A research made by the Institute of Judicial Administration Lushoto (IJA) which was conducted in Tabora[49] and Mwanza [50] revealed that tribunals are not supplied with the necessary law materials. Again, authorities tasked to have the members trained have been off duty [51] on the matter.[52] Section 185 of the Land Act and section 66 of the Village Land Act impose a duty to the Minister to cause the two laws to be translated in Kiswahili. This obligation has either been neglected or hardly ever done. The research conducted by IJA showed that there are hardly translated versions of relevant laws which have ever been issued to the members of the village land councils in Mwanza and Tabora. Nevertheless, there is no legal obligation on the part of the Minister to have the Ward Tribunals Act and the Land Disputes Settlement Act translated in Kiswahili.

There are cases where the tribunals have been acting without jurisdiction. This is clearly reflected in the following cases entertained by the ward tribunals in Missenyi District in Kagera Region.

The first instance is from Kashenye Ward tribunal in the case *of WEO vs Hosea Ntula Criminal Case No. 2/2005.* Out of its jurisdiction, the tribunal entertained a sexual offence case in which the accused had a love affair with a school girl one Namala Begashe and made her pregnant. The tribunal sentenced the convict to ten years imprisonment.

The second instance arises from the *Nsunga Ward tribunal* in the case of *John Machume vs Gasper Zacharia Criminal Case No, 3/2005*. While the tribunals have no power to deal with witchcraft cases, the *Nsunga Ward tribunal* entertained a witchcraft dispute on 10th April 2005. The accused was sentenced to six months imprisonment.

The third instance is from *Minziro Ward Tribunal* which without jurisdiction, the ward tribunal tried a serious offence of breaking and entering in the case against *Stephen Paul, cited as civil case no. 21 of 2005.*

The fourth instance is from *Buyango Ward Tribunal* in the case of *Gustodes*

40 Cap 267 R.E 2002
41 SS. 33-36 of cap 216 R.E 2002
42 Produced in May 2014
43 LRC Report at pp 6, 35 and 53
44 Kironde, J. M. Improving Land Sector Governance in Africa: The Case of Tanzania, Paper prepared for the "Workshop on Land Governance in support of the MDGs: Responding to new challenges" Washington DC March 9-10 2009
45 Olenasha, W. Reforming Land Tenure in Tanzania: For Whose Benefit? At www.hakiardhi.org/WILLIAM%20SUBMISSION.pdf, pg 21(accessed on 6.6.2019)
46 Gaston, K. "The Dynamics and Continuity in Land Dispute Mechanisms in Mainland Tanzania: The Jurisdictional Debate" (2009) pp. 583-584
47 S (1) d of cap 206 R.E. 2002
48 See also Edson J.M, The Role of Tribunals in the Administration of Justice: A Case Study of Njombe District, (2000), Dissertation Submitted in partial fulfillment of the requirements for the Award of Degree of Bachelor of Laws at the Faculty of Law, University of Dar es Salaam.
49 A report on capacity building to Primary Courts Magistrates on supervisory powers over administration of justice held at Tabora, 8-12 October 2018
50 Was done in March, 2019
51 LRC Report pp53-54
52 S.26 of Cap 206 R.E 2002

Rugafunya vs Jackson Michael which entertained a land criminal case without jurisdiction. This is contrary to section 4(2) of Cap 216 R.E 2002.

Another serious problem is confusion between civil and criminal wrongs by the tribunals. This was noted all over Bukoba and Misenye districts. Some of the cases include the following: *Kanyigo Ward Tribunal* in the case of *Vincent Aporinali vs Gosbert Rwegoshora, Civil Case No. 1 of 2005* entertained a dispute concerning the contract for a house construction as a criminal case involving allegation of theft. The accused was sentenced to one year imprisonment. In *Criminal Appeal No. 15 of 2003* from *Bwanjai Ward Tribunal*, the primary court magistrate ordered the retrial of the case because the tribunal had tried the land dispute as a criminal case instead of being a civil matter.

In another land dispute between *Fredrick Stanslaus vs Method Stanslaus Criminal Case No. 2 of 2005; the Buyango Tribunal* tried it as a criminal case while it was a civil one. The primary court at Bukoba town considered the issue and ordered retrial of the case. In the case of *Gasper vs Zacharia criminal Case No 8 of 2005*, *the Nsunga Ward Tribunal* tried a defamation matter as a criminal case and sentenced the accused to imprisonment. Likewise, In *R vs Creophas Kajungu,* Kyaka Ward Tribunal entertained a trespass dispute as a criminal case.

Furthermore, although it is mandatory for tribunals to employ mediation mechanisms to obtain amicable settlement of disputes before resorting to compulsive jurisdiction, most tribunals ignore the procedure and instead, they only jump to a compulsive jurisdiction without attempting mediation.

In the absence of legal knowledge by the tribunal members, lack of law materials coupled with absence of the necessary training; the competence of land tribunal's members to administer justice is in issue.

The same fate is affecting assessors of DLHT. The latter are lacking legal knowledge and training and are not supplied with legal materials.

6.2 Tribunal Independence

Independence of judiciary (tribunals) refers to the freedom of the institutions responsible to administer justice. It is when a decision maker delivers justice fairly and impartially without fear or favour and without being subjected to any pressure regardless of the angle upon which it is generated. There are four main elements of independence of judiciary which also can be used to analyse independence of tribunals. These are security of tenure and remuneration, immunity of tribunal officers and, their separation from other offices and responsibilities.

6.2.1 Security of Tenure

Members of the village land councils and ward tribunals, assessors and the chairpersons of the DLHT are appointed for three years tenure. The Village Council is responsible to appoint members of the Village Land Council, while the Ward Development Committee is vested with powers to appoint members of the ward tribunals. The chairpersons and assessors of the DLHT are appointed by the Minister responsible for land. The first two organs cannot be detached from political affiliation[53] which may have direct influence on the composition of the tribunals. While the majority of the Village Council members are *vitongoji* chairpersons, the majority for the WDC are village chairpersons who come into office under political parties' umbrella. It is not uncommon to have land conflicts which feature political tussles.[54] Political clashes have caused some tribunals to be dissolved, while others became inactive for substantial period of time.[55]

Since the chairperson for the DLHT is appointed by the Minister, he is accountable to the executive. The Ministry responsible for Land has supervisory and disciplinary powers on the chairpersons[56]. As a result, the executive has unchecked enormous powers over the tribunals[57]. It has exclusive authority not only over chairperson's appointments and renewal of their tenure but also on the general operation and transaction of business by the tribunals. Under the current tribunal institutional structure; the Minister responsible for land, the registrar and local government authorities have unchecked administrative[58], supervisory and ultimate control over the tribunals[59]. The tenure for the tribunal's members and chairpersons is not secured. They survive in offices at the mercy of the executive. Re-appointment into offices and re-newal of their tenure of office is under absolute discretion of the same authorities.

53 Raulencio. P., Competence and Independence of Ward Tribunals in Administration of Justice: A Dissertation submitted at the University of Dar es Salaam in partial fulfillment of the requirement L.L.B (2006) at page 39-40
54 *Ibid*
55 *Ibid*
56 Section 28(2) of Cap 216 R.E 2002
57 LRC Report pp. 45-47
58 LRC Report p. 62-63
59 LRC Report p.59

There are many cases where the local government authorities have been registered as parties on the disputes to be resolved by the tribunals. Where the Ministry for land and the local government authorities have direct interests on cases lodged before the tribunals, the independence of the latter is wanting and justice cannot in the eyes of members of the public be seen to be done.

6.2.2 Security of Remuneration

There is no scheme to remunerate members of the village land councils. It can fairly be said that they work on a pro-bono basis. The ward tribunal members are almost suffering from the same fate. Although the law is providing for the Local government authorities to determine their sittings and allowances, their remuneration is neither fixed nor reliable. In many cases, they are not paid.[60] Where they are paid, remuneration is meagre and normally subjected to inordinate delays. Because of this problem, some tribunals have preferred the system of self-remuneration. This arises where they get their allowances from the case filing fees and from the fines imposed to offenders.[61] Under that circumstance, the more the cases, the more assurance for members to be remunerated. The fewer the cases that are filed to the tribunals and absence of fines imposed to the offenders, the less the opportunity for members to be paid. The latter fact is one among the reasons for the tribunals to register and entertain cases without jurisdiction. The Tribunals also impose high rates of fines to the offenders in order to secure their remuneration through fines.

60 Raulencio No 37 page 36-38
61 *Ibid*

It should further be noted that there is no uniformity on amount of fee charged when filing cases[62]. Authorities have not formulated regulations on the matter. The tribunals are at liberty to fix any amount of fee charged for case filing.

The worse situation is when members are called to attend seminars. On the study made in Bukoba Rural District, there are cases where members neither receive transport fare nor accommodation allowances. When asked as to why there is no special fund from Bukoba Rural District Council, the then lawyer for the council simply answered "it is because the District Council suffers from shortage of fund."

Members of the tribunals spare their time and sometimes incur expenses for food and transport fare to attend tribunal meetings. Failure to pay them is against their constitutional right of earning out of a rightful work.

Chairpersons and assessors for DLHT are remunerated from the Ministry of land. Their salaries and allowances are determined by the Ministry. Generally speaking, they are civil servants in the public service and there is no special protection on their remuneration.

6.2.3 Immunity and Separation of Powers

Just like judicial officers, tribunals' members enjoy immunity. Section 55 of the Land Dispute Courts Act provides that no matter or thing done by a chairman, member, officer, servant or agent of a Land Village Council or tribunal shall if done in good faith in the execution or purported execution of the provisions of the Act or of regulations made there under be subjected to any action, liability or demand whatsoever.[63] The Land Act extends the immunity even to all officers dealing with land. It states;

S.16. Protection of officers

No officer appointed under this Act shall be personally liable for any act or matter done or ordered to be done or omitted to be done by him in good faith and without negligence and in the intended or purported exercise of any power, or the performance of any duty, conferred or imposed on or allocated or delegated to him by or under this Act.

The law does not expressly provide immunity for the DLHT assessors. This omission presents an obvious absurdity. However, it should be pointed out that since they are performing their duties in the court established under section. 167 of the Land Act, assessors have immunity just like any officer discharging his duties under the Act. Their immunity is implied under section 16 of the Land Act.

There is separation of tribunal members from other offices. The Ward Tribunal and the Village Land Act excludes civil servants from serving as members. The two Acts provide a long list of people under exclusion most of which are in the government service at different capacities.[64]

7. Land Tribunals Vis a Vis the Judiciary

The tribunals are dealing with administration of justice just like the judiciary. The tribunals however have more workload and are overloaded even more than many of the subordinate courts.[65]

The operation system of the tribunals is quite different with that for the judiciary and some of the remarkable differences are noted below:

Firstly, members of tribunals, the chairpersons and assessors are not judicial officers. Their appointments are not governed and regulated by the Judicial Service Commission. They are recruited by executive authorities and they are as a result not bound by professional ethics and norms of judicial conduct[66]. For the same reasons rules of etiquette applicable to judicial officers are far-off from them.

Secondly, although the tribunals are statutory designated as courts, they are not operating on judicial principles. Institutionally, they are divorced from the judiciary. As they are not answerable to the judiciary, their loyalty is pledged to the executives especially the Ministry responsible for land.

Thirdly, the tribunals are characterised by structural deficiencies. The Chief Justice as the head of the judiciary has neither defined powers nor control over them. The chain of accountability is linked to the executive bodies. While the DLHT is accountable to the Minister for Land, the ward tribunals are accountable to the District Councils and the ward development committees. The Village Land Council on the other hand is accountable to the Village Council. It should further be noted that some of these tribunals do operate and discharge their functions in the Regional or District Administrative Offices.

Fourthly, although the tribunals merge with the judiciary at the High Court level, there is still a confusion between the powers of the Registrar of the High Court with that of the Registrar from the Ministry of Land. Chairpersons of the DLHT do receive directives and orders from the latter which is likely to affect powers and call for the records from the superior courts which are made for appeal and revision purposes. Monthly returns from DLHT are directed to the Registrar with no reversionary judicial powers.

Fifthly, the tribunal's personnel are not trained for administration of justice[67]. Members of the ward tribunals and village land councils are purely lay persons. Not only they are not lawyers but also they do not have basics in law. It should further be noted that the law does not even record literacy as a necessary conditions for membership in these organs. A legitimate question is how those lay persons will interpret and apply land law principles provided under the land statutes and case laws written in legal English? Similarly, unlike judges and magistrates, the tribunal chairpersons do not attend induction courses and continuing legal education provided by the Institute of Judicial Administration Lushoto. The tribunals are not manned by judicial officers and their members and chairpersons are not administrated with judicial oaths.

Sixthly, poor case management system. Tribunal members are not trained in administration of justice. Consequently, they are missing some important case management skills such as facts analysis, application of the law to the facts, legal reasoning and judgment

62 LRC Report p. 42-44

63 Cap 216 R.E 2002

64 S.5 Cap 206 R.E 2002 and S.60(s) of Cap 114 R.E 2002

65 E.g Korogwe DLHT for a long time until 2017 has been serving four districts i.e Handeni, Korogwe, Kilindi and Lushoto. After establishment of Kilindi and Lushoto tribunals, it is currently serving only two districts i.e Handeni and Korogwe.

66 LRC Report p.56

67 See LRC Report at p. 41

writing. Capacity building programs are rarely organised to improve their knowledge and skills. The DLHTs are overloaded with cases. The tribunals do not have special programs like judicial clean up sessions to get rid of backlog of cases. Since the tribunals are detached from the judiciary there is no efficient system of accountability for case delays, under performance and for some other malpractices.

Seventh, constitutionally the judiciary is an organ with the last say in administration of justice. In view of the fact that land conflicts constitute a large number of cases country wise, to divorce the judiciary from handling land cases and deny it administrative and supervisory powers over the tribunals is a serious breach of the cardinal principle of separation of powers.

8.0 Towards Addressing the Problems

To curb the weak points as discussed above, the remedy is manifested in different dimensions which is the subject of the next discussion.

Firstly, the Land Disputes Courts Act should be repealed and other related laws should be amended to get rid of the current awkward structure characterizing the land dispute resolution machinery. Administratively, the village land council and ward tribunals fall under the Regional Administration and local government Authority. While the DLHT falls under the Ministry of Lands and Human Settlement Development, the High Court Land Division and the Court of Appeal falls under the judiciary. The three organs have no operational legal link and are not coordinated to have efficient administration, supervision and management of land courts.

Secondly, all land disputes should be adjudicated by the judiciary. [68]The court structure will run from the Primary Court, District Court, High Court and the Court of Appeal. The DLHT should be repealed. The ward tribunals and the Village Land Councils should be retained only for mediation and reconciliation. The judiciary should therefore have exclusive jurisdiction in administration of justice for land disputes.

Thirdly, the judiciary should recruit competent legal practitioners with skills in adjudication of land disputes. The present chairpersons of DLHT should be integrated into the judicial system after undergoing intensive short courses for capacity building. They should be trained to master judicial practice and procedure.

Fourth, the Land Division of the High Court should be abolished. This is due to the fact that all High Court centres and zones have and should retain their jurisdiction over land matters.

Fifth, existing ward tribunals and the DLHT should finalize proceedings already commenced. Thereafter the two organs will come into a final close up.

Sixth, the democratic principle of separation of powers must be respected. Administration of justice is vested with the judiciary. Executive tribunals with enormous powers divorcing the judicial supervision, control and monitory should never be established,

Seventh, there is a need to have coordination; networking and experience sharing among the stakeholders to have sound machinery for land dispute resolution. There should be involvement and consultation of legal practitioners, stakeholders, litigants, activists, judges, advocates, academicians and NGOs.

68 LRC Report p.66

9.0 Conclusion

The land tribunals were part of the new land dispute resolution machinery introduced early in 2000s. There are structural and operational deficiencies of the tribunals which have negative impacts on administration of justice. The tribunals have some weak points associated with their composition. Members of ward tribunals and Village Land Councils are lay persons with no basics in legal principles. Their ignorance of the law affects their competence to deliver justice. As there is no sound and reliable capacity building schemes for tribunals' members, chairpersons and assessors, the problem arises on their competence to administer justice clockwise with best and acceptable judicial practice.

Independence of the tribunal is also in issue. Both, the Ministry of Lands and local government authorities have unchecked powers and authority to appoint and dismiss members of the tribunals. Generally, executive has exclusive control, supervision and monitoring of the tribunals.

Based on serious deficiencies characterizing the current system of land dispute resolution, there are urgent calls for law reform. The principle of Separation of powers should be respected. Judicial powers need not be hijacked. For a sound machinery for the land dispute resolution to be in place, there is need to consult the stakeholders such as legal practitioners, litigants, activists, judges, advocates, academicians and Non-Government Organizations.

THE FAIR COMPETITION ACT AND IMPARTIALITY OF THE FAIR COMPETITION COMMISSION IN MAINLAND TANZANIA

Edward Kisioki[1]

Abstract

The Fair Competition Act, (No 8 of 2003) establishes the Fair Competition Commission (FCC) and the Fair Competition Tribunal (FCT) to enforce competition law in Mainland Tanzania. Sections 68, 69 and 71 of the Act give powers to the FCC to initiate a complaint on restrictive trade practices as provided under part II of the Act, investigate, prosecute and adjudicate dispute on it, while section 84 vests appellate powers in the FCT whose decision is final.

This article is a critique on the FCC's impartiality. It argues that, although powers of the FCC were unsuccessfully challenged in two cases, namely, *the Tanzania Cigarette Company case* and *the Tanzania Breweries case*, such concentration of powers to one organ impairs the principles of natural justice (rule against bias) as suggested by the experience from other jurisdictions.

The methodology employed was desk study where cases, statutes and rules were reviewed and the study eventually recommended for amendment of the Competition Act to separate investigative and prosecutorial functions from adjudicative functions of the FCT. It further recommended that, the FCC remains with its initiation, investigation and prosecution powers while the FCT becomes the tribunal of first instance in competition disputes and an appellate tribunal in mergers issues.

Key words: Partiality, Fair Competition Commission, Fair Competition Act.

1.0 Introduction

This article focuses on impartiality of the Fair Competition Commission in administration of justice in Mainland Tanzania. The FCC is a regulatory body whose function is to ensure that there is a competitive market and consumers' welfares are preserved.[2] However, the FCC as an administrative agency has other functions such as conducting research on the market and publishes the same for public consumption to mention but a few.[3] The article is not going to address all functions of the FCC. It critically reviews the provisions of the Fair Competition Act, No. 8 of 2003 (the Competition Act) that gives the FCC powers to investigate, initiate and prosecute a competition dispute. The decision of the FCC is appealable to the Fair Competition Tribunal (FCT) and its decision is final. However, the issue of appeal and finality clause is not addressed in this article. Article 13 (6) (a) of the Constitution of United Republic of Tanzania,[4] provides for the right to fair hearing which includes impartiality of the decision maker and right to appeal. Drawing from this constitutional provision, this article inquires on the constitutionality of sections 68, 69 and 71 of the Competition Act[5] and their implications in administration of justice on matters relating to competition law in Mainland Tanzania.

The article is based on a desktop-study in which data was collected through review of relevant documents such as statues, cases, policies, and books. Where applicable, experience was drawn from Jamaica, United Kingdom, Canada and South Africa. These jurisdictions were selected because competition laws and policies for South Africa, Jamaica, United Kingdom and Canada have a good hierarch of filing competition disputes from *quasi*-judicial bodies to courts of law and vest investigation and adjudication powers to different organs. Before the *Jamaica Stock Exchange v Fair Trading Commission,*[6] the Competition Law in Jamaica was similar to the Competition Law of Tanzania. However, following the decision of the High Court of Jamaica, the provisions of the Competition Law of Jamaica that vested multiple powers to the Commission was declared unconstitutional.

This article is organised into five parts. The next part is a discussion of the provisions of the Competition Act which violate the constitutional principles of fair hearing. It includes the analysis and critique of the FCC's powers and procedure of challenging constitutionality of a provision of a law in Tanzania. The forgoing is followed by experience from other jurisdiction in part three. Thereafter, part four deals with findings of the discussion and part five winds up by providing a conclusion and a way forward.

1 * Edward Kisioki Prosper (ekprosper@mzumbe.ac.tz , laiza.edwar@gmail.com is a Assistant Lecturer staff at the Faculty of Law, Mzumbe University specializing in economic law

2 See section 3 of the Fair Competition Act.
3 See section 65 of the Fair Competition Act.
4 Cap: 2 RE 2002.
5 No 8 of 2003.

6 Civil Appeal No: 92/97.

2.0 The Constitutionality of the Provisions of the Fair Competition Act

The Fair Competition Act establishes two enforcement bodies in matters of competition law and policy, namely, the Fair Competition Commission (FCC) and the Fair Competition Tribunal (FCT). These bodies are vested with powers to enforce competition law and protect consumers in Mainland Tanzania.

According to this Act, the FCC has powers to investigate anti-competitive practices, including the power to issue summons, search, initiate a complaint and adjudicate on it.[7] This structure invites a scholarly criticism which this paper intents to do, since it is questionable whether the FCC as a regulatory organ is capable of regulating itself in the exercise of its functions if all these powers are concentrated to it. This structure is similar to the European Competition Commission which receives criticism from scholars on the ground that it is designed as 'a lawmaker, a policeman, an investigator, a prosecutor and a judge.'[8]

The functions of the FCC is challenged based on the general principle of natural justice and article 13(6) (a) of the Constitution for it is unfair to concentrate investigation, prosecution and adjudication powers into a single body, the FCC.

The FCC determined its first case in 2008, on notification of merger and abuse of dominant power.[9] Later in 2010, the Tanzania Cigarette Company (TCC) filed a case in the High Court of Tanzania challenging the constitutionality of s. 69 of the Competition Act, (TCC's case).[10] The 2010 case was an offspring to the 2008 case.

2.1 Brief facts of the TCC's case

The petitioner (TCC) intended to merge its business with Iringa Tobacco Company Ltd (ITC) which would result in the assets of the ITC being sold to the TCC. The TCC made inquiry in to whether the merger proposal was objectionable under the terms of the Competition Act and, after satisfaction of no objection, concluded the merger. The FCC claimed that the TCC had violated provisions of the Competition Act by completing the merger without notification and approval by it.

The TCC averred that at the time of the merger transaction the Commissioners of the FCC were not appointed and the threshold notification was published on 17 January 2007 and made to operate retrospectively from 10 March 2006 (the merger transaction took place on 17 September 2005). It further alleged that the exercise of the FCC's accusatory and adjudicative powers infringes constitutional right to be head by impartial adjudicator. The FCC overruled the preliminary objections and proceeded with hearing of the complaint. Dissatisfied, the TCC sought redress in the High Court of Tanzania against the FCC and the Attorney General, thus giving rise to the TCC's case.

Before the High Court, the TCC argued that the first respondent (the FCC) made itself a judge of its own cause, thus infringing its right to a fair hearing as enshrined under article 13(6) (a) of the Constitution of United Republic of Tanzania, 1977. Accordingly, the TCC prayed for the High Court to declare as unconstitutional section 69(1) of the Competition Act which gives the FCC jurisdiction to determine complaints initiated by itself.

The Attorney General (AG) (second respondent in this case) contended that the merger transaction was notifiable whether the threshold notification of a merger was published or not, and argued that the Commissioners of the FCC were already appointed when the merger transaction was concluded. However, the court did not entertain the contention since the High Court is not an appellate body on competition matters. The intention of the TCC was to request the High Court to exercise its original jurisdiction vested by both the Constitution and the Basic Rights and Duties Enforcement (BRADEA)[11] to declare a provision of the law a nullity. The AG, however, submitted two preliminary objections (POs), one being that the petitioner ought to have exhausted available remedies before filing the petition to the High Court. The High Court determined the PO and ruled that the petitioner (TCC) should first exhaust the opportunity available under the Competition Act, specifically to appeal to the FCT before seeking a remedy in the High Court. Accordingly, the petition was dismissed with costs. Therefore, the question of unconstitutionality of section 69 (1) of the Competition Act and the arguments on powers of the FCC remain unsettled.

The impartiality of the FCC was also challenged in the case of *Tanzania Breweries Ltd v Serengeti Breweries Ltd and the FCC,* (TBL's case).[12] This appeal originated from complaint No 2 of 2009 which was the second case handled by the FCC.

2.1.1 Brief facts of the TBL's case

The FCC in complaint No 2 of 2009 held that the appellant (TBL) was liable for contravening both sections 8 (1) and 10 (1) of the Competition Act by entering into branding agreements which had led to serious and important distortions of competition in the beer market and abuse of dominant position. It ordered the appellant to pay a fine of five percent of its annual turnover. In addition a compliance order was issued (refrain from removing its competitor's signage and posters or POS materials at the outlets and entering into anti-competitive branding agreements with outlet owners).

Aggrieved by the decision of the FCC, the appellant appealed to the FCT. It filed two appeals, No 4 and No 5 of 2010 respectively, but the FCT consolidated them. The appellant submitted ten grounds of appeal, including failure of the FCC to act in accordance with the principles of natural justice and procedural fairness, thus failing to act independently and impartially. The appellant further averred that the proceedings and the decision of the FCC are a nullity because the FCC was not properly constituted when it determined the matter. This ground, took priority and it was concluded that the meetings of the FCC held during determination of complaint No 2 of 2009 lacked a proper quorum and such a decision was invalid and therefore a nullity. Faulting the FCC's quorum, the FCT did not consider

7 Sections 68-71 of Act No 8 of 2003.

8 Jones A. and Sufrin B,EU Competition Law Text, Cases and Materials (4th ed)(2011)Oxford University Press, New York at 1037.

9 See the *Fair Competition Commission v Tanzania Cigarette Company Ltd (TCC)*,Complaint No 1 of 2008.

10 SeeTanzania *Cigarette Company Ltd v The Fair Competition Commission and the Attorney General*; Misc. civil cause No.31 of 2010, High Court of Tanzania at DSM (Unreported).

11 Act No 33 of 1994.

12 Consolidated Tribunal Appeals No 4 and 5 of 2010.

other grounds of appeal raised, including the question of impartiality of the FCC.

2.2 Questioning the impartiality of the FCC

Section 69(1) of the Competition Act provides that 'the Commission (FCC) may initiate a complaint against an alleged prohibited practice'. Subsection 2 allows a person to submit a complaint against an alleged prohibited practice before the FCC for investigation. The court in TCC's case interpreted this provision and stated that, 'the provision creates a situation in which it is the FCC that investigates an alleged prohibited practice, then prepares and files a complaint before itself, prosecutes a complaint before itself and goes on to adjudicate over the same complaint.'[13]

The FCC is concentrated with investigatory, accusatory and adjudicatory powers. According to the OECD report,[14] 'combining the function of investigation and adjudication in a single institution may save costs, but may also dampen internal critique; it may raise a concern about the absence of checks and balances'. Although section 62 (2) of the Competition Act provides that 'the Commission (FCC) shall perform its functions and exercise its power independently and impartially without fear or favour', its independence and impartiality is questionable. Members of the FCC are appointed by the executive[15] to perform administrative duties (quasi-judicial function). Also, impartiality of the FCC is affected by lack of internal independence.

The organisational structure of the FCC does not guarantee absolute separation of functions within its departments. For instance, section 71 of the Competition Act and Rule 10[16]suggest that both the chairman and the Director General (DG) who sit for adjudication also participate in investigative processes, this impair the doctrine of natural justice.

2.2.1 The FCC and Natural Justice (rule against bias)

Article 13 (6) (a) of the Constitution of United Republic Tanzania[17] provides that, 'when the right and duties of any person are being determined by the court or any other agency, the person shall be entitled to a fair hearing…'What amount to 'fair hearing?

Fair hearing is rooted from the doctrine of natural justice. Basically, this principle recognizes two other principles known as *Nemo judex in causa sua,* i.e. rule against bias, no man shall be a judge in his own cause and *Audi alteram partem*, i.e. hear the other side.[18] In this piece of work, the FCC's powers to initiate, investigate, prosecute and determine a competition dispute is tested based on rule against bias or interest. According to Justice Bowen,[19] rule against bias is based on three maxims namely no man shall be a judge in his own cause, justice should not only be done, but manifestly and undoubtedly be seen to be done and judges like Caesar's wife should be above suspicious, that anything that causes a person to decide a case otherwise than on evidence is termed as bias. Therefore a judge must be impartial and free from bias. This was also supported by Lord Denning by arguing that: '...justice must be rooted in confidence: and confidence is destroyed when right-minded person go away thinking 'the judge was biased.'[20]

The partiality of the FCC may be proved by giving facts or the circumstances that surround the entire process of determining a right. As such, to decide whether section 69 of the Competition Act causes the FCC to be partial, one has to analyse the loopholes provided by the Competition Act. In *Johnson v Mississippi, [21]*it was stated that a party to litigation has the right to be heard by an impartial decision-maker. The question is who is an 'impartial decision-maker'? In *Caperton v. A.T. Massey[22]*it was stated that '[t] he inquiry is an objective one. The court asks not whether the judge is actually subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional potential for bias.'

The potential bias created by the Competition Act is that the same person, who takes part in an investigation of restricted trade practices, sits for adjudication of the same. For example, when the allegation/complaint is submitted before the FCC for investigation, the Director General (DG) has power to decide whether the matter is to be investigated by the FCC or not. The DG has power to issue a notice of non-referral to the person who submitted a complaint. The complainant then has the right to refer the complaint directly to the FCC for adjudication.[23] The same DG who issued a notice of non-referral forms part of the hearing meeting of the FCC. Also, the chairman or the DG of the FCC has the power to issue a summons and request for a search warrant from the FCT for the purposes of conducting investigation. The investigation department cannot call a person to supply information unless it requests the chairman or DG to issue a summons to call that person. Section 71 (1) of the Competition Act provides that, '… a member of the Commission (FCC) may by the summons signed by the chairman or DG serve on that person…'to produce any information or document to the FCC.

For searching processes, the chairman or the DG applies for the search warrant from the FCT and appoint the FCC's staff to participate in searching. Section 71 (5) of the Competition Act provides that the FCT 'shall issue a search warrant authorizing a police officer accompanied by staff of the Commission duly authorized by the chairman of the Commission to enter the premises and conduct searches…' The Competition Act does not vest these powers in the head of the investigation department; rather to the chairman and DG of the FCC. These examples extracted from the Competition Act evidence that the chairman and DG of the FCC participate in both investigation and adjudication of alleged prohibited practice. To avoid lack of neutrality, the FCC when it has investigated the dispute, needs to recuse itself in adjudication to let the neutral organ decide the matter.

Waelbroeck and Fosselard[24] argued that, everyone is entitled to be heard by an impartial tribunal (court) regardless of whether a matter is inquired into by an

13 The *Fair Competition Commission v Tanzania Cigarette Company Ltd (TCC)*,Complaint No 1 of 2008 at 13.
14 OECD's report on European Commission- Peer Review of Competition Law and Policy, (2005) at 62, available at http://www.oecd.org/eu/35908641.pdf, [accessed on 27 November 2015].
15 The chairman is appointed by the President and other members are appointed by the Minister for trade, see sections 62-64 of Competition Act.
16 The Fair Competition Commission Procedure Rules of 2013.
17 Cap: 2 RE 2002.
18 Takwan CK, Lectures on Administrative Law (3rd ed)(2006)Eastern Book Company, Lucknow at149.
19 See *Lesson v General Council* (1889) 43 Ch D 366.
20 See *Metropolitan Properties Ltd v Lannon* (1969) 1 QB 577.
21 403 U.S212.216 (1971).
22 *Coal Co*129.
23 See Rule 10 (7) of the Fair Competition Commission Procedure Rules 2013.
24 .Waelbroeck D and Fosselard D, *Should the Decision-Making Power in EC anti-trust Procedures be left to an Independent Judge? The Impact of the European Convention of Human Rights on EC Anti-trust Procedures*,'YEL 1995No: 15 at 115 quoted also in Slater at ell at 27.

administrative body. Slater *et al*[25]also argued that, giving the Commission all the powers will create a so-called 'prosecutorial bias' as naturally the Commission will have a bias in favour of its findings during the investigations when it comes to the question of adjudication, a 'hindsight bias or desire to justify past efforts.' They relate this bias to the one possessed by the lawyer in favour of his or her client.

Would a prudent person expect that the FCC, having used its resources in investigations and drawn an inference that there was an infringement of the provisions of the Competition Act, would then in trial declare that its findings in the investigations hold no water? Montag[26] argued that, 'it is understandable inhuman terms that Commission officials sometimes want to push through what they perceive to be their case, and it explains why the arguments put forward by the parties often appear to fall on deaf ears.'

Although the decision of the FCC is appealable to the FCT, it is impossible for the FCT to declare the acts of the FCC void on grounds of wanting of jurisdiction because the provisions of the Competition Act supply loopholes for the FCC to be a judge of its own acts. In *Findlay v United Kingdom* , [27]the European Court stated that, '... to maintain impartiality, the tribunal... must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect'.

The test to apply for impartiality is the nature of the incidence supported by the evidence which suggests that there was danger of bias on the side of the adjudicating body.[28] Thus, the first step is to examine whether the surrounding circumstances may support the allegation that the decision-maker is biased or not. The next is to look at it from the viewpoint of the prudent or fair-minded observer, and decide whether inference may be drawn that such leading circumstances are in real danger of bias on the side of a decision-maker.[29]In the TCC's case[30], the FCC in its submissions contended that 'accusatory and adjudicative powers are exercised separately' and that it is impartial and independent since the initiation of complaints 'do not involve a single individual or single department within the FCC, which both initiate and decide the complaints.' Although this submission was not determined by the court, it is clear that the FCC's departments are not independent from the control of the chairman and DG due to the following:

- Why does the Chairman or DG issue a summons and not the director or the head of the investigation department? The Competition Act does not guarantee that the DG or the chairman will not interrogate the summonsed person before referring him or her to the investigation department for further investigation.

- Why does the Chairman or DG apply for a search warrant and appoint a member of the FCC to accompany the police in the search, and not leave the investigation department to work alone? This indicates that they know the nature of the investigation and they are aware at what stage the search warrant is required. If the investigation department were to be independent from the control of the chairman or DG in due course of performing its function, the Competition Act or the Fair Competition Commission Procedure Rules (FCCPR) could empower it to summon any person to provide information to it, and where it deems fit, it would also be empowered to apply for search warrants and act alone without waiting for the authorization of the chairman of the FCC.

- Why does the DG have a mandate to order an investigation and yet it may decide not to refer a complaint to the FCC? If the investigation department were independent, the complaint would have been submitted to it for investigation. Where it deemed fit, it would refer a matter to the FCC for adjudication depending on the evidence on record, or issue a notice of non-referral to the complainant. The Chairman and the DG form part of the FCC hearing meetings. Indeed, they participate in investigation and adjudication.

The fact that the FCC investigates complaints and establishes sufficient evidence to support its case, leads to an undisputable inference that it is likely to be influenced, and be partial, as it cannot make a decision against itself. A decision-maker, who is biased, cannot easily give a fair trial as he or she may be influenced to favour one side.[31] One might say that an empty-minded judge is a good judge compared to a well-informed judge who might have pre-judged a matter before a hearing. In other words, a good judge is one who makes a decision based on facts and evidence submitted during the hearing, and not the one who makes a decision based on facts that came into his or her knowledge, prior to the arguments of the disputants. The premises of the this discussion draw an inference that section 69 of the Competition Act allows the FCC to be partial in due course of performing its duties and therefore breaches the fundamental principles of fair hearing as guaranteed by the Constitution.[32]

2.2.2 Example of Independent Departments of a Commission

In United States of America, despite of the fact that the Federal Trade Commission is vested with the powers to administer all issues of anti-trust, the Commission has further powers to establish independent departments such as the Bureau of Competition which is vested with investigation and prosecutorial powers and an Administrative Law Judge vested with adjudicative powers.[33] The decision of the Administrative Law judge is appealable to the Federal Trade Commission and thereafter to the courts.[34]

2.3 Procedure for Challenging the Constitutionality of Legislation in Tanzania

Article 64 (5) of the Constitution of United Republic of Tanzania declares that any law in United Republic of Tanzania which is inconsistent with the

25 .Slater at el,*'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?'* European Competition Journal,2009, Vol: 1, issue No: 5, at 33.
26 .Montag F,' The Case for a Radical Reform of the Infringement Procedure under Regulation 17' (1996) 8 *ECLR* 428-437, at 430.
27 (1997) 24 EHRR 221:244.
28 See *R v Gough* [1993] AC 646).
29 See *Re Medicaments* case 2001: 726H-727C.
30 See Tanzania *Cigarette Company Ltd v The Fair Competition Commission and the Attorney General*; Misc. civil cause No.31 of 2010, High Court of Tanzania at DSM (Unreported) at 10.
31 Betts DW, *How High is Too High? Judicial Elections and Recusal after Caperton*, Texas Review of Law & Politics, 2010, Vol: 15 at 248, available at *http://www.trolp.org/main_pgs/issues/v15n1/Betts.pdf*, [accessed on 24September 2016].
32 The Constitution of United Republic of Tanzania, 1977, Cap 2 RE 2002.
33 See Part 3 of Federal Regulation (16 Code of Federal Regulation (USA).
34 Neale AD and Goyder DG, The Anti-trust law of USA (3 ed) (1980),Cambridge University Press, London at 385-6. See also S 45. (Sec. 5) (c) and (g) of the Code of Federal Regulation.

Constitution shall be void. In order to give effect to it, article 30 (5) of the same Constitution, vests the only High Court of Tanzania with powers to deal this issues relating to unconstitutionality of the law or a provision of the law.[35]Likewise, article 30 (4) of the Constitution vests power to the legislature to enact a procedural law to institute proceeding relating to rights enshrined in the Constitution. It is on this basis that in TCC's case, TCC prayed for the High Court to declare as unconstitutional section 69(1) of the Competition Act which gives the FCC jurisdiction to determine complaints initiated by itself.

The expectation was to let the High Court exercise its power to satisfy itself with the constitutionality of section 69 (1) of the Competition Act and give the ruling. However, the court directed the petitioner to exhaust the local remedies available by appealing to FCT.

The question of law that arise from the decision of the High Court is as to whether the FCT has constitutional powers to deal with issues of unconstitutionality of the provision of law. Article 30 (5) of the Constitution vested power to the High Court to hear and determine issues of unconstitutionality and not any other administrative body. By directing a constitutional matter to the administrative bodies, the High Court allowed justice to be defeated by the technicalities of the law.

The High Court had a duty to ask itself what the petitioner before it sought? It is a constitutional issue, declaration of a provision of law as unconstitutional. The petitioner was not challenging the findings of the FCC *per se*, rather the powers vested in the FCC by the Competition Act. The FCT does not have the power to declare any law void. In Tanzania there is a rebuttable presumption that, 'a piece of legislation or provision in a statute is constitutional. The FCT would obviously presume that section 69 of the Competition Act is constitutional. The High Court allowed itself to be tied up with the technicalities of section 8 (2) of the Basic Rights and Duties Enforcement Act[36] **(BRADEA)** which obstruct dispensation of justice, thus contradicting the requirement of the Constitution, which direct courts 'to dispense justice without being tied up with technical provisions which may obstruct dispensation of justice'. [37]

3.0 Some Lessons from Other Jurisdictions

Solution to the challenge imposed by the TCC's case can also be obtained by drawing experience from other jurisdictions which have established precedents on similar situations. This article extrapolates from the experience of Jamaica in the case of *Jamaica Stock Exchange v Fair Trading Commission* (JSE's case).[38] In this case, the court was moved to interpret the provisions of the Fair Competition Act[39] of Jamaica, (FCA 1993) that vested the Fair Trading Commission (FTC) of Jamaica with the powers to initiate a complaint, investigate and adjudicate on it. The court declared such provisions unconstitutional. The JSE's case is discussed below.

3.1 Brief Facts of the JSE's case

In 1992 *Behring, Bunting & Golding Ltd* (*BD& G Ltd*) applied to the Jamaica Stock Exchange for corporate membership. The application was not determined until 1993, and in 1994 *BD & G Ltd* submitted a complaint before the FTC for investigation. The FTC made an investigation of the procedures and rules of the Jamaica Stock Exchange concerning the process of admitting new members; and based on its finding it concluded that the Jamaica Stock Exchange was in breach of the law. It therefore wrote an official complaint to the Jamaica Stock Exchange alleging, *inter alia* that the Jamaica Stock Exchange had created a barrier to entry into the market since it had failed to respond to an application for membership within a reasonable time, therefore, abusing its dominant position in the securities market.

The Jamaica Stock Exchange informed the FTC that it had no jurisdiction to entertain the matter since the FCA 1993 did not apply to the Jamaica Stock Exchange but to the Securities Act. The FTC contended that it had jurisdiction. The Jamaica Stock Exchange referred the matter before the court (Judge in Chambers) for determination of matters of law that the FCA 1993 was not applicable to it, and further that its constitutional right to be heard by an impartial decision-maker was breached when the FTC that conducted the investigation, lodged a complaint and adjudicated it. The court entered judgment in favour of the FTC. Sections 49 and 50 of the FCA 1993 allow the findings of the FTC to be appealed to the ordinary courts, thus the appellant (Jamaica Stock Exchange) appealed to the Supreme Court of Jamaica. The Supreme Court addressed several issues in this case. But, it is the action by the FTC and the constitutionality of the FCA 1993 that gives the FTC the powers to investigate and adjudicate alleged anti-competitive practice are relevant to this article.

3.1.1 The Decision of the Supreme Court of Jamaica

Forte P (Judge) was of the view that; '...to my mind the more substantive contention is whether the Commission (the FTC) has, and if so, should have the power to adjudicate upon matters which it has itself investigated and itself laid the complaint.'[40] The evidence on the record indicated that the officers of the FTC applying the powers vested in them by the FCA 1993 summonsed the manager of the Jamaica Stock Exchange under threat of penalty and had a thorough interview concerning the alleged prohibited practice. There was also a constant communication between the FTC and Executive Director of the Jamaica Stock Exchange for purposes of investigation. The court observed that; 'there is no guarantee that the Commissioner who directed the investigation or might have undertaken the investigation, would not sit and hear the complaint'. It was of the view that 'the evidence in record has revealed sufficient conduct in the officer of the FTC who consulted with the Commission throughout the 'investigation' to establish that there is a real danger of the Jamaica Stock Exchange being the subject of bias in the determination of the complaints'.

The investigation and adjudication powers vested in the Commission not only breach the 'common rule of natural justice' but also the constitutional right to be heard by 'an impartial tribunal.'[41]

35 *Attorney General v Lohay Akonaay and another,* [1995] TLR 80 (CA), at 94D-F.

36 Cap: 3 RE 2002.

37 See article 107A (e) of the Constitution of United Republic of Tanzania 1977, Cap: 2 RE 2002

38 Civil Appeal No: 92/97.

39 No 9 of 1993.

40 . See also sections 5, 7 and 8 of the Fair Competition Act of Jamaica, No 9 of 1993.

41 See Article 20 (2) of the Constitution of Jamaica of 1962.

The Supreme Court declared that '… the action and proceedings being taken and pursued by the FTC against the Jamaica Stock Exchange whereby the FTC is performing the functions of investigation, complainant and adjudication is in breach of the rules of natural justice and void.

The court gave its opinion that 'a problem may however, be remedied in the future if the legislature would place those functions in two separate bodies, (the investigative function in the FTC and the adjudicative function in the courts or in some other appropriate body)'. No one fit to be a judge in his own cause, *Nemo judex in causa sua*. The issue of bias has to be strictly emphasized,[42] and justice has to be administered impartially.

Another example is seen in the case of *Porter and Another v Magill*,[43] in which the Local Government Finance Act 1982 (England) vested the Auditor of the Commission with power to investigate, make up the complaint and hear and determine it. The court was of the view that '[t] he question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'. It further stated that no fair-minded and informed observer would suggest that the auditor, who investigated the matter and prosecuted it and made a decision, was free from bias.

4.0 Findings of the Discussion

Based on the findings of the Supreme Court of Jamaica and *Porter's case* which are persuasive, it is obvious that in Tanzania the multiple functions of the FCC originate from the settings of the Competition Act, and in the *TCC's case* the High Court ought to have exercised its constitutional power to declare the provisions of the Competition Act that vest multiple functions in the FCC void and therefore unconstitutional, for it breaches the general rules of natural justice and constitutional right of fair hearing as enshrined under article 13 (6) (a) of Constitution of Tanzania.[44]

In Jamaica, the decision in *JSE's case* sensitized many writers who called upon the relevant authorities to amend the competition law. According to Derrick[45], investigative power is to be left to the Commission and all the adjudicatory and enforcement functions to be passed on to the court. He admits that the background of the compositions of bills and the intention of the policy-makers led Jamaica to have a law which is not easy to enforce, and the remedy available is to amend the law (FCA 1993).

On the contrary, Gordon[46] introduced two relevant models to amend the FCA 1993. The first model is to separate adjudication and investigation functions into two distinctive bodies, which entail the establishment of a new body, which to him is too expensive. However, to re-set the adjudication and investigation in Tanzania together with its various functions seems to be possible and efficient as demonstrated in the recommendations, since the two institutions are already in place (the FCC and FCT).

42 See the *King v Essex Justices* [1927] 2 KB 475 at 490. Swift J stated that, 'it is essential that justice should be so administered as to satisfy reasonable persons that the tribunal is unbiased'.

43 [2002] 1 ALL ER 465.

44 Cap: 2 RE 2002.

45 Mc Koy, Derrick V, The Courts as the Preferred Means of Competition Law Enforcement (July 16, 2009) at 2, available at *http://ssrn.com/abstract=1913529* or *http://dx.doi.org/10.2139/ssrn.1913529*, [accessed on 23 September 2016].

46 Gordon PJ, 'The Case for Maintaining a Single Competition Agency for Investigation and Adjudication of Anti-trust Cases' at 14, available at *http://www.jftc.gov.jm/Libraries/Speeches_and_Presentations/The_Case_for_Maintaining_a_Sin* [accessed on 23 September 2016].

The second model according to Gordon is to divide the investigation and adjudication functions within the same body (the existing FTC), 'with the appropriate fire-walls to ensure that the rules of natural justice are preserved,' as in the American model. Gordon prefers this approach; however, this approach does not work in Tanzania as demonstrated above. There is no guarantee of 'fire-walls' between the Chairman or the DG and other members of the investigation department.

Based on the above arguments, the experience from the Jamaican competition legal regime is relevant to this article because competition law of both countries gives multiple functions to the regulatory bodies. These powers had been challenged in both countries by stakeholders, successfully in Jamaica (the *JSE's case*) and unsuccessfully) in Tanzania (the *TCC's case*). Tanzania has a lesson to take from Jamaica that the status of these multiple powers works against the principle of fair hearing as declared by the Supreme Court of Jamaica.

5.0 Conclusion and the Way Forward

5.1 General Conclusion

This article sought to answer the questions; firstly, whether the provisions of the Competition Act that concentrate investigation, prosecution and adjudication powers to the FCC breaches the right to a fair trial and limits access to justice and therefore unconstitutional. Secondly, whether it is the High Court or the Fair Competition Tribunal that has the power to declare provisions of the Competition Act unconstitutional. Further, to determine whether there is a need to amend the Competition Act.

Generally, the two institutions, namely FCC and FCT established by the Competition Act in Tanzania for enforcing competition law and policy are commendable since they are specialised institutions to deal with competition matters, notwithstanding some problematic areas identified in this article that require amendment.

The provisions of the Competition Act that concentrate investigation, prosecution and adjudication powers to the FCC are open to criticism as evidenced in the TCC's and TBL's cases above. The grounds of appeal laid down by the appellant in the TCC case, although overruled on a technical ground and not on merits, are very good grounds that show that the provisions of the Competition Act that concentrate power to the FCC are unconstitutional. These cases put to light the weaknesses of the current set up of the enforcement system that seems to undermine the Constitution and the principles of natural justice. It is therefore, an opportunity for both internal and external stakeholders to urge the government to review the law to remove this impediment of fair trial.

The decision of the Supreme Court of Jamaica which is persuasive in the Tanzania legal system revealed that the provisions of competition law that concentrate the powers in one body, is not only unconstitutional, but also breaches the general principles of natural justice, and the High Court has the Constitutional power to declare void and not the FCT. The Jamaican competition law also shows that courts are best positioned with final appellate jurisdiction in the dispensation of justice.

The Jamaican competition regimes have also revealed that it is possible to separate investigation from adjudication powers and build a bridge between specialised competition bodies and the normal court system. This article, however, does not intend to transplant these foreign regimes into the Tanzanian legal regime, but the legislature is bound to adopt the general principles of natural justice taking into consideration the fact that Tanzania has ratified international and regional instruments that advocate for a fair trial and domesticated them in the Constitution. The article therefore concludes that the institutional framework, functions and dispensation of justice under the FCC call to be amended, as herein below recommended.

5.2 Recommendations

The following recommendations are suggested based on the findings of the article. It is expected that if these recommendations are utilized, they will enhance both questions of effectiveness and efficiency of competition policy and adherence to the principles of natural justice.

5.2.1 Recommendation for FCC

Based on the analysis above, it is suggested that s. 69 (1) of the Competition Act, and rules 12 and 18 of Fair Competition Commission Procedure Rules be amended to remove adjudication function of the FCC. As a result, when prima facie evidence is established on cases of restricted trade practices; the case will be referred to a neutral body to determine it. In the event the amendment is done, it is also suggested that the current Director of Compliance be appointed as the chairman of the FCC (appointment should be done in accordance with the procedure set by the law) and the two departments of investigation and enforcement to continue to be under the Director of Compliance as they have necessary experience to investigate anti-competitive practices. The FCC will be well constituted and solely vested with investigation powers and hearing of other specific issues such as the proposal for mergers, exemptions and other administrative duties as provided by the Competition Act.

5.2.2 Recommendation for FCT

According to the findings of this article, ss 61 and 85 of the Competition Act and the rules of the Fair Competition Tribunal regarding the power of appeal of the FCT need to be amended to make the FCT the tribunal of first instance in the adjudication of competition disputes. Following this amendment, this article further suggests that the current chairman of the FCC be appointed a chairman of the FCT, and the current Director General of the FCC to be appointed a deputy chairman of the FCT so long as their tenure exists, for both have sufficient experience in adjudicating competition disputes.

In case the tenure of the office expires, competent personnel should be appointed to cover the above positions. The FCT should retain its appellate power on matters that the FCC has the power to make decisions, such as merger proposals and exemptions under sections 12 and 13 of the Competition Act.

5.2.3 Recommendation for Linking Administrative Bodies with Judicial Bodies

This article suggests that the High Court should be vested with powers to hear appeals from the decisions of the FCT. The High Court of Tanzania has several divisions including the commercial division. The preferable division suitable to hear appeals from decision of FCT on competition disputes is the High Court-commercial division. The High Court Commercial division has no exclusive jurisdiction on competition dispute, but there is no enabling provisions of the law that allow competition disputes settled by the FCT to be appealable to High Court commercial division.

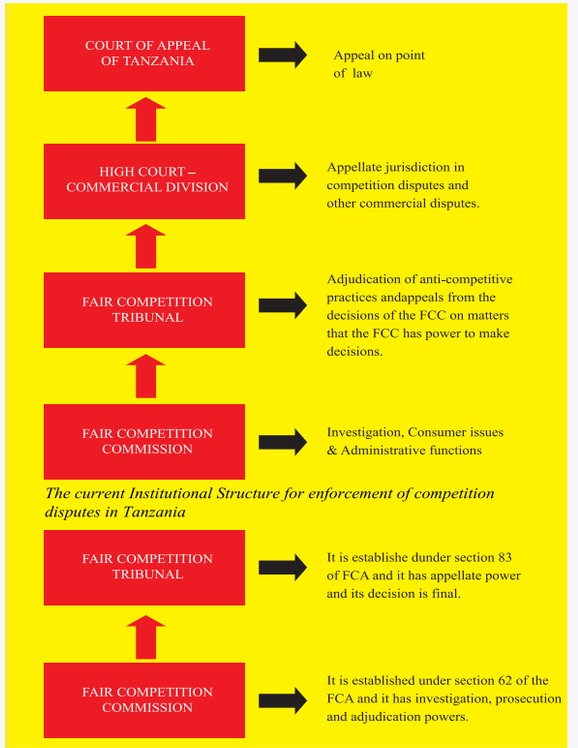
It is therefore suggested that the appeals from FCT should go to the High Court-Commercial Division because it is the relevant branch of the High Court for competition issues which are commercial in nature. Thus, the amendment of section 84 of the Competition Act goes hand in hand with amendment of the High Court Registry Rules so as to accommodate appeals from the FCT.

Therefore, as opposed to the current institutional framework provided by the Competition Act, herein

below is a suggested institutional structure that links both administrative bodies and the judicial bodies.

The re-structuring of the FCC and the FCT and linking them with the High Court-Commercial Division will help to draw a link between the quasi-judicial bodies and judicial bodies in

The proposed Institutional structure that links with the Court System



Source: Fair Competition Act No. 8 of 2003 (Tanzania)

determination of competition disputes, and therefore adhere to the doctrine of separation of power. Many jurisdictions like the United Kingdom,[47] South Africa,[48] and Canada[49] have opened this link in such a way that a competition dispute may be adjudicated from the administrative tribunals to the highest courts. The Court of Appeal of Tanzania retains its constitutional final appellate jurisdiction in all matters

47 .The Competition Act 1998 (England).
48 . The Competition Act, No 89 of 1988.
49 . Canadian Competition Act 2010.

LEGAL CHALLENGES RELATING TO TAXATION OF THE INFORMAL SECTOR IN TANZANIA.

Rose Joseph Jally[1] *& Tundonde Steven Mwihomeke*[2]

Abstract

This article looks at some underlying legal challenges of taxing the informal sector in Tanzania. In many African countries SMEs have been in existence since 18thc and their recognition is unvoidable. In Tanzania Micro and Small Enterprises (MSMEMs) are recognized in the Income Tax Act. A presumptive Taxation system is used as a means of taxing the sector. However, one of the challenges of using this system is on how to bring all the MSMEMs into tax base. Despite all what has been done by MKURABITA (Financing and Financing Plan), the small informal sector still cannot pay tax as provided in the tax law as the sector does not meet legal requirements for taxpaying sectors. Devising strategies that will bring the sector into tax net seems to be one of the solutions the government should think about. It is against the above context that the article exposes legal challenges in taxing the sector and highlights on how the government can structure and implement some legal strategies to bind the informal sector to pay tax.

Key Words: Legal challenges, taxation, informal sector

1 * LLM, Ruaha University College, LLB Tumaini University College and Assistant Lecturer, Institute of Judicial Administration.

2 * LLM and LLB University of Venda and Assistant Lecturer, Institute of Judicial Administration

1.0 Introduction

In Tanzania the Informal Sector occupies much of the population in the economy. The sector consists of many small scale businesses carried out by different individuals. Some of the businesses are not identified, and hence not registered. They tend to hide and evade tax payment.[3] Informal sector in Tanzania needs to be formalized since it includes people of low classes,[4] such as shoe shiner, *mama ntilie*, local clothes tailor, *machingas* and sales men of local medicines.[5]In 20th century the ILO first defined a socio-economic structure that is now commonly known as the informal sector, to mean.

> *All activities that operate largely outside the system of government benefit and regulation.*

Informal sector is characterized by the following; ease of entry, reliance on indigenous resources, family ownership of enterprise, small scale operation, labour-intensive methods of production and adapted technology, skills acquired outside the formal school system, unregulated and competitive markets.

In Tanzania, it is very difficult to make a clear determination of the informal sector as it is composed by those with no realistic enterprises and those who have fleeting behavior or appear seasonally and those who migrate from one area to another. Hence, there is no clear determination of all business records, properties and account.[6]

The MSMEM is now on the face of reformation in order to bring any business activity into tax net for the aim of ensuring that they all pay all necessary tax as is in a formal sector. This involves formalizing its small enterprises.[7] The main objective is to formalize the informal sector so that it pays tax and expands the tax base.[8] The taxation of informal sectors has proved to have many challenges which hinder effective tax collection by the government. This article aims at revealing and explaining the major legal challenges which hinder effective tax collection from the informal sector by the government.[9]

1.1 Identifications (Id) of the Informal Sector in Tax Law

Identification of the informal sector in tax law in a developing country like Tanzania is a major problem. This is because the National Identification (ID) does not

3 The Tanzania Investor Road Map, Final Assessment Report, USAID/ Tanzania,1999 provided that; "While the current regulatory environment is difficult for medium and large scale formal sector firms, it is largely inappropriate and irrelevant to micro and small scale informal businesses. … It is virtually impossible for small businesses to operate legally. … Consequently, the current environment encourages businesses to remain small, informal, and operating outside many of the constraints faced by large more visible operations. Although informal sector entrepreneurs, by being informal, may operate outside some of the constraints faced by larger enterprises, they face multiple obstacles of similar and different nature. Besides the fact that informal sector entrepreneurs often cannot operate without permits and do face regulatory constraints, they also have to deal with insecure and inappropriate working places, harassment by authorities and limited access to utilities and other inputs and services."

4 Mkuki, M,J., *Corruption in Africa: Cases, Consequences and Clean Up, the Ronan and Littlefield* Publishing-U.K, USA, 2005.

5 www.taknet.or.tz/viewclosedtopics.asp?topic_id=19&topic_status=1..... Aceessed*(03/01/2018)* The informal sector in Tanzania consists of mainly the unregistered and hard-to tax groups such as small scale traders, famers, small manufacturers, craftsmen, individual professionals and many small scale businesses

6 The informal sector is regarded as a group of production units which form part of the household sector. Household enterprises are units engaged in the production of goods and services, which are not constituted as separate legal entities independently of the household or household members that own them. They do not have a complete set of accounts which would permit a clear distinction between the production activities of the enterprises and the other activities of their owners, or the identification of any flows of income and capital between the enterprises and owners. The informal sector comprises: • Informal own-account enterprises ('self-employed') • Enterprise of informal employers (employing one or more employees).

7 Shahe, M. E., and Stiglitz, J.E., *On selective indirect tax reform in developing countries,89*, Journal of Public Economics, 2005, pp. 599-623.

8 Kimungu, H., and Kileva E. L., International Tax Dialogue Conference on SMEs Taxation: Challenges of Administering Small and Medium Taxpayers Tanzania Experience, Buenosaires, Argentina, 2007.

9 "The first phase of the program (diagnostic study) has been accomplished. It is now in the second phase of Reform design be 'I fore entering the third and fourth phases which are creation of the resource and implementation respectively .The formalization process in Tanzania is following a model by Peru's Professor Hernando De sotto. His company , Institute of liberty and Democracy (ILD) has been contracted by the government of Tanzania – with financial assistance from the Royal Norwegian Government –onto advice on the property and business formation process"

cater for all income earners. As a result, many businesses in the informal sector are left unregistered. It is thus difficult to access the tax payers' information. Yet, TRA has always been blamed for the lack of well organised strategies in collecting tax and in particular from the informal sector.

Recent development has seen petty traders across the country being given special identity. The exercise started on 10th November 2018. The special identity cards will make it easy for TRA to recognize them. This is a new strategy by President Magufuli to protect the group.[10] The IDs issued by the President Office are like 'stickers' that one buy and stick for identification and it carries no further information in terms of for instance which ID belongs to which *Machinga*. It seems that, the security features and serial numbers will only help to know if the ID is legal or fake, but it will not help to detect its holder and the trade he/she is engaged in, for example, whether its holder is a shoe shiner or *mama lishe*. The obvious danger is that these IDs might be sold to others when they become scant and precious. By using this model, the government is denying itself the right to have stout information or data of those engaged in the informal sector as the only information they will have now is the number of the *Machinga* based on the number of IDs sold out and this will make the Informal sector to remain untaxed.

Nevertheless, identification of individuals engaged in the informal sector such as the *Machinga* is an important stage and the country should be commended for that as it recognizes and support small traders to unleash their potential. To make the most out of the President's will and order, the Government should not only 'sell' these IDs, but they should properly identify and capture key information and profiles of all those engaged in the sector who turn out to buy and collect the IDs. As such, the exercise should result into a strategic investment in the 'informal' sector and have them paying tax.

10 During the meeting of his excellence with the Regional Commissioners the President pointed out that, the identification cards titled 'Small entrepreneur identification card' will be carried by these people wherever they will be doing their activities. In the first phase, each region will have 25,000 ID cards and the exercise will be continuous.

1.2 Registration of the Informal Sector

Registering petty traders in the informal sector such as *mama ntilie*, shoe shiner and *machingas* in Tanzania seems is a serious problem. The problem mainly hinges on the fact that most of the petty traders in the informal sector do not meet requirements which enable them to be registered. Nevertheless, the law requires any business of any size to obtain a business license prior to commencing operation. This is a process which is meant to ensure that the proposed business takes place in authorized areas in premises which the authorities can reach the entrepreneur for inspection and at which legal standards of safety, hygiene, employment and production are respected.[11]

On the other hand, there is a complex business registration and licensing systems. This is due to the fact that, there are many and different ways of registering and licensing a business entity. So, each business operating in Mainland Tanzania is required to obtain a certificate of registration from the Business Registration Centre within the local authority where the business is located depending on type of activities example of authorities includes local government, BRELA and TRA.[12] In most cases these processes of registration are cumbersome to Small and Medium Enterprises Sectors.[13]

11 Section 17 of the Tanzania Investment Act of 1997

This is again due to the fact that, there is no proper personal contract between tax officials and tax payers and poor provision of knowledge on regulation regarding taxation process which results into illegal and dishonest in tax collection as a result there is resistance in tax registration for purpose of tax payment.[14]

Another observed problem from the SMEs is that there is lack of a well-designed strategy to secure property right, example permanent piece of land for running the business.[15] Therefore, to avoid this people find it easy to opt to engage themselves into informal sector (SMEs) activity which seem to be easy to conduct.[16]

For SMEs to be registered for paying tax, the knowledge of tax laws should be given. This is because education is a key element of the human capital needed for business achievement. It is through education and training that one gets the foundation for intellectual development needed by entrepreneurs for a successful business.[17] Furthermore, it gives confidence to the entrepreneurs when dealing with clients.

On this, the government should be commended for its efforts on educating the SMEs on different issues of tax. However, the knowledge of tax law which is needed always depends on; expectations about the tax, the type of tax and the quality of the tax which is not sufficiently provided to the SMEs. Individuals should also be given knowledge about ways to conduct their businesses. For instance, they can be trained on how to dispose of hazardous waste, to negotiate, and manage contracts, essential elements of a binding contract, a basic knowledge of their rights and duties and how they can escape from making crimes.

Hence, the policy maker should keep in mind that the knowledge of tax law is a key factor for government revenue. There should therefore be guidelines to tax advisers so that a proper knowledge can be given and implemented in peoples mind and individuals should not be scared from asking for advice he or she needs on taxation matters before they register.[18]

12 Review of Informal Sector for Taxation Purposes – DPG Tanzaniawww.tzdpg.or.tz/.../TRA_Informal_Sector_Presumptive_Income_Tax_Report_draft_J... (accessed on 13 May, 2019)

13 *www.ilo.org/wcmsp5/groups/public/@ed_emp/.../documents/.../wcms_asist_8365.pdf(accessed on 13 May, 2019)*

14 https://journals.openedition.org/articulo/3376(accessed on 13 May, 2019)

15 Basically, an entity will be regarded to acquire legal status if it is formed (incorporated), registered and or licensed according to the laws of the country. In Tanzania an entity acquires legal status if it is registered and formed according to the law. When an entity acquires a legal status as a limited liability company, it separates itself from its owners. It becomes liable on its own. For a business entity to acquire legalization in Tanzania, it should be registered in accordance with the requirement of laws.

16 University of Dar es salaam Entrepreneurship centre (UDEC), ''Jobs, Gender and small Enterprises in www. Yef Africa.org/ (accessed on 12th January 2019)

17 Nkonoki, E., *What are the factors limiting the success and/or growth of small businesses in Tanzania? – An empirical study on small business growth* Arcada University of Applied Sciences, Helsinki, 2010, p.43-44

1.3 Lack of Record Keeping and Uncertainty of Income

An accounting system is one of the most effective decision making tools of management. It provides ordinary methods of gathering and organizing information about the various business transactions in order to aid management in making informed decisions.[19]

In developing countries like Tanzania,

18 *Ibid*

19 Amoako. G.K., (2013) *Accounting Practices of SMEs: A case Study of Kumasi Metropolis in Ghana*: International Journal of Business Management Vol.8 No.24, pp.73- 83.

most of those engaged in the informal sector experience challenges relating to income generation activities.[20] They lack transparency in accounting records and financial statement. This is mainly because of improper business records keeping.[21] The challenges of improper record keeping make it difficult for the financial institutions and government agencies to deal with the SMEs.[22]

As a result of lack of proper record keeping and record filing system in Africa and Tanzania in particular, the SMEs are traditionally experiencing difficulties in obtaining financial credits or equity. Consequently, most of them finance their activities using own funds, loans from friends and family, money lenders, relatives, rotating servings and credit groups.[23]

For instance for a person to purchase a loan he/ she should have a record of his or her business income of which the informal sector is lacking. SMEs also lack business plan and in most cases, their businesses are not permanent. Therefore, it is difficult for them to access loans. Morland and Dobie provide that SMEs are considered not to have any assistance in controlling up their activities.[24] Because of all these challenges of poor record keeping and uncertainty of income, it is hard for the tax collectors to have definite tax estimation. This leads to tax avoidance in order to expand their profit margin.

20 Kolstad I et al, (2006) *Bribes, Taxes and Regulations.. Business Constraints for Micro-Enterprises in Tanzania*. CHR Mchelsen Institute Norway. "the informal sector are subjected to high rate of business failure, high administrative cost, low productivity, under capitalization, shortage of skills, poor attitudes of the borrowers, collateral, legally registration as a limited liability company; and submission of feasibility studies.."

21 Masuke E(2010) Recent African Experience in SMEs Financing – A Case Study of CRDB Bank LTD (Tanzania). A presentation Paper.

22 Kengere,O., et al (2011). An Assessment of the effect of proper book keeping on the financial performance perspective from small and medium Scale Business Enterprises Kisiji Municipality

23 Olomi. D., et al (2018) Constraints to Access to Capital by Tanzania SMEs, Dar es Salaam: REPOA

24 M.P Morland And C Dobie, "Africa Ethics and Sustainability Within SMEs In Sub Sahara Africa Enabling Contradicting and Contaminating Relationship" In L. J. Spence And M.P. Moorland , (Eds) The International Society Of Business, Economics And Ethics Book Series, Heidelberg London , New York, 2010, p. 22

1.4 Fleeting or Seasonal Nature of Informal Sectors

Normally informal sectors are involved in businesses which are very difficult to measure and capture. Their businesses are done seasonally and they are transitory in nature. It is common place for these people to engage in a particular activity which is possible in specific period of the year.[25] Therefore the businesses depend on seasons. Selling of fruits during their season and when the season ends, the seller may engage in another activity like selling of second hand clothes is an example of the nature of businesses in this sector. One feature that needs to be noted is that change of business in relation to change of seasons also goes hand in hand with transferring from one place to another.[26] In this regard, it is difficult for the government to manage them. As a result, the government receives very little income tax from this sector. In most cases the sector operate from underground. This makes it difficult to capture the group for the government income.[27]

1.5 Migratory Nature of Informal Work

This is another challenge of informal sector. It is characterised by a habit of having no permanent place of business. This presents many challenges. They include difficulties in accessing market, unfaithful and unreliable customers, and

25 *https://books.google.co.tz/books?isbn=019872845X* (Edwin G. Nelson and Erik J. De Bruijn (2005). The informal sector of the Tanzanian economy is a changing, heterogeneous mixture of enterprises operating wholly or partially outside of the government system of regulation. It flourishes partly because informality offers opportunities of economic necessity to the poor, most of who will never be able to assimilate the costs of formalization, and partly because it offers others a low cost arena for experimentation that can lead to business growth. Some enterprises do formalize voluntarily, the stimulus for which can be represented as an economic function determined by the values that operators assign to institutional incentives, opportunity costs and formalization costs, and the process can be represented as an exchange transaction with government.

26 F . Schneider," The Size and Development of The Shadow Economy Around The World And Its Relation.
The hard to tax aysps.gsu.edu/isp/2636. Html- America (accessed on 6th September, 2018),

27 T.A. Backu,(*et al*) "SMEs, growth, and poverty: cross- country evidence" 10,3, *Journal of economic Growth* ,2005 p. 220

poor growth of a business.[28]The other challenge is in relation to the difficulties of capturing these individuals for tax purposes. As they make different places to be their selling places for their product, this makes the assessment of tax collect.[29]

1.6 Tax Evasion and Tax Avoidance

Tax avoidance is the practice and technique whereby one arranges his business affairs such that he pays little or no tax at all without contravention of the tax laws. Section 35 of Income Tax Act of 2008 defines tax avoidance[30] and also empowers the commissioner to make adjustment to any arrangement where he is of the opinion that the arrangement is tax avoidance.[31]

Tax avoidance is not punishable by the law. Thus where the tax authorities detect the practice of tax avoidance, the only solution is to amend the law in order to cork the loophole and weakness of the law which allows the possibilities of tax avoidance.[32]

28 Robinson, D.O., "Tanzania: Growth Acceleration and Increased Public Spending with Macro Economic Stability." In Chuhan-Pole, P. and Angwafo, M., (Edts), *Yes African Can success: Stories from a Dynamic Continent,* The World Bank Washington DC-Street NW, USA, 2011, pp. 1-20.

29 *Ibid.*

30 Section 35 (3) of the Income Tax Act of 2008 state that, "For the purposes of this section, "tax avoidance arrangement" means any arrangement - (a) one of the main purposes of which is the avoidance or reduction of liability to tax of any person for any year of income; (b) one of the main purposes of which is prevention or obstruction in collecting tax; or (c) where the main benefit that might be expected to accrue from the arrangement in the three years following completion of the arrangement is - (i) an avoidance or reduction of liability to tax of any person for any year of income; or (ii) prevention or obstruction in collecting tax, but excludes an arrangement where it may reasonably be 45 considered that the arrangement would not result directly or indirectly in a misuse of the provisions of this Act or an abuse having regard to the provisions of this Act, other than this section, read as a whole."

31 Section 35(1) of the Income Tax Act of 2008 state that, "Notwithstanding anything in this Act, where the Commissioner is of the opinion that an arrangement is a tax avoidance arrangement, he may by notice in writing make such adjustments as regards a person's or persons' liability to tax (or lack thereof) as the Commissioner thinks appropriate to counteract any avoidance or reduction of liability to tax that might result if the adjustments were not made."

32 (PDF) Avoidance and Evasion Tanzania By Godlove MMari | Godlove https://www.academia.edu/.../Avoidance_and_Evasion_Tanzania_By_Godlove_MMari. (Accessed on 13 June 2019)

Tax evasion on the other hand involves tax payers deliberate contraventions of the laws in order to minimize or eliminate tax liabilities altogether by paying no or little tax through violation of the law. Tax evasion is the application of fraudulent practices in order to minimize or eliminate tax liabilities. Unlike tax avoidance, tax evasion is punishable by the law. Examples of tax evasion includes making a false return of income by omitting or understating income or overstating expenses or making false statement in a return affecting tax liabilities.[33]

It is common ground that about 60 to 80 percent of the Small and Medium Enterprises sector do not pay tax because of small sizes of their capital, turnover and profit generated from their operations. Not paying or negative taxes is a means of increasing business net

33 Sections 98, 99 and 100 of the Income Tax Act of 2008, As follows; Section 98(1)A person who fails to – (a) maintain proper documents for a year of income as required by section 80(1); (b) file an estimate for a year of income as required by section 89(1); or Penalty for failure to maintain documents or file Statement or return of income (c) file a return of income for a year of income as required by section 91(1), shall be liable for a penalty for each month and part of a month during which the failure continues calculated as the higher of - (d) 2.5 percent of the difference between the income tax payable by the person for the year of income under section 4(1)(a) and (b and the amount of that income tax that has been paid by the start of the start of the month; or (e) Tshs. 10,000 in the case of an individual or Tshs. 100,000 in the case of a corporation. (2) A withholding agent who fails to file a statement as required by section 84(2) is liable for a penalty for each month or part of a month during which the failure continues calculated as the higher of - (a) the statutory rate applied to the amount of income tax required to be withheld under Subdivision A of Division II of Part VII from payments made by the agent during the month to which the failure relates; or 89 (b) Tshs. 100,000; Section 99(1) This section applies where – (a) an installment payer's estimate or revised estimate of income tax payable for a year of income under section 89, which shall be used to calculate an installment of income tax for the year of income payable under section 88; shall be less than (b) 80 percent of the income tax payable by the payer for the year of income under section 4(1)(a) and (b) (the "correct amount"). (2) Where this section applies, the installment payer shall liable for interest for each month or part of a month (the "period") from the date the first installment for the year of income is payable until the due date by which the person must file a return of income for the year of income under section 91(1). (3) The amount of interest that an installment payer must pay for each period under subsection (2) shall be calculated as the statutory rate, compounded monthly, applied to the excess of- (a) the total amount that would have been paid by way of installments during the year of income to the start of the period had the person's estimate or revised estimate equaled the correct amount; over (b) the amount of income tax paid by installments during the year of income to the start of the period and Section 100.-(1) A person who fails to pay tax on or before the date on which the tax is payable shall be liable for interest for each month or part of a month (the "period") for which any of the tax is outstanding calculated as the statutory rate, compounded monthly, applied to the amount outstanding at the start of the period. (2) For the purposes of calculating interest payable under subsection (1), any extension granted under section 79(2) or 93 shall not be applied. (3) A withholding agent may not recover from a withholder interest payable by the agent in respect of a failure to comply with section 84(1) or (3),

worth and keeping more of the wealth for the purpose of further investments. Negative taxes help micro and small businesses to survive and grow and get ahead in life significantly.[34] Thus the government fails to obtain tax from the SMEs.

To solve this the Government rationalized the presumptive scheme by introducing a new simplified taxation schedule for small business taxpayers as part of a drive to make it easier for informal sector operators (including start-up businesses) to register, formalize and start paying taxes. The First Schedule of the Income Tax Act of 2008 defines and provides content and structure of Presumptive Income Tax in Tanzania. However, the scheme could not accommodate all informal sectors due its requirements which seem to be difficult to be adhered by the SMEs.

In order to address the problem of taxation of informal sector in 2016 TRA conducted a policy research study aiming to pull small and medium enterprises into the tax net and introduced presumptive taxation scheme. Whereas the scheme has managed to simplify the taxation for operators in the informal sector to enter in the tax net, significant number of the operators in the informal sector still operate outside the net. However to date, the only success so far is identification of SMES which is a crucial stage for taxation process.

Therefore, this article proposes that, there is still a need to put in place a more simplified presumptive income tax structure in Tanzania that will promote an enabling and supportive environment to the development and taxation of the informal sector. This is because SMES are in huge numbers and if they could be taxed, the government revenue would have increased and this could have improve social services provisions to the citizens. Therefore Tanzania should find a better way to place the informal sector in the tax base for improvement of taxation.[35]

1.7. Conclusion

This article looked at the legal challenges that contribute to the rapid growth of informal sector in Tanzania, as not all persons in the informal sector are in tax base. The informal sector as a part of SMEs is categorized by two groups; the formal SMEs and Informal SMEs. To that effect, the formal SMEs consist of those businesses which can be taxed by the use of Presumptive Tax System. On other hand, the informal SMEs are not taxed. This shows that there is inadequate strategy in place for placing them in tax base.[36] With all these, taxation system of the informal sector in Tanzania seems to be a current issue which poses serious dilemma in tax. Tax law does not comprehensively provide for informal sector (micro informal sectors –MSMEMs) as it does to the formal sector.

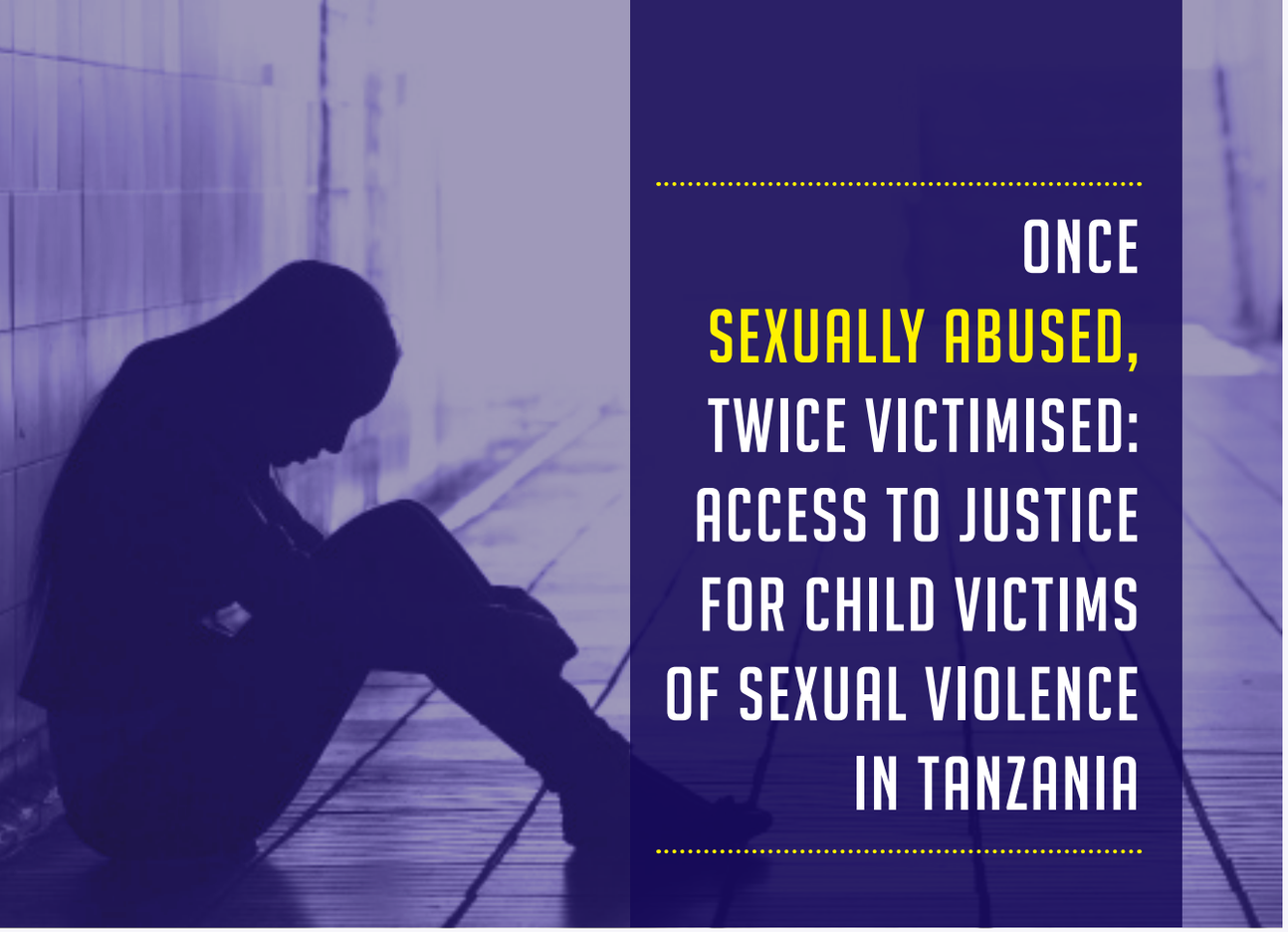
Despite the call for registration of informal sector, there is little improvement made thus far. The government is thus alerted to re-think of new methods of taxing small businesses.[37] Consideration may be made on the merits and demerits of adopting ways applicable to other sectors in Part III Division I: Subdivision A and B in the Income Tax Cap 332 RE 2008 which include employers, businesses and investments. On the other hand the government should promote voluntary compliance to the rules of taxation and have a self-assessment approach. This can be made by using information technology to facilitate communication with all tax payers and putting in place special officers for taxing these informal sectors in order to bring them to tax base.

34 Muhanga, M. I., et al (2014), How informal is the Informal Sector? An analysis of the Setting and Characteristics of the Informal Sector in Morogoro, Tanzania. A paper presented at Mwenge Catholic University 1st Annual Conference, October 29th – 30th , 2014, At Moshi, Kilimanajro, Tanzania.p.166-167

35 D. Romav., "Costs And Benefits Of Marginal Reallocation Of Tax Agency Reallocation Of Tax Agency Resource In Pursuit Of Hard –To-Tax Groups " aysps.gsu.edu/isp/2636.Html-North America, (accessed on June 6, 2018),

36 E.G. Nelson and E.J. De Bruijn, " *The Voluntary Formalization of Enterprises in a Developing Economy: the Case of Tanzania*" Journal of International Development, 2005.

37 As also provided under Paragraph 2.-(1) of the 1st Schedule of The Tanzania Income Tax Act of 2008 which provides that, Where a resident individual meets the following requirements for a year of income the individual's "income tax payable with respect to section 4(1)(a) for the year of income shall be equal to the amount of presumptive income tax provided in subparagraph (3): (a) the individual's income for a year of income consists exclusively of income from a business having a source in the United Republic; (b) the turnover of the business does not exceed the threshold in subparagraph (2); and (c) the individual does not elect to misapply this provision for the year of income. (2) The threshold referred to in subparagraph (1)(b) is Shillings. 20,000,000".



ONCE SEXUALLY ABUSED, TWICE VICTIMISED: ACCESS TO JUSTICE FOR CHILD VICTIMS OF SEXUAL VIOLENCE IN TANZANIA

Ms. Isabela Warioba[1], Dr. Ines Kajiru[2**]*

Abstract

This article uses empirical data to provide answers on the extent to which the justice system is accessible to child victims of sexual violence in Tanzania. It is informed by the procedural justice theory which holds that in interactions with authorities, the perceived fairness of the process may be more important than the favourability of the outcomes themselves.

It argues that despite Tanzania being a party to international treaties which guarantee access to justice and guaranteeing access to justice in its laws, the reality on the ground is that child victims of sexual violence are faced with so many hurdles to an extent that they decide to abandon the justice system in favour of out of court agreements which may not necessarily provide justice in favour of the victims. Thereafter, it is recommended that measures need to be taken in order to improve access to the justice system for child victims of sexual violence in order to protect them from being double victimised.

Key words: **Access to justice**, **sexual violence, child victims**

1 * PhD in Law candidate (University of Antwerp), LL.M in Human Rights and Democratisation Africa (Centre for Human Rights, UP), LL.B (M.U). Assistant Lecturer, Faculty of Law, Mzumbe University, Advocate of the High Court and Subordinate Courts thereto save for Primary Courts. Email: imwarioba@mzumbe.ac.tz and belawarioba@gmail.com.

2 ** PhD in Law (University of KwaZulu-Natal), LL.M in Commercial Law (M.U), LL.B (M.U). Lecturer, Faculty of Law, Mzumbe University. Email: inkajiru@mzumbe.ac.tz and ikajiru@gmail.com.

Introduction

Sexual violence occurs throughout the world. Research conducted suggests that in some countries nearly one in four women may experience sexual violence by an intimate partner, and up to one-third of adolescent girls report their first sexual experience as being forced.[3] Sexual violence has a profound impact on physical and mental health. Apart from causing physical injury, it is associated with an increased risk of a range of sexual and reproductive health problems, with both immediate and long-term consequences and sometimes even death. Deaths following sexual violence may be as a result of suicide, HIV infection or murder, the latter occurring either during a sexual assault or subsequently, as a murder of 'honour'. Sexual violence can also profoundly affect the social wellbeing of victims because individuals may be stigmatised and ostracised by their families and others as a consequence.[4]

Childhood sexual abuse is a major problem in Tanzania affecting 1 in 3 females and 1 in 6 males at some time before their 18th birthday.[5] Nearly 3 out of every 10 females and 1 out of every 7 males reported at least one experience of sexual violence prior to the age of 18.[6]

Millions of children throughout the world suffer harm as a result of crime for example sexual violence and if the rights of those children have not been adequately recognised, they may suffer additional hardship when assisting in the justice process.[7] Arguments in favour of strengthening the rights of victims in the criminal justice process have largely been made within the framework of a human rights perspective and with a view to meeting their procedural needs and minimising their experiences of secondary victimisation.[8] Secondary victimisation occurs when people who have been victimised experience victim-blaming, insensitive comments and statements that minimise the harm they have experienced.[9] Victims of sexual violence in particular have been found to experience secondary victimisation, often feeling blamed, doubted and re-victimised.[10] Girls are particularly vulnerable and may face discrimination at all stages of the justice system.[11]

It is therefore important to improve the responses to child victims and witnesses of crime because this improvement can make children and their families more willing to disclose instances of victimisation and be more supportive of the justice process.[12] The procedural justice theory[13] holds that in interactions with authorities, the perceived fairness of the process may be more important than the favourability of the outcomes themselves. This shows that it is important for people who have been victimised to be met with dignity and respect by the

3 Dahlberg, L.L., Krug, E.G., Mercy, J.A., Lozano, R., and Zwi, A.B., World Report on Violence and Health, World Health Organisation, Geneva, 2002, p. 149.

4 *Ibid*

5 UNICEF, CDC, MUHAS, Violence against Children in Tanzania Findings from a National Survey, UNICEF, Dar es salaam, 2011, p. 27.

6 *Ibid*

7 Para 7(a) of the UN Economic and Social Council (ECOSOC), UN Economic and Social Council 2005/20: Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, 22 July 2005, E/RES/2005/20, available at: http://www.refworld.org/docid/468922c92.html [accessed 5 July 2018 at 1810 hrs].

8 Antonsdóttir, H.F., *A Witness in My Own Case: victim–survivors' views on the criminal justice process in Iceland*, Feminist Legal Studies,2018, available at https://doi.org/10.1007/s10691-018-9386-z [accessed 17 December 2018 at 1350 hrs].

9 Orth, U., *Secondary Victimization of Crime Victims by Criminal Proceedings*, Social Justice Research, 2002, Vol. 15, No. 4, pp. 313–325.

10 Campbell, R. and Raja, S., *Secondary Victimization of Rape Victims: insights from mental health professionals who treat survivors of violence*, Violence and Victims, 1999, Vol. 14, No. 3, pp. 261–275.

11 Para 7(c) of the the UN Economic and Social Council (ECOSOC), UN Economic and Social Council 2005/20: Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, 22 July 2005, E/RES/2005/20, available at: http://www.refworld.org/docid/468922c92.html [accessed 5 July 2018 at 1810 hrs].

12 Para 7(i), Ibid.

13 Lind, E.A and Tom R.T., The Social Psychology of Procedural Justice, Springer, New York, 1988.

police and legal professionals, to be informed about how the criminal justice system works and how their case is progressing, and to be able to participate and have a voice in the criminal justice process.[14]

In Tanzania, like most legal systems, a victim is simply a complainant who initiates the criminal justice process by making a complaint or bringing evidence and information about commission of a crime to the police.[15] The police conducts investigations. Once investigation is completed the case will be ready for prosecution. If it is decided that there is a realistic prospect for conviction, the victim then plays an additional role as a witness for the prosecution and helping the State to give evidence in court in support of the offence the accused is charged with.[16]

This article investigates the ability of child victims of sexual violence to seek and obtain a remedy through formal institutions of justice in Tanzania. The article discusses briefly on why children need special provisions on the right of access to justice, on the right of the child to access justice under international law, access to justice for children in Tanzania and further examines legal and social barriers affecting child victims of sexual violence to access the formal systems and structures of the law and thereafter gives recommendations for improvements.

14 Antonsdóttir (no. 6 above).
15 Philip, M.T., *Victims of Criminal Justice System in Tanzania –the need for radical approach in advancing juvenile justice*, A paper presented at TLS 2015 Annual General meeting at the Arusha International Conference Centre, 2015, p. 2.
16 Philip, M.T., *Victims of Criminal Justice System in Tanzania –the need for radical approach in advancing juvenile justice*, A paper presented at TLS 2015 Annual General meeting at the Arusha International Conference Centre, 2015, p. 2.

1.1. The Study and Methodology

This article is a product of a research study entitled *Study on Drivers of Violence against Children and Positive Change in Tanzania Mainland and Zanzibar*. The study was commissioned by UNICEF and permission has been given to publish this article. The overall aim of the study was to understand better the underlying factors that contribute to a protective environment for children.[17] This aim was pursued through a dual focus on understanding better how socio-cultural norms and practices give rise to different forms of violence against children and how socio-cultural factors can help provide a protective environment for children. The study was undertaken between October 2014 and December 2015 in 10 regions across Mainland Tanzania and Zanzibar.

The framework for the study was informed by sociological theories of childhood, children's rights, ecologies of human development and principles of participatory action research. Emphasis was placed on providing opportunities for participants to engage in a process of participatory learning and reflection rather than simply offering their views. The study involved a first phase of focus groups followed by a second phase of community-based participatory research involving adults and children.

In the study, six focus groups were undertaken in each study location with boys, girls, mothers, fathers, professionals, and community leaders. This was then followed by 6 community action research workshops in each location to engage community members in a participatory inquiry process to explore how socio-cultural factors give rise to violence against children and in turn how to develop a protective environment for children. Community action research was complemented by participatory research with children exploring their own experiences of, and reflections on, violence against children and their visions for a protective environment. Participatory research with children involved community mapping, drawings, time-line/diaries, letters to adults and production of newspaper front pages to present their visions of protective environments for children. Additionally three community reference group meetings were held in each location involving on average 12 participants per group to engage key local stakeholders in a process of reflection and sense making at different stages of the research and to ensure a degree of local ownership.

17 Percy-Smith, B. *et al*, Study on Drivers of Violence against Children and Positive Change in Tanzania Mainland and Zanzibar, UNICEF, Dar es salaam, forthcoming, p. 4.

1.2. What is Sexual Violence

In this article, sexual violence means any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality by using coercion, by any person regardless of their relationship to the victim, in any setting.[18]

Coercion can cover a whole spectrum of degrees of force.[19] Apart from physical force, it may involve psychological intimidation, blackmail or other threats for instance, the threat of physical harm. It may also occur when the person aggressed is unable to give consent.[20]

18 Dahlberg (no. 1 above) p. 149.
19 *Ibid*
20 *Ibid*

1.3. What is access to justice

There is no single definition of access to justice. However, the words 'access to justice', serve to focus on two basic principles of the legal system, a system by which people may vindicate their rights and resolve their disputes under the general auspices of the state.[21] For such to be effective, the system must first be equally accessible to all, and second, it must lead to results that are individually and socially just.[22]

Over the last few decades the concept of access to justice has evolved from a right to take legal action for the violation of rights into a term that more broadly encompasses equitable and just remedies.[23] Access to justice is increasingly viewed as the right of individuals and groups to obtain a quick, effective and fair response to protect their rights, prevent or solve disputes and control the abuse of power, through a transparent and efficient process in which mechanisms are available, affordable and accountable.[24]

It has been said that access to justice is not limited to the procedural mechanism for the resolution of disputes but includes other variables like the physical conditions of the premises where justice is dispensed, the quality of the human and material resources available thereat, the quality of justice delivered, the time it takes for the delivery of justice, the moral quality of the dispenser of justice, the observance of the general principles of the rule of law, the affordability of the cost of seeking justice in terms

21 Malunga, B., *The Rule on Corroboration in Sexual Offences and Women's Access to Justice in Malawi*, Zambia Law Journal, 2015, Vol.46, pp.121-150, at p. 126.
22 Malunga (no. 19 above) p. 126.
23 Smith Hrle, M., and Tošić, S., Children's Equitable Access to Justice in Bosnia and Herzegovina, UNICEF, Sarajevo, 2015, p. 24.
24 Human Rights Council, Rights of the Child: Access to Justice for Children, A/ HRC/25/L.10, 25 March 2014.

of time and money, the quality of the legal advisers that assist the litigants, the incorruptibility and impartiality of operators of the system.[25]

Traditionally, access to the justice system has focused more on access to justice per se rather than on the quality of justice itself.[26] From the rights-based approach, access to justice system is important to protect people's rights and promote their social inclusion while barriers to access reinforce poverty and social exclusion.[27] Thus, access to justice system should be seen from a holistic point of view.[28]

Access to justice is a right in itself and a prerequisite for the fulfilment of all other rights, whether social and economic or civil and political rights.[29] Access to justice is crucial for restoring rights that have been disregarded or violated because there is no point of having rights, if the rights are violated without a remedial course.[30]

1. Do Children Need Special Provisions and Protection on the Right to Access Justice?

As in other areas of the law and its operation there are unspoken and often unrecognised prejudices which operate to exclude children and young people from the legal system and work against their interests.[31] Although a human rights approach is generally accepted when dealing with adults, it is somehow deemed to be ineffective when children are the potential client group. This is because to some extent there is a perception that children and young people are not able to make decisions in their own best interests.[32] For children of tender age, particularly those under the age of five, it is true that it would be difficult to act on their behalf without obtaining further guidance from either a guardian, whether or not a parent, or someone with knowledge of child development or child psychology.[33] However, this argument cannot be considered persuasive when it comes to older children and young adults.[34]

Consequently, children and young people do not readily seek legal advice independently because of the temptation on the part of adults to deny the competence of children and young people and to substitute their judgement for that of the child or young person in the belief that they are acting in the best interests of the child or young person.[35]

However, the concept of the best interests of the child is problematic as it has an inconsistent history.[36] Until very recently most societies have interpreted the concept in a manner that was paternalistic.[37] Adults were able to substitute their judgement for that of the child on the basis that they possessed a greater knowledge of the world and had a better understanding of the consequences of actions. Rarely were any guidelines given to decision-makers as to the factors to be taken into account when they were making decisions purportedly in the best interests of the child.[38] This conception of best interests also served to undermine the idea that children had competencies which should be respected.[39] This approach to the best interests principle has been brought into question by the provisions of the Convention on the Rights of the Child.[40] Increasingly, scholars are taking the view that the best interests principle should be seen in light of the purposes of the CRC, one of which is to give greater recognition to the autonomy rights of children and young people and to accord due weight to their views.[41]

The purpose and necessity for special children's rights is arguably that children are more vulnerable compared to adults and hence require special provision and protection by adults and special institutions.[42] This is not disputed. However, this article emphasizes that children should be allowed to exercise these rights and conditions should be created to allow this. Children must be understood as social agents if the principle of the CRC that children are subjects of rights is to become a reality.[43]

Therefore, the attitude that children are 'incomplete' human beings who must first develop and until then are dependent and possibly inferior on adults which is socially constructed, if allowed to be the basis of interpretation of children's rights will result into and intensify dependence.[44] This article takes the position that children's rights are a possible way to reduce socially constructed children's independence, to strengthen their autonomy and make their agency a reality. This should be reflected in the legal provisions of access to justice so that the right conditions are created to enable children to participate directly in proceedings, air their views and their views being given due weight.

2. Right of the Child to Access Justice under International Law

The right of the child to access justice has two dimensions. A child can have rights as an alleged offender, and also a child can have rights as a victim/witness. This paper will focus on the second dimension of the right of the child to access justice as victims/ witnesses. Guideline 9 (a) of the UN Guidelines on Matters involving Child Victims and Witnesses of Crime[45] defines child victims and witnesses as 'children and adolescents, under the age of 18, who are victims of crime or witnesses to crime regardless of their role in the offence or in the prosecution of the alleged offender or group of offenders'. Children's access to justice, as defined by United Nations (UN), is the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards (including the Convention on the Rights of the Child).[46]

Access to justice for children is at the core of the protection of human rights of children and an essential prerequisite for the protection and promotion of all other human rights.[47] Children often face challenges in their efforts to seek justice

25 Gwangudi, M.I., *Problems Militating against Women's Access to Justice in Nigeria*, University of Maiduguri Law Journal, 2002, No. 5, pp. 13-14 as quoted by Okogbule, N.S., *Access to Justice and Human Rights Protection in Nigeria: Problems and prospects*, SUR International Journal on Human Rights, 2005, Vol.2 No.3, pp. 95- 113, at p. 9.
26 Mece, M., *Access to Justice System as an Effective Enjoyment of Human Rights: Challenges faced by Roma minority in Albania*, Contemporary Readings in Law & Social Justice, 2016, Vol.8, No.1, pp. 215- 44, at p. 216.
27 Mece (no. 24 above) p. 216.
28 *Ibid*
29 UN Special Rapporteur on Extreme Poverty and Human Rights, Extreme poverty and Human Rights, A/67/278, 9 August 2012, para. 91.
30 Smith and Tošić (no. 21 above) p. 24.
31 Ustinia, D., Justice for Children: The obligations of society, lawyers and law schools, Flinders Journal of Law Reform, 1997, Vol.1, pp. 297- 309, at p. 298.
32 For a proposed model of decision-making which would recognise the competencies of young people, see Eekelaar, J., *The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determination*, International Journal of Law, Policy and the Family, 1994, Vol. 8, No. 1, pp. 42–61.
33 Ustinia (no. 29 above) p. 299.
34 *Ibid*, p. 298.
35 Ustinia (no. 29 above) p. 303.
36 Ustinia (no. 29 above) p. 299.
37 *Ibid*
38 *Ibid*
39 *Ibid*
40 *Ibid*
41 Rayner, M., *The Right of the Child to be Heard and Participate in Legal Proceedings: Article 12 of the UN Convention on the Rights of the Child*, A paper presented to the First World Congress on Family Law and Children's Rights, Sydney, July 1993.
42 Liebel, M., Children's Rights from Below: Cross-cultural Perspectives, Palgrave Macmillan, Hampshire 2012, p. 85.
43 *Ibid*
44 Liebel (no. 40 above) p. 85.
45 ECOSOC Resolution 2005/20, 22 July 2005.
46 United Nations, UN Common Approach on Justice for Children, 2008, available at https://wwwessex.ac.uk/armedcon/storyjid/UNCOMMON.pdf [accessed 5 July, 2018 at 1532 hrs].
47 The UN Office of the High Commissioner for Human Rights (OHCHR), Opening remarks of Flavia Pansieri, Deputy High Commissioner for Human Rights on Human Rights Council Annual meeting on the Rights of the Child, 2014, available at https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14367&LangID=E [accessed 6 July 2018 at 12.33 hrs].

because of complex justice systems, lack of awareness about their rights, reluctance to seek justice and because in many parts of the world it was culturally and socially unacceptable for children to lodge complaints and claim redress because as discussed above, children are considered incompetent and unable to make decisions in their best interests[48]

The Economic and Social Council's Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime[49] provide good practices, standards and principles relevant for effective criminal justice for children. Access to justice for children requires the legal empowerment of the children to be able to obtain a just and timely remedy for violations of their rights.[50] Access to justice also guarantees the speedy and fair administration of justice accompanied by appropriate support for children especially children with disabilities as victims of the offences through, among other things, access to relevant information, legal and other services for counselling and social assistance/support and the right to participate in criminal trials where relevant and appropriate.[51] In order to ensure justice for child victims and witnesses of crime, professionals and others responsible for the well-being of those children must respect the following cross-cutting principles: dignity, non-discrimination, best interests of the child, protection, harmonious development and right to participation.[52]

Therefore, there should be a child sensitive justice system to guarantee access to justice for children. A child-sensitive justice system is the one that understands and respects the rights of children and their unique vulnerabilities and includes independent, safe, effective and easily accessible complaint mechanisms for children.[53] The views of children, even those of the youngest, are to be given due consideration. Furthermore, children have to be protected from manipulation, harassment, reprisals or intimidation.[54]

2.1. Specific Aspects of the Right to Access Justice for Children

2.1.1. Children's Participation in Court Proceedings

Children's participation in court proceedings is an empowering experience especially if they are mature.[55] It affirms their dignity by being treated as individuals and also affirms their equality in society and under the law.[56] It may also be essential to ensure that justice is served as their testimony may provide the necessary evidence to secure a conviction.[57] However, there are many concerns about child participation in court, especially when the child has a disability, as the court environment by its nature is hostile and unfavourable to children.[58] It may involve long waiting periods, and the content of the proceedings in sexual offences by nature is traumatising and uncomfortable.[59] The court, therefore, has a duty to provide the necessary support and means of participation to children so as to ensure effective access to justice.[60] As vulnerable witnesses, there must be special measures and other reasonable accommodations according to the personal needs of the child.[61]

Article 12 of the CRC gives children the right to express their views freely in all matters affecting them. The article places a legal obligation on State parties to make sure that a child who can form her/his own views has the right to express those views freely in all matters and that these views are given due weight in accordance with the age and maturity of the child. Even more explicitly, article 12(2) of the CRC provides that children in particular shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The United Nations Human Rights Council has noted with concern that children are rarely seriously consulted and that states must ensure that children are provided the opportunity to be heard in any judicial or administrative proceeding affecting them, either directly or through a representative or an appropriate body, in accordance with article 12 of the CRC.[62] This requires giving children the opportunity to participate meaningfully; the opportunity to express themselves if capable of forming views; information about processes in which they are involved, adapted to their age, maturity and circumstances, in a language they understand and in a gender and culture sensitive manner; and explanation of the consequences of decisions affecting them. It also necessitates taking an overarching child-sensitive approach, which is adapted to the child's individual needs and circumstances.[63]

The CRC and the African Charter on the Rights and Welfare of the Child (ACRWC) provide for legal and other appropriate assistance but the presence of parents or legal guardian when a child is being heard is an additional requirement provided for only under the CRC.[64] The presence of parents or legal guardians may be waived if this is not in the best interest of the child and the child's age and situation are taken into consideration.[65]

2.1.2. Non-discrimination

The non-discrimination principles found in international human rights law are particularly important for children, because as discussed above, they can face discrimination based on their age as well as a particular vulnerability or status.[66]

Article 26 of the International Covenant on Civil and Political Rights (ICCPR)[67] reaffirms the principle of non-discrimination and equality before the law, stating that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. The ICCPR includes a broad non-discrimination provision[68] as well as a more specific provision affirming equality before the law, equal protection by the law and non-discrimination.[69]

48 OHCHR (no. 45 above).
49 United Nations Office on Drugs and Crime Vienna, Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary, United Nations, New York, 2009.
50 UN (no. 44 above).
51 OHCHR, Access to Justice for Children: Report of the UN High Commissioner for Human Rights, A/HRC/25/35,UN General Assembly, New York, 2013.
52 ECOSOC (no. 5 above) para 8.
53 OHCHR (no. 45 above).
54 *Ibid*
55 See generally Ross. I. et al, Child Participation in Court, available at http://www.law.umich.edu/centersandprograms/pcl/ljjohnsonworkshop/Documents/Child%20Participation20in%2OCourt.pdf [accessed 5 July, 2018 at 1751 hrs].
56 ECOSOC (no. 5 above).
57 Malunga, B., Kanyongolo, N.R. and Mbano-Mweso, N., *Access to Justice of Children with Disabilities in Defilement Cases in Malawi*, African Disability Rights Year Book, 2017, Vol. 5, No. 1, pp. 25 – 39, at p.36.
58 Ross (no. 53 above).
59 See Firth, H. et al, *Psychopathology of Sexual Abuse in Young People with Intellectual Disability*, Journal of Intellectual Disability Research , 2001, Vol. 45, No. 3, pp. 244-252; Gail, S., et al, *Testifying in a Criminal Court: Emotional effect on child sexual assault victim*, Monographs of the Society for Research in Child Development, 1992, Vol. 57, pp. 1-159.
60 Malunga (no. 55 above) p. 36.
61 *Ibid*
62 United Nations, Human Rights Council Resolution A/HRC/25/L.10, United Nations, Geneva, 25 March 2014, para. 7.
63 *Ibid*
64 CRC Article 40(2)(b)(iii).
65 CRC Article 40(2)(b)(iii).
66 Smith and Tošić (no. 21 above) p. 28.
67 1966.
68 Article 2.
69 Article 26.

Specifically for child victims and witnesses, they should have access to a justice process that protects them from discrimination based on the child's, parent's or legal guardian's race, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status.[70]

Age should not be a barrier to a child's right to participate fully in the justice process. Every child should be treated as a capable witness, subject to examination, and his or her testimony should not be presumed invalid or untrustworthy by reason of the child's age alone as long as his or her age and maturity allows the giving of intelligible and credible testimony, with or without communication aids and other assistance.[71]

2.1.3. Effective Remedy

Article 2(3) of the ICCPR requires States parties to provide an effective remedy to those whose rights or freedoms are violated. This may entail judicial, administrative and legislative measures. Claims must be determined by a competent judicial, administrative or legislative authority, or by any other competent authority provided for by the legal framework of the state. Claims that have been granted must be enforced. The Human Rights Committee has further noted in relation to article 2(3) that remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children.[72]

The Committee on the Rights of the Child has also stated that for rights to have meaning, effective remedies must be available to redress violations. And that this requirement is implicit in the CRC ... Children's special and dependent status creates real difficulties for them to pursue remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy and access to independent complaints procedures and to the courts with necessary legal and other assistance.[73]

Article 39 of the CRC recognises a right to reparation and obliges States parties to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. The child's right to reparation, depending on the nature of the injury or violation of rights suffered, may include the right to assistance in repairing the consequences of a wrong or injury and/or financial and/or moral compensation.[74]

The Guidelines in Matters Involving Child Victims and Witnesses of Crimes adds that child victims should, wherever possible, receive reparation in order to achieve full redress, reintegration and recovery. Also, procedures for obtaining and enforcing reparation should be readily accessible and child-sensitive.[75]

2.1.4. Privacy

The Committee on the Rights of the Child has stated that there is a need to have easy access to individual complaint systems as well as judicial and appropriate non-judicial redress mechanisms that guarantee fair and due process, with special attention to the right to privacy.[76]

The right of the child to privacy is guaranteed in both the CRC and the ACRWC.[77] It seeks to protect the honour and reputation of the child by limiting publicity in child justice. Both the Committee on the Rights of the Child and the Beijing Rules have recommended that privacy should be respected to avoid undue publicity or labelling.[78] The Guidelines in Matters Involving Child Victims and Witnesses of Crimes have recommended that respect for a child's dignity should be a matter of primary importance for child victims and witnesses.[79]

In order to ensure respect for the right to privacy, it is recommended that cases involving children should be heard in camera and anonymity maintained,[80] and that court documents, such as court orders and judgments, should not disclose children's names.[81] In addition, any information that may lead to the identification of a child should also not be published.[82]

2.1.5. The Right to Safety

In order to encourage children and their families to be more willing to disclose instances of victimisation and spearhead the prosecution process, the safety of the child victims should be guaranteed. Where the safety of a child victim or witness may be at risk, appropriate measures should be taken to require the reporting of those safety risks to appropriate authorities and to protect the child from such risk before, during and after the justice process.[83] Professionals who come into contact with children should be required to notify appropriate authorities if they suspect that a child victim or witness has been harmed, is being harmed or is likely to be harmed.[84] Furthermore, professionals should be trained in recognising and preventing intimidation, threats and harm to child victims and witnesses.

Where child victims and witnesses may be the subject of intimidation, threats or harm, appropriate conditions should be put in place to ensure the safety of the child.[85] Such safeguards can include avoiding direct contact between child victims and witnesses and the alleged perpetrators at any point in the justice process, restraining orders and bail restrictions for the alleged offender.[86]

2.1.6. Expedited Trials

Furthermore, States are to ensure that trials take place as soon as practical, unless delays are in the child's best interest. Investigation of crimes involving child victims and witnesses should also be expedited and there should be procedures, laws or court rules that provide for cases involving child victims and witnesses to be expedited.[87]

70 ECOSOC (no. 5 above) para 15.
71 *Ibid*, para 18
72 United Nations Human Rights Committee, General Comment No. 31 [80]: The nature of the general legal obligation imposed on states parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, United Nations, New York, 26 May 2004, para. 15.
73 United Nations Committee on the Rights of the Child, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, United Nations, Geneva, 27 November 2003, para. 24.
74 See, for example: United Nations Committee on the Rights of the Child, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, United Nations, Geneva, 27 November 2003, para. 24; and United Nations Human Rights Committee, General Comment No.31[80], The nature of the general legal obligation imposed on States parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, United Nations, New York, 26 May 2004, para. 16.
75 Para 35.
76 United Nations Committee on the Rights of the Child, General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child, CRC/GC/2003/4, United Nations, Geneva, 17 March 2003, para. 9.
77 175Article 40 (2) (b) (vii) CRC; art 17(2) (d) ACRWC.
78 United Nations Committee on the Rights of the Child, CRC General Comment No 10: Children's rights in juvenile justice, CRC/C/GC/10, United Nations, Geneva, 25 April 2007, Para 64; Beijing Rules, rule 8.
79 ECOSOC (no. 5 above) para 8 (a).
80 ECOSOC (no. 5 above) paras 27, 28; UN CRC (no. 76 above) para 64.
81 ECOSOC (no. 5 above).
82 *Ibid*
83 ECOSOC (no. 5 above), para 32.
84 *Ibid*, para 33.
85 *Ibid*, para 34.
86 *Ibid*
87 *Ibid*, para 30 (c).

3. The Law on Access to Justice for Children in Tanzania

Access to justice for all is a constitutional right guaranteed by article 13(1) of the Constitution of United Republic of Tanzania. The provision guarantees equality before the law and equal protection before the law for all. It means that children are covered by the provision as well. The Constitution also provides for the right to be heard for all including children.[88] The Law of the Child Act (LCA) also provides for the right to be heard in judicial proceedings for children.[89]

The matter of a child as a witness is covered by section 115 of the LCA. In this provision, the courts have been given the mandate to convict on the basis of a testimony of a child for sexual offences even if that testimony is not corroborated.[90] However, they can only do this after establishing the credibility of the child victim of sexual violence. This was also the position in the case of *Saasita Mwanamaganga vs. R.*[91]The same way for other offences, in criminal proceedings, the court may receive and act on uncorroborated evidence of a child of tender age after satisfying itself that the child is telling nothing but the truth and recording its reasons for that satisfaction in the proceedings. This position is reflected in section 127(8) Evidence Act as amended by the Written Laws (Miscellaneous Amendments) Act.[92]

The importance of the right to be heard for children was underscored in the case of *Kimbute Otiniel v the Republic*[93] whereby the court held that the right to be heard is pivotal to the protection of the best interests of the child in the administration of justice. The court proceeded to state that the right to participate in judicial proceedings particularly for child victims of sexual violence is clearly entrenched in our laws.

4. Legal Efforts to Address Sexual Violence against Children in Tanzania

Each child has the right to his or her physical and personal integrity, and protection from all forms of violence.[94] Children, as human beings, are entitled to enjoy all the rights guaranteed by the international human rights treaties that have developed from the Universal Declaration of Human Rights.[95] However, childhood sexual abuse is a major problem in Tanzania affecting 1 in 3 females and 1 in 6 males at some time before their 18th birthday.[96] Nearly 3 out of every 10 females and 1 out of every 7 males reported at least one experience of sexual violence prior to the age of 18.[97]

Several efforts especially legal ones have been made in order to deal with the frightening statistics of sexual violence against women and children in particular in Tanzania. The Penal Code[98] was amended in 1998 by the Special Offences Special Provisions Act (SOSPA).[99] The SOSPA amended several written laws, making special provisions in those laws with regard to sexual and other offences to further safeguard the personal integrity, dignity, liberty and security of women and children.[100] SOSPA as a regulatory framework provides severe penalty for anybody found guilty of a sexual offense. However, some argue that, this severity of the law that has created unintended problems in the legal proceedings including inadequate prosecution and a low rate of convicting perpetrators.[101] This is partly due to an unrealistic demand by magistrates for evidence convincing them beyond reasonable doubt that the accused committed the crime.[102]

5. Factors Affecting Access to Justice for Child Victims of Sexual Violence in Tanzania

Even though the law clearly provides for the right to access justice, the reality on ground is somewhat different. The process of access to justice especially for child victims of sexual violence is characterised with many hurdles. The study revealed some factors which impede access to justice for child victims of sexual violence as follows:

5.1. Social Norms

Considerable stigma and stereotypes concerning sexual violence persist in Tanzania, and the perception that girls/ women who are sexually assaulted are to blame is common. This results into the failure of the girls to report sexual violence against them. Furthermore, the view that family matters should be resolved privately, by and within the family, are a pervasive factor in reducing recourse to justice in situations of sexual violence especially in cases where the perpetrator is a family member.

Therefore, there is a preference to settle these cases out of court mostly at the family level.[103] In these cases, elders, parents or traditional leaders will carry out the settlement.[104] The assailant will mainly be asked to pay a small sum of money to the elders or the parents or husband of the victim. [105] In most occasions parents only report when they do not like the young man or after the girl has become pregnant or when the boy refuses to marry her.[106] For example in the case of *Galus Kitaya v. Republic*,[107] part of the appellant's defence was that even though he was involved sexually with the complainant who was below the age of 18 years, when the parents became aware, the father of the complainant demanded an amount of Tanzanian shillings 400,000/= as dowry. He was only reported to the police after his failure to pay the sum. The preference to settle out of court is fuelled by the perceived ineffectiveness of the justice system in upholding their duties in enforcing laws and bringing perpetrators to justice.[108] The general view is that there is corruption in the police and judiciary and therefore their cases will not get to court and even when they do, the perpetrator will be let off.[109]

88 Article 13(6)(a).
89 Section 99(1).
90 This position is also reflected in section 127 of the Evidence Act (Cap. 6 R.E 2002).
91 (Criminal Appeal No. 65 of 2005).
92 Evidence Act [cap. 6 R.E 2002] as amended by section 26 of the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016.
93 Criminal Appeal No 300 of 2011 (unreported) Dar es Salaam (CA) 74.
94 Pinheiro, P.S., World Report on Violence Against Children, The United Nations Secretary-General's Study on Violence against Children, Geneva, 2006, p. 31.
95 1948.
96 UNICEF, CDC, MUHAS, Violence against Children in Tanzania Findings from a National Survey, UNICEF, Dar es salaam, 2011, p. 27.
97 *Ibid*
98 Cap 16 R.E 2002.
99 Act no. 4 of 1998.
100 Mwenegoha H.O., *Violence Against Women In Tanzania: A call for an anti-domestic violence legislation*, Institute of Judicial Administration Journal, 2017, Vol. 1, No. 1, pp. 34 – 49, at p. 38.
101 Bali T.A.L., *Child Sexual Abuse Laws and Cultural Adjustments: case of Tanzania*, Unpublished MA Thesis, University of Connecticut, Storrs, 2006.
102 Bali T.A.L, *Understanding Strengthening Administration of Justice through Experiences of Child Sexual Abuse Victims in Tanzania*, Journal of Law, Policy & Globalization, 2014, Vol. 24, pp. 95 – 104, at p. 98.
103 Percy-Smith (no. 15 above) p. 101.
104 Pearce, S., *Violence against Women and HIV/AIDS in Sub Saharan Africa: The enforcement of rape laws in Tanzania, Zimbabwe and South Africa*, p.19, available at https://www.law.utoronto.ca/documents/ihrp/HIV_pearce.doc [accessed 11 June 2018 at 2010 hrs].
105 *Ibid*
106 The Law Reform Commission of Tanzania, Report on the Review and Drafting of the Proposed Provisions for the Amendment of the Sexual Offences Laws as Amended by SOSPA 1998, The Law Reform Commission, Dar es salaam, 2009, p. 75.
107 Criminal Appeal No. 196 of 2015.
108 Percy-Smith (no. 15 above) p.169.
109 *Ibid*

Simultaneously, many participants explained that sexual violence is often an implicit part of the social fabric. The case of *Francis Nguza alias Babu Seya and others v. R*[110] is a good case to elucidate this point. The appellants in this case were charged with eleven counts of raping and sodomising eleven standard one primary school pupils for several months in 2003 at 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. Unfortunately, in 2017, the appellants who are famous musicians were pardoned by the President of the United Republic of Tanzania.[111] Faiza Mohamed who is the director of the rights group *Equality Now* is of the opinion that the President's decision to pardon convicted child rapists signifies that Tanzania's leaders are promoting and normalising a culture of human rights violations in which young victims of sexual violence are being punished while perpetrators are going free.[112]

110 Nguza Viking @ Babu Seya and others vs. Republic (CA), Criminal Appeal no 56 of 2005

111 Their world, *Outcry as Tanzania 'Punishes' School Girl Victims of Sexual Violence*, available at https://theirworld.org/news/tanzania-outcry-president-magafuli-pardon-rape-schoolgirls-pregnancy [accessed 17 July 2018 at 1615 hrs].

112 Their World (no. 109 above).

5.2. Traditional and cultural practices

This research revealed that sexual violence is mainly committed by men and appears to be justified by socio-cultural beliefs and practices that appear to privilege 'male entitlement.' Child sexual violence is therefore a product of gender inequalities. Participants reflected that the prevailing social attitude is that women are created just to please and fulfil a male desire and nothing else. Witchcraft also causes sexual violence through advocating to men seeking wealth to engage in sexual relations with daughters / young girls. There is also a belief that young girls are safe from HIV and that young girls will cleanse men of HIV. Accordingly, children are subjected to sexual violence as a result of among other things, cultural beliefs and practices, and their access to justice is impeded by traditional and cultural practices as well.

Chagga of Hai District for example have specific traditional and cultural practices which result into a restriction for victims of sexual violence to access justice.[113] The Chagga have several traditional methods of solving disputes especially when the perpetrator is a family member.[114] These traditional ways of solving disputes include apologising through alcohol gatherings, apologising by touching the private parts of the victim or victim's mother and also by the presentation of a leaf known as *isale*. When someone has committed sexual violence against a child and the perpetrator presents to the parents or a guardian of the child this leaf of apology known as *isale*, the parents/ guardian have to accept it or else they believe that they will be cursed.

113 Percy-Smith (no. 15 above) p.145.

114 *Ibid*

In Magu District, there is a practice known as *misango* whereby if a man impregnates a girl he will be required to pay compensation to the girl's parents to 'cleanse the girl of the mischief.'[115] Here also, the parents are obliged to accept which means according to tradition, no other measures are needed. Another socio-cultural practice in situations where young girls become pregnant is to expect the man and girl to marry, even though the girl has been raped. These practices reduce the possibility of reporting the violence to the appropriate authorities.

Furthermore, the research revealed that having the culture of protection of extended family members and other people with whom they have personal relations affects access to justice for child victims of sexual violence. This is because when sexual violence is committed by a family member or a close friend, the parents do not report the perpetrator who has abused their child to initiate criminal investigation fearing breakage of personal or family relationship. This was termed as 'social corruption' by a respondent in Pemba. The respondent stated that community members live a communal life in which they help each other in different situations. This develops relations which makes it harder for the victims' families to report perpetrators to legal organs. This is known in local language as *rushwa muhali.*

These traditional methods as well as the decision not to report go against the notion that children are right holders as provided by the CRC and that they have a right to have an opinion in matters affecting them taking into account the evolving capacities of a child as per article 12 of the CRC. This is because the decisions not to report are taken by parents and/or guardians and the mechanisms to solve out of court involve the participation of parents or guardians rather than the child victim.

115 *Ibid*, p.105.

5.3. Corruption

Accounts of corruption within the administration of justice in Tanzania are normal.[116] Although efforts have been made by the Government to address the problem, it continues to give rise to a general lack of faith in the justice system and a tendency to avoid contact with law enforcement authorities and recourse to the courts.

Many respondents perceive police and the justice system in general to be corrupt with the likelihood that perpetrators will be released without trial or will be acquitted so see no point in reporting. Corruption was noted in all regions and was manifested in expressions of despair and demoralisation in some cases. For example in Kisarawe, one respondent gave an example of a case which he believed to have been tainted by corruption. The case involved an uncle who was alleged to have sodomised a boy. However, the medical doctor who examined the boy did not give evidence in court and no one bothered to explain to the family why the doctor was not called by the prosecution and why some evidence to support the prosecution was deleted from the court files. The result was that the suspect was acquitted due to lack of evidence.

116 See Transparency International, The Corruption Perceptions Index 2017, available at www.transparency.org/country/TZA [accessed 17 July, 2018 at 1558 hrs].

All in all, the research revealed that there is a widespread lack of trust and belief in the efficacy of the justice system. As a result, incidences of sexual violence against children are not being reported to formal institutions of justice.

5.4. When another Child is the Offender

International law of the child discourages imprisonment as an appropriate sentence for child offenders. Article 37(b) of the CRC provides that states parties shall ensure that arrest, detention or imprisonment shall be in conformity with the law and shall be used **only** as a measure of last resort and for the shortest appropriate period of time.[117]

The United Nations Standards Minimum Rules for Non-custodial Measures 1990 (the Tokyo Rules)[118] also seek to promote the use of non-custodial measures and the respect of human rights where measures other than imprisonment have been adopted.[119] They complement the idea of social reintegration in the CRC[120] by seeking to promote among offenders the sense of responsibility towards the community.[121] In the spirit of international law, section 19 of the Law of the Child Act also states that a child shall not be sentenced to imprisonment.

Ideally, this provision serves to promote the rehabilitation of a child offender who has entered the criminal justice system to make sure that the child does not come out worse than before. However, on the party of the participants of this research, this provision was mentioned as one of the factors which limit justice for child victims of sexual violence. An example was given by the police who work at the district gender and children's desk[122] that a 10 year old girl was raped by a 17 year old boy and the boy was found guilty by the court. The boy was consequently sentenced to corporal punishment which was executed and was released back to the community whereby also the victim lives.

Unfortunately for the girl victim, she underwent such physical trauma that doctors had to perform a hysterectomy on her to save her life. After being released from the hospital she had to endure living in the same community with the perpetrator who was not in the least remorseful. The perpetrator actually went around their community boasting how he only got a slap on the wrist. Therefore, according to participants, when the perpetrator is also a child who commits sexual violence against another child and gets a lenient sentence, it discourages child victims from reporting to the authorities about the violence which limits access to justice.

5.5. Nature of the Criminal Justice System

The nature of the criminal justice system also discourages attempts of victims of sexual violence to access justice. The criminal justice system in Tanzania is characterised with delays. The delays and the feeling that the criminal justice system would be ineffective in prosecuting the offender, destroys the confidence victims have in the criminal justice system even to report what has happened to them.[123]

117 Article 37(b).
118 GA Res 45/110, Annex, 45 UN GAOR Supp (No 49A) 197, UN Doc A/45/49 (1990).
119 Item I: general principles:1 fundamental aims and Item 2: scope of non-custodial measures: para 2.2.
120 Article 40 (1).
121 Tokyo Rules item 1 fundamental aim para 10.1.
122 Gender and Children's Desks refer to established confidential spaces in police stations where victims of gender violence can file their complaints to specially trained female officers as part of the authorities' efforts to tackle gender violence. Hey were firstly established in 2008 in a few police stations but with the intention of having them in all police stations.
123 Philip (no. 14 above) p. 4.

Delays in the criminal justice system are caused by various factors for example legal technicalities and formalities,[124] prosecution delays, bulkiness of cases due to an inadequate number of judges and magistrates, lack of judicial diligence on the side of judges and magistrates and also limited resources.[125] Delays in the justice system coupled with long distances to courts and resource constraints discourage victims and parents of victims from taking the formal justice recourse and encourage private agreements. Parents argue that it is better for them to enter into private agreements with the perpetrators because at least through these agreements they manage to get some money or marry off their child unlike pursuing formal justice institutions where they have to spend a lot of money in form of fare to and from the court, sometimes for years without a guarantee that that they will get justice from the courts.

In most occasions parents only report when they do not like the young man who abused their daughter or after the girl has become pregnant or when the boy refuses to marry her.[126] For example, in the case of *Galus Kitaya* when the parents became aware that the alleged offender was sexually involved with their minor child, the father of the complainant demanded a specific amount of money as dowry. He only reported to the police after the failure of the alleged offender to pay the sum. As discussed above, the preference to settle out of court is fuelled by the perceived ineffectiveness of the judicial system in upholding their duties in enforcing laws and bringing perpetrators to justice.[127] The general view being that there is corruption in the police and judiciary and therefore their cases will not get to court and even when they do, the perpetrator will be let off.[128]

5.6. Nature of the Law

Tanzania has adopted and acceded several international[129] and regional[130] conventions and recognised declarations which address violence against women and children. Through the adopted conventions and declarations, Tanzania was able to undergo criminal and civil justice reforms under the Legal Sector Reform Programme (LSRP).[131] This resulted into amendment and enactment of several laws some of which address the issue of violence against women and children. Such laws are for example the Sexual Offences Special Provision Act (SOSPA)[132] which amended several laws such as the Penal Code, the Evidence Act and the Criminal Procedure Act intending to offer more protection to women and children.[133] Some of the new offences created by the Penal Code include trafficking of persons especially children, sexual exploitation of children, cruelty to children(criminalising Female Genital Mutilation to persons under eighteen years), statutory rape, sexual harassment and qualified marital rape (being his wife who is separated from him without her consenting to it at the

124 See for example *Mbushuu Dominic Mnyaroje V. R* (1995) TLR 97, *Cooper Motors Corporation V. Arusha International Conference Centre* Court of Appeal Tanzania at Arusha Civil Appeal no 42 of 1997 and T*otal Tanzania Ltd V. Yahya Ahmed* Court of Appeal of Tanzania at Arusha Civil Appeal no.41 of 1997.
125 Maina, C.P. and Kijo- Bisimba, H., Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal, Mkuki na Nyota, Dar es salaam, 2007, p. 207.
126 The Law Reform Commission of Tanzania, Report on the Review and Drafting of the Proposed Provisions for the Amendment of the Sexual Offences Laws as Amended by SOSPA 1998, 2009, p. 75.
127 Percy-Smith (no. 15 above) p. 169.
128 *Ibid*
129 The Government of the United Republic of Tanzania has ratified CEDAW of 1979 in 1985, the Optional Protocol to CEDAW in February 2004, it has also ratified the CRC on 10th June 1991 and its two protocols in 2003 and 2004 respectively.
130 Tanzania is also 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. Tanzania has also ratified the African Charter on the Rights and Welfare of the Child on 16th March, 2003.
131 Mwenegoha, H.O., *Violence Against Women in Tanzania: A call for an anti-domestic violence legislation*, Institute of Judicial Administration Journal, 2017, Vol. 1 No. 1, pp. 34 – 49, at p. 36.
132 No. of 1998 R.E. 2002.
133 Mwenegoha (no. 129 above) p.36.

time of the sexual intercourse). The amended provisions in the Evidence Act took into account Tanzania's adversarial system by removing the requirement for corroboration in sexual offences and a similar provision is also included in the Law of a Child Act as discussed above. However, despite these improvements which have been done, our laws still have gaps which result into a limit to access justice for child victims of sexual violence.

Some notable gaps include the failure to amend the Law of Marriage Act (LMA)[134] which provides for the minimum age for marriage. Section 13 of the LMA allows for girls of the age 15 to get married with the consent of parents or a guardian as provided for under section 17 of the same. Despite outcry against this law, the government has failed to amend it. Even the law of the Child Act which was enacted in 2009 failed to incorporate a specific provision to repeal this law. When questioned on the failure to amend the LMA and change the minimum age for marriage in Tanzania by the CEDAW Committee, the government responded that reviewing the age of marriage has been a challenge for years due to some cultural and religious stands considering that the issue of marriage touches on certain religious and cultural beliefs.[135] In 2016, the provisions allowing child marriage were challenged in court in the case of *Rebecca Gyumi v. Attorney General.*[136] The court in this landmark decision ruled that the provision was unconstitutional as it contravenes articles 12, 13 and 18 of the Constitution of the United Republic of Tanzania, which give people equal rights before the law and the right not to be discriminated against. The court stated that it was unfair to subject a girl aged 15 to marriage and that such a child has no wide understanding and could hardly comprehend her responsibilities and obligations as a married person. And that, the law was discriminatory and unfair as it subjected a girl child to be married at 15 years old, while the same law stated that a male person could only marry when he was aged 18 years. The Court as required by law directed the Parliament to amend the law as required by the Constitution since 2016 but Parliament has yet to do that.[137]

The Penal Code as amended by SOSPA also supports the LMA because it created the offence of statutory rape but made an exception in situations where a woman is a wife who is fifteen or more years of age and is not separated from the man who married her.[138] Therefore, these provisions promote child marriage and eliminate the recourse to justice for these girls who are subjected to such marriages.

Another legal gap is the fact that marital rape is not criminalised in Tanzania. Therefore, considering that a child can be married in Tanzania, the marriage eliminates her chances of seeking justice for rape that occurs within the marriage unless there is separation.

134 Cap 29 R.E 2002.

135 UN Committee on the Elimination of Discrimination Against Women (CEDAW), Consideration of Reports Submitted by States Parties under Article 18 of the Convention, seventh and eighth periodic reports of States parties due in 2014 : United Republic of Tanzania, 3 December 2014, CEDAW/C/TZA/7-8, available at: http://www.refworld.org/docid/56a88e944.html [accessed 6 March 2018 at 1800 hrs], para 14.

136 Misc. Civil Cause no. 05 of 2016. It is common place that there is an appeal by the Attorney General pending in the Court of Appeal against this decision of the High Court.

137 Warioba I.M, *Child Marriage in Tanzania: A human rights perspective*, Journal of Law, Social Justice and Global Development, 2019, No. 23, pp.1-18, at p. 8. It is common place that there is an appeal against the decision of the High Court

138 S.130(2)(e) of the Penal Code (Cap 16 R.E 2002).

6. Conclusion

Access to justice is a right in itself and a prerequisite for the fulfilment of all other rights, whether social and economic or civil and political rights. Access to justice is crucial for restoring rights that have been disregarded or violated which gives meaning to the human rights phenomenon. Considering the profound impacts of sexual violence against children, it is imperative that access to justice should be guaranteed. From the discussion above, access to justice for child victims of sexual violence is highly impeded. Children who have gone through the trauma of sexual violence become traumatised again when accessing formal justice institutions. As a result, they decide to stay away from these systems. Therefore, there is a need for reform in order to remove the impediments towards access to justice. Furthermore, access to justice should be improved based on the rights-based approach coupled with the new sociological studies of childhood. This is because access to justice is important to protect people's rights and promote their social inclusion while barriers to access reinforce poverty and social exclusion. Working on the elimination of the barriers is in line with the Sustainable Development Goal 16[139] which among other things calls for reducing all forms of violence, ending abuse, exploitation, trafficking and all forms of violence against children and ensuring equal access to justice for all.[140]

139 UN General Assembly, *Transforming our world : the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, available at https://www.refworld.org/docid/57b6e3e44.html [accessed 18 January 2019].

140 UNGA (no. 137 above).

7. Recommendations

There is still much to be done in addressing the issue of victims of criminal justice. This includes enacting a specific law on victims and providing other remedies that will assist and provide support to victims. Such remedies will encourage more victims to come out and report violence that has happened to them.[141] In the meantime, the criminal justice system needs to be improved in order to build confidence for people to report crimes. Areas of improvement include recruiting an adequate number of judicial officers and strengthening laws and enforcement dealing with judicial misconduct and corruption. Also, the Law of Marriage Act needs to be amended so that the minimum age for marriage can be raised to 18 for both boys and girls. Also, free and personal consent of the persons getting married should be a prerequisite. The Penal Code should equally be amended to make sure that marital rape is criminalised and also the definition of rape should be gender neutral especially statutory rape.

Additionally, there is a need for a discussion on the sentencing aspect of children when they commit atrocious crimes against other children. Sentences should be more serious which reflect weight of their actions against other children. Furthermore, serious advocacy should be done to make sure that children and their parents understand that sexual violence against children is wrong and when it happens, access to justice is a right. Similarly, advocacy should be done so that awareness is created against the harmful cultural practices which limit access to justice for child victims of sexual violence.

141 Philip (no.14 above) p. 21.

DIVISION OF MATRIMONIAL ASSETS AFTER DIVORCE:

A Feminist Theoretical Standpoint vis a vis Tanzanian Law

Mwanabaraka Saleh Mnyukwa[1*] *& Archibald Aristarch Kiwango*[2**]

Abstract

Division of matrimonial property upon divorce is very important aspect in matrimonial disputes. However in Tanzania the division is somehow blurred. It is more of courts discretion rather than a clear yardstick on how the division should be. The foregoing is as a result of the courts being masterminded by discretion rather than a clear yardstick for division. Henceforth the phenomenon of division has remained somehow a "dubious" undertaking. It is against the above background that the article considers the extent to which the Law of Marriage Act Cap: 29 RE: 2002 and the Tanzania case laws appreciate ownership and distribution of matrimonial property acquired by spouses during the subsistence of marriage. In so doing, the article considers whether courts in matrimonial cases consider domestic chores (work) as a contribution of value in distributing matrimonial property. The article underscores that whilst domestic work was recognized in a 1983 landmark decision as one among the basis for contribution in acquisition of the matrimonial home, there is lacuna on its implementation which is associated with the use of discretionary power by the courts. The discretion is in relation to determining percentages or value that attach to domestic work. The authors therefore examine this lacuna on the use of discretionary power from a gender perspective. The article argues that the discretion hinders fair and reasonable distribution of property. The authors offer recommendations on how best the courts may adjudicate cases by incorporating gender issues.

Key words: Property, Divorce, Feminist

1 * LLB (Hons) Zanzibar University, Masters in Women's Law, University of Zimbabwe, Lecturer from the Institute of Judicial Administration Lushoto, Box 20 Lushoto, Tanga- Tanzania, email mmnyukwa@yahoo.com and a registered advocate to the Tanganyika Law Society.

2 ** LL.M (Constitutional and Administrative Law), (Mzumbe University), LL.B (Mzumbe University), PGD in Legal Practice (The Law School of Tanzania), Assistant Lecturer at the Institute of Judicial Administration Lushoto (IJA). He is an Advocate of the High Court of Tanzania However , the sentiments expressed in this article do not represent any of these institutions. The author is solely responsible for the anomalies pressed in this article. E – mail archibaldkiwango@yahoo.co.uk

1.0 Introduction

Injustices on the division of matrimonial assets have been noted on many decided cases in Tanzania through judicial decisions. This is contributed by the failure of the relevant legislation to recognize the value of formal or informal contribution of women towards the acquisition of matrimonial assets[3].

It is the trend of feminists all over the world to fight against any kind of injustice to women. It is not disputed that at family level the economic development of the family is contributed by both men and women regardless of whether one is employed in the formal or informal sector. The value of domestic work is also indispensable as it has a direct impact to make home's life comfortable and ensures peace and harmony in the matrimonial home. As such, domestic work contributes significantly to family economic development. In this paper, the authors try to establish whether courts in matrimonial cases consider domestic chores (work) as a contribution of value in distributing matrimonial property. The article underscores that whilst domestic work was recognized in a 1983 landmark decision as one among the basis for contribution in acquisition of the matrimonial home, there is lacuna on its implementation. The lacuna is associated with the use of discretionary power by the courts. It is thus a thrust and driving force of this article to address the phenomenon.

3 There are plethora of authorities to this effect, most referred is in the case of *Maryam Mbaraka Saleh v. Abood Saleh Abood*, Civ. App. No. 1 of 1992

2.0 Feminist Theory on Women and Property

There are many feminist theories and perspectives which address women's property rights. But for the purpose of this article, attention is paid on three feminist theories and their views on women's property rights particularly their contribution on matrimonial assets and the way their contribution are valued.

Liberals hold that freedom is a fundamental value, and that the just state ensures freedom for individuals. Liberal feminists share this view, and insist on freedom for women. Liberal Feminists believe that female subordination is rooted in a set of customary and legal constraints that block entrance and success to them.[4] They presuppose that women's rights in most cases are denied by the presence of some customs and laws which are unfriendly to women. Thus, there is need to fight for access and equitable enjoyment of rights. This can be achieved by emphasizing on woman's ability to maintain equality through actions. Liberal feminists believe that women's domestic responsibilities will inevitably place them at a disadvantage and favour policies that encourage men to assume a proportionate share of family responsibilities.[5] Therefore, domestic responsibilities of a woman can be weighed as an asset as well as an exploitation tool in acquiring matrimonial property during the subsistence of a marriage.

On the other hand, the Radical Feminists believe that the oppression of women is so deep that it will take a significant overhaul of existing society structures

4 Available at http://en.m.wikipedia.org/wiki/liberal-feminism accessed on 17th March, 2017

5 Carbone, JR A Feminist Perspective on Divorce available at http://www.nbci.nlm.nih.gov/pubmed/7922279 accessed on 15th March, 2017

to make the world fairer to women.[6] Those advocating for this theory believe that injustices to women is a historical phenomenon embedded in male dominance over women. Therefore, it is very difficult to appreciate women's effort and contribution through domestic work and its impact to the economic development of the family.

Cultural Feminism is based mainly on the biological difference between a man and a woman. The differences which mainly focused on the reproductive functions resulted in the woman being considered as the main care taker for children. However, their service as care takers is so undermined to the extent that it is not considered as part of contribution on acquisition of matrimonial property.

3.0 Property Rights of Spouses in International Human Rights Laws

The right of spouses to own property within marriage has not been given special attention in International Human Rights Instruments. The Instruments however recognize the general right of everyone to own property. For example, article 17 (1) of the Universal Declaration of Human Rights of 1948, (the Declaration)[7] guarantees every individual a right to own property alone as well as in association with others. The Declaration presupposes two types of ownership of property, sole ownership and joint ownership of property. The Declaration further provides for equal rights during marriage and at its dissolution[8]. As long as all human being are born free and equal in dignity and rights[9], therefore, in order to be just and fair it is reasonable to suggest that, if there is sole ownership of the property that property is not subject to division. It would also be reasonable to conclude that if there is contribution whether formal or informal by a spouse in the acquisition of property, that property will be considered as jointly owned and therefore subject to division during dissolution.

The Convention on the Elimination of All Forms of Discrimination Against Women[10] (CEDAW) does not have a specific provision concerning the issue of division of the matrimonial assets. It argues for the need for state parties to take appropriate measures to eliminate discrimination against women in all matters related to marriage and family relation and in particular to recognize the same right and responsibilities during marriage and at its dissolution.[11]

The above provision provides one among the rights which women may enjoy during marriage and at its dissolution. CEDAW emphasis is to have equality of men and women during the subsistence of marriage and at its dissolution. This right might be implied in property rights of the spouses during and at dissolution of marriage. It may therefore be argued that spouses have equal rights to independently or jointly acquire property. As such, if the property is jointly acquired, the right to equal division of the property will also be implied.

In addition to the above, the Protocol to the African Charter on Human and People's Rights of Women in Africa[12] (the Protocol) recognizes the right of a woman during marriage to acquire her own property and to administer and manage it freely.[13] The Protocol gives space to a woman to have the right to have sole ownership of property to the exclusion of her spouse. The aspect of marriage therefore does not interfere with the right to independently own property.

Again, the Protocol requires state parties to enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation and divorce and in particular to ensure that women and men have the right to equitably share joint property from the marriage.[14]

The above provision has strongly denied unjust and biased decisions on the division of joint property acquired during marriage. Impliedly, the provision reveals the need for having in place a piece of legislation which could facilitate an equitable sharing of property by looking at contribution of spouses. This suggests that the contribution is not necessarily to be in form of money. It can be in the form of work or property so long as it has an input during the realization of the property.

Even if the equitable sharing is subjective, what is important is to have a reasonable decision in the eyes of the reasonable man by taking into consideration all the circumstances which contributed to the acquisition of the joint property in dispute.

4.0 Legal Framework Governing Property Rights of Spouses at the National Laws

Right to own property is one among the fundamental rights which have been guaranteed by the mother law of the land that is the Constitution of the United Republic of Tanzania of 1977 (the Constitution) as amended from time to time. When one takes a glance to the reality on the ground, one aspect is very evident. Husbands and wives have not been treated as equals, men have been considered as heads of families, a resultant of which significantly affects the division of matrimonial property.[15]

4.1 The Constitution

The Constitution[16] recognizes the entitlement which an individual has on owning and protection of his property in accordance with the law. The stated right impliedly extends also to the spouses. This is because there is no specific provision in the Constitution which provides for the modality of owning, protecting and distributing property among spouses during marriage and at the dissolution of marriage.

The Constitution assumes the rights of the spouses to own property as one of the basic rights. It does not accord special rights to women as regards ownership, acquisition and protection of property during the subsistence of marriage and its dissolution.

In the feminist stand point of view, the lacuna of the specific provision in the mother law of the country is a serious

6 Available at study.com/academy/lesson/cultural-feminism-definition-lesson-quiz.html accessed on 17th March 2017
7 General Assembly of the United Nations, Resolution 217A, passed in Paris France, 10th December 1948
8 Article 16(3) of the Universal Declaration of Human Rights of 1948, the same can also be seen under Article 16(1)c of the Convention on the Elimination of All Forms of Discrimination against Women under which Tanzania had ratified in 1985.
9 Article 1 of the Universal Declaration of Human Rights of 1948
10 Tanzania had signed it on 17th July, 1980 and ratified it on 20th August, 1985
11 Article 16(3) of CEDAW
12 Tanzania signed it on 5th November 2003 and ratified it on 3th March, 2007
13 Article 6 (j) of the Protocol to the African Charter on Human and People's Rights of Women in Africa
14 *Ibid* Article 7 (d)
15 See Binamungu C.S.M, Division of Matrimonial Property in Tanzania: The Quest for Fairness, 2013, PhD thesis, Open University of Tanzania,p.2
16 Article 24(1) of the Constitution of the United Republic of Tanzania, Cap 2of 1977

anomaly which cannot be cured by including the woman in the group of every person. There ought to be a special provision which must recognize the rights of the woman to own property during the marriage and its protection when the marriage is dissolved. This is because women have been historically disadvantaged in property ownership and acquisition especially in marriage in Tanzania.

4.2 The Law of Marriage Act, Cap 29 R.E 2002

The enactment of the Law of Marriage Act in 1971 came as a panacea towards harmonizing the regime of matrimonial property relations which in essence prior to the enactment was governed by multiple laws.[17] The enactment of the Law of Marriage Act of 1971 to regulate family matters including marriage, divorce, property rights between spouses and other incidental related matters in marriage was a milestone in realizing the property rights of spouses during marriages. The Act is also relevant in the division of property when the marriage is broken down at the time of granting decree of separation or when it is broken down beyond repair which ultimately results in a decree of divorce. The Act is however supplemented by other Acts like the Land Act[18] and the Village Land Act[19], among others.

The Law of Marriage Act[20] (the LMA) is a consultative statute in Tanzania on family matters. The Law through its provisions recognizes the right of the spouses to own property individually and jointly[21] during the subsistence of the marriage. It is a well established principle in the Law that marriage does not affect the property rights of the spouse as it allows each of the spouses to own property to the exclusion of the other. The law presumed that in any property acquired by either of the spouses during the subsistence of marriage, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his/her spouse.[22]

The above position was enunciated in the case of *Samwel Olung'aigogo and two others Vs Social Action Trust Fund and others*[23] which held that deeds of plots in the name of a husband indicated that the plots solely belonged to him. This meant that the issue of joint ownership could not be established based on the available proof of the title deeds.

The afore abstraction is famously known as "separate property" which presupposes that whatever property the husband or wife acquired before and after marriage remains his or her property, exclusively. To the extent of such property, marriage changes nothing. Accordingly, section 60 of the LMA, presupposes that during subsistence of the marriage spouses would each hold some kind of a "share certificate" indicating his or her personal property. Realistically, this is not the case. Most women in Tanzania are housewives without independent sources of income. Their share in matrimonial assets usually accrues from the contributions they make in kind towards the acquisition or development of such assets initially owned by their husbands.[24]

The foregoing legal position means that it requires conclusive proof to rebut the presumption of sole ownership to property. If that proof is unavailable, the presumption will hold water and there will be no avenue for that property to be subjected to matrimonial assets and division thereof during the granting of the decree of separation or divorce.[25] In other words, following marriage, spouses' separate property remains separate until such property is improved upon by the other spouse, thus converting it into matrimonial property.[26]

Despite the ownership in the names of both spouses, the law presumed that there are equal beneficial interests to the named couple.[27] Again, this is a rebuttable presumption in which the court welcomes any conclusive proof to prove otherwise. If that proof cannot be established and the court is not convinced on a balance or preponderance of probability, the presumption stands as the mentioned provision stated. Consequently, the property will be regarded as matrimonial property and subject to division when the decree of separation or divorce is granted by the court.

It is also worth to note that, property independently acquired during or before marriage if substantially improved by the other party or spouse during the subsistence of marriage is considered as part of matrimonial property and therefore subject to division when the decree of separation or divorce is granted.[28]

The above has been stated in the case of *Anna Kanungha Vs Andrea Kanungha*[29] in which the court held that, in terms of S. 114 (3) of the Law, personal property is liable for distribution when such property has been substantially improved during marriage by the joint efforts of the spouses.[30]

Therefore, our laws recognize all property which is acquired by the parties before and during the marriage as part of matrimonial property so long as there is contribution of each of the spouses either in terms of money, property or work. The contribution must have substantially improved the property in question. Thus, the law is very clear that what is subject to division when the decree of separation or divorce is granted is any property which will be termed as a matrimonial property.

Now an interesting issue which this article tries to examine is the extent to which the law and case law appreciate the division of the matrimonial assets based upon the contribution made by each party on acquiring the property from a gender perspective. It is important to note that one among the challenges of the law is its failure to define what constitutes matrimonial assets. This is despite the fact that its presence is appreciated under section 114 of the LMA that gives power to the court to order the division of the matrimonial assets when granting or subsequent to the grant of a decree of separation or divorce.

17 It should be taken into cognizance that, prior to 1971 laws governing matrimonial property relations included the following, Statutory Law, English Law (common law, principles of general application and principles of equity), customary law and religious law.
18 Cap . 113 R.E 2002
19 Cap. 114 R. E 2002
20 Cap 29 R.E 2002
21 Sometimes referred to as Joint and Community property ownership
22 *Ibid* Section 60(a)
23 [2003] TLR 343
24 Lukiko, V. "Protection of Matrimonial Property Rights of Non-co Divorcing Wives in Tanzania," Institute of Judicial Administration Lushoto Journal Volume I, Issue No. II, June , 2018 , at p.48. It was an apt position as well in the case of *Bi Hawa Mohamed v. Ally Sefu [1983] T.L.R. 32*
25 The position in the case of *Samwel Olung'aigogo and Two others vs. Social Action Trust Fund and Others* (*supra*) is explicitly coined under Section 58 of the LMA which provides to the effect that 'a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or the wife from acquiring , holding and disposing of any property.'
26 Binamungu, C.S.M, (2013) p.57
27 *Supra* 60(b)
28 Section 114(3) of Cap 29 R.E 2002
29 [1996] TLR 195
30 This was an akin view in the case of *Bi Hawa Mohamed* (supra) which as to what is "a family or marital property" was to the effect that "those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole"

Meanwhile, the term matrimonial assets has neither been clearly defined in the Law nor in the judicial decisions. The failure is notwithstanding that the concept of matrimonial asset has been appreciated in various judicial decisions through interpretation of section 114 of the LMA. For example, in the case of *Samweli Moyo Vs Mary Cassian Kayombo,*[31] the court held that, the District Court erred in ordering the division of the matrimonial assets because the assets were acquired neither during the marriage nor through the joint efforts of the parties. This decision suggests that matrimonial assets include those assets acquired by the parties during the subsistence of marriage and properties acquired by the parties before the marriage which has been substantially improved by the spouses during the subsistence of the marriage.

It has to be borne in mind that the law and the judicial decisions are silent on those assets which are acquired by the parties during a pending court proceeding of either separation or divorce. It is still a question whether these can be considered as part of matrimonial assets so as to be part of the division. It is important to have a clear definition because during court proceedings the law still considers the parties as husband and wife.[32]

A difficult situation arises when the couples are still cohabiting in the matrimonial home. The wise decision on that scenario is to confirm whether the other party had contributed towards the acquisition of the matrimonial property or not without forgetting to take into consideration the contribution in terms of work particularly domestic work performed by one of the spouses.

31 [1999] TLR 197

32 See section 99 of Cap 29 R.E 2002 which authorize the court of law to issue divorce

5.0 Power of the Court to Order Division Matrimonial Assets

The Law empowers the court when granting a decree of separation or divorce to order among other reliefs the issue of division of matrimonial assets acquired by the parties during the subsistence of marriage.[33]

It has to be noted that a distinction must be drawn between assets acquired by the parties through their joint efforts and those properties acquired by the sole efforts of one spouse in which the other spouse had substantially improved. The two scenarios cannot be equated at the time of ordering the division of the matrimonial assets since their contribution on acquiring the property cannot be the same even if both are considered as matrimonial assets.

The principles governing jointly acquired assets are set out under section 114 of the Law. The Law empowers the court subject to consideration stated in the above provision to incline towards equality on the issue of division of the matrimonial assets acquired by them during the marriage by their joint effort. The law is very clear that what is subject to division are those properties which are acquired by the joint efforts of the parties. In this respect, the law tries to set out the criteria to be considered by the court when exercising the power conferred to it in order to arrive at a just and reasonable decision in the eyes of the law.

33 However as it introduced this article squarely ventures on the division of matrimonial property upon divorce per se

5.1 The Operation of Section 114 of the LMA on Division of Matrimonial Assets

In Tanzania there is no presumption of equal sharing of the matrimonial assets. Equality of division may apply only if the court is satisfied that the claimed property is jointly acquired by the spouse in terms of money, property or work. The following are the principles that owe its origin from the above provision of the Law to guide the court on the issue of division of the matrimonial assets acquired by the joint efforts of the parties

i. The Custom of the Community to which the parties belong;
ii. The extent of the contribution made by each party in money, property or work towards the acquisition of the assets;
iii. To any debts owing by either party which were contracted for their joint benefit and
iv. To the needs of the infant children, if any, of the marriage.

With all the above considerations, the court should have a serious commitment to divide the property based on equality and without any kind of discrimination. In some cases the court can have regard to all the above stated factors in arriving at its verdict. However in other cases the court may only consider one or two of the stated factors depending on the circumstances of the case. All this is allowed, what is important is to make sure that equality is upheld in the division of matrimonial assets.

5.1.1 The Custom of the Community to which the Parties Belong

Tanzanian's legal system is pluralist in nature as it has distinct systems of law. Customary law is one of the laws which is applicable in the country. The legal basis for the application of customary law in Tanzania can be seen under the Constitution which impliedly authorizes its application so long as its provisions don not conflict with it.[34] The Constitution is very clear that any law which is in contradiction with its provisions can be declared null and void to the extent of its inconsistency. The application of customary law is subject upon the following pre requisite; the custom in question must be in existence and practiced in an area, the parties involved in disputes should be natives of that area, the rules of customary law should be relevant to the matter between the member of one community or if the rule of both communities make similar provision and the matter in dispute should be of civil nature.[35]

Since the division of matrimonial assets is one among the reliefs recognized when there is matrimonial disputes, the law authorizes the application of custom of the community among the criteria for division of the matrimonial assets if the property was acquired by the joint efforts of the parties. In the case of *Pulcheria Pundugu V Samwel Huma Pundugu*[36] the court stated that, on the question of division of matrimonial assets if the parties are of different customs a non-traditional mode of life may be assumed and the criteria of division will not base on the custom of the community. It is

34 The Constitution of the United Republic of Tanzania, Cap 2 under Article 64(5)

35 Section 11(1) a of Judicature and Application of Laws Act Cap 352 R.E 2002

36 [1985] TLR 7

worth to note that, this decision impliedly suggest that if the spouses belong to the same community, the rule of customary law may apply. This has however a negative impact on women because in some communities, custom dictates that a divorced woman is not entitled to a share of a matrimonial property even if the property was jointly acquired during the subsistence of the marriage.[37]

Such customary laws are arguably bad laws since they discriminate women which is against the Constitution and International Human Rights Instruments discussed above. Tanzania signed and ratified the International Human Rights Instruments without any reservation. After ratification the state party had affirmed to domesticate them into its national laws though not all the provisions have been domesticated.

There are two contradictory decisions from the High Court. One school ventures towards declaring customary law unconstitutional and the other one is reluctant to subject the customary law to constitutional scrutiny. The first school of thought is to the effect that, any custom which does not recognize the contribution of a woman in acquiring matrimonial property should be declared unconstitutional and it should lack legal effects to enforce it. This is a position in the case of *Ephraim Vs Pastory and Another*[38] in which the court declared the customary law of Haya as unconstitutional because it contravened the right to enjoy the property of woman as guaranteed under the Constitution.

On the other hand, the High Court in the case of *Elizabeth Stephen & Another v. Attorney General of Tanzania*[39] denied inheritance rights of two widows who each had been married under customary law. Despite the court recognizing the impugned provisions of Local Customary Declaration Order No. 4 being discriminatory, the Court nevertheless refused to invalidate the law on the basis of its unconstitutionality. Instead, the High Court stated,

> *"it is impossible to effect customary change by judicial pronouncements. A legal decision must be able to take immediate effect, unless overturned by a higher court. For customs and customary law, it would be dangerous and may create chaos if courts were to make judicial pronouncements on their constitutionality. This will be opening Pandora's box, with all seemingly discriminative customs from our 120 tribes plus following the same path."*

The two cases before the High Court as observed above are in juxta position, having disturbed the position that was enjoyed for quite sometimes in the case of *Ephraim v Pastory (supra)*. As a result, the situation remains precarious in relation to constitutionality of customary law.[40]

Moreover, in recognizing the custom to which the parties belong, the Law does not resolve the circumstance when one party of the dispute is in polygamous marriage since the law presumed that customary marriage allows the husband to have more than one wife.[41] The interesting question is how the court will consider the issue of division of matrimonial assets to the other spouses who did not petition for divorce.[42]

37 This is the practice of most of the patrilineal societies in Tanzania

38 Civil Appeal No. 70 of 1989, High Court of Tanzania at Mwanza (Unreported)

39 Miscellaneous Civil Cause No. 82 of 2005 , Judgment of the High Court 2006

40 Whilst waiting for more directives from upper courts, we are of the view that Communication to CEDAW as a result of the High Court decision be maintained. And that is for the parties be given " appropriate reparation and adequate compensation commensurate the seriousness of the infringements of the rights", this is per CEDAW Committee Communication No. 48/2013 as adopted by the Committee at its 16th Session , 15th February, 2015.

41 Section 10 of the Cap 29 recognize polygamous marriage on the part of the husband who contracted customary or Islamic marriage

42 The position on this may be a food for thought when one visits the case of *Maryam Saleh v. Abood Saleh Abood*, Civ. App. No. 1 of 1992, the Court of Appeal of Tanzania (unreported)

43 [1982] TLR 146

44 *Ibid*

45 [1988] TLR 197

5.1.2 The Contribution Made by Each Party in terms of Money, Work and Property

The Law considers the contribution towards the acquisition of matrimonial assets in a very peculiar style for the purpose of enabling the spouse to acquire a share when the marriage is dissolved by the court. It takes into account the contribution in terms of money, works and property.

Before 1984 the interpretation of assets jointly acquired before the marriage was quite different with what is, as of now. Case law did not consider the purposive meaning of the word 'works' as is defined and connoted in the Law. The case law suggested that 'works' include formal or informal undertaking done by the spouses and did not consider domestic work as part of 'works.' Traditionally, domestic work is considered as a part and parcel of a woman's job and therefore to be done by women alone.

That can be seen in the case of *Christna Petro Lugemalira v Helena Abatoli Kolwe*[43] in which the Court held that, section 114 of the Law required that contribution should be in terms of money, property or works and not otherwise. The decision emphasized that the works intended under the above provision does not include the domestic work of cooking. The Judge in that case disowned the decision of the Primary Court which took into consideration the contribution of the wife in acquisition of matrimonial property through cooking food and performing of other housewife duties.

The controversy on the interpretation of the Law was resolved by the 1983 landmark decision of the Court of Appeal in the case of *Bi Hawa Mohamed V Ally Se*fu.[44] In this case, the Court of Appeal defined work as it is provided under s. 114 of the Law to include the domestic works done by the wife as a contribution towards acquiring matrimonial property and so to be considered as part of the contribution in acquisition of matrimonial assets.

The contribution in terms of works in the above case has to be considered as embracing the domestic work of a husband and wife. It means that, the work is not strictly limited to formal works but also includes household chores, bearing and rearing of children, making the home comfortable to the other spouse and the issue of marriage.

Therefore, the principle under s. 114 of the Law concerning the division of matrimonial assets is that of compensation whether what is being compensated is direct monetary contribution or domestic services as it was held in the case of *Mohamed Abdallah Vs Halima Lisangwe*.[45] The decision established the need for compensation on the duties done by a woman which are considered as the primary duties of the woman. The duties include but not limited to delivering children, rearing them and taking care of the matrimonial home.

In another case of *Bibie Mauridi v Mohamed Ibrahim*[46] it was held that performance of domestic duties amount to contribution towards acquisition but not necessarily 50% since the amount to be awarded normally depends on the extent of contribution made by each party in the acquisition of the matrimonial property in dispute.

The issue now is how the court assesses the percentage of domestic work when it is considered as part of contribution. The question is whether the performance of domestic work adds any credit to a spouse when the marriage is dissolved. The other matter to consider is with regard to women who apart from doing domestic work, they are also working in formal or informal sector. The question would be whether these women are entitled to a double share during division of matrimonial property. Do our Law and Court have positive discrimination when interpreting section 114 of the Law?

There is still ambiguity on the issue of percentage a woman is entitled to receive as her compensation by performing domestic duties apart from her contribution from her formal or informal work. This was evident in the case of *Charles s/o Manoo Kasare and Another Vs Apolina w/o Manoo Kasare*[47] in which the woman prayed to be awarded half of the value of the property acquired during the subsistence of the marriage on the basis that they had stayed together and she performed wifely services for 25 years and that she had also provided monetary contribution towards the acquisition of the property. Unfortunately, at the end of the day the woman was awarded only a quarter of the value of the property even where the court recognized that there was ample evidence proving her monetary contribution towards the acquisition of the properties apart from her housewife services.

In another case of *Sophia Mgalla Vs Adolph Amian*[48] the appellants appealed against the decision of the trial court's order refusing her an equal share of the matrimonial assets when an order for divorce was granted. Despite her monetary and housewifely contribution still the trial court denied her equal share on the matrimonial assets acquired during the subsistence of the marriage. This can be seen in the following remarks of the High Court Judge:

> *'The appellant was both a housewife and a businesswoman. Her contribution as a housewife embraces both her domestic efforts and work. Her contribution as a businesswoman was both in terms of money and work'.*

The above testimony shows that the appellate court was satisfied with the contribution of the appellant based upon the evidence presented in the trial court. Despite the good remarks made by the Judge, the court failed to award the appellant an equal share of the matrimonial assets as she prayed, instead she was awarded forty percent of the market value of the matrimonial property in dispute. This shows that the mindset of some of judicial officers does not adequately address the issue of contribution made by the woman particularly the contribution in terms of domestic work. In the above case it was well proved that the woman had doubled her contributions towards the acquisition of the matrimonial property through her monetary and domestic work. However, the Judge abandoned her contributions by failing to appreciate her prayer of equal share of the matrimonial assets.

The above issues create a centre of contention on the proper use of discretionary powers exercised by judicial officers when adjudicating division of matrimonial assets in divorce cases. The judicial discretion needs to be exercised in a just and fair manner as intended by the law. It is very clear that the court recognize domestic work as a primary duty done by women owing to patriarchal system in our jurisdiction as part of contribution in acquisition of matrimonial property. However, the court does not compute it in terms of percentage to assess the contribution of the woman. In most cases the court uses discretional power to evaluate the domestic work. The extent to which the discretional power is exercised judicially is one among the issues which this article is trying to address.

5.1.3 To any debts owing by either party which were contracted for their joint benefit

The Law extends its power when ordering the division of matrimonial assets to include the debts that the spouses have contracted jointly during the subsistence of marriage. If the assets are divided by the spouses, it is wise also to share the liabilities so long as it will be proved that the liabilities contracted benefited both spouses or if both spouses signed the contract and the creditor's documents prove the name of both[49].

The above division will not include the debts contracted by the wife in accordance with section 64 of the LMA. This is because the law presumed wife's authority to pledge her husband credit if the spouses are living together, or separated or deserted of which the husband is under a duty to provide maintenance on necessary items to the wife and the children and the wife does not receive such maintenance and does not have sufficient means to receive the same. The division does not also include the debts contracted by either of the spouse before contracting the marriage.

It is worth to note that, so far the authors have not come across any decided case on the issue of debts contracted by the joint efforts of the spouse. Therefore, the court should have the same spirit of dividing the debts as the way they do in assets. Suffice to say that it is advisable that reasonable arrangements be made for payment of the debts before ordering the division of the assets.

5.1.4 To the needs of the infant children, if any, of the marriage

This is another criteria in which the court may consider when granting an order on the division of matrimonial property. The division of the matrimonial assets shall also consider the best interest of the children. The vigorous approach on exercising judicial discretion on the division of matrimonial assets on Feminist standpoint can be seen in the case of *Eliester Philemon Lipangahela V Daud Makuhana*[50] where by one among the reliefs sought by the appellant was the equal division of matrimonial assets in which the trial court held that the appellant failed to adduce evidence to

46 [1989] TLR 162
47 [2003] TLR 425
48 Civil Appeal no 73 of 2005, High Court of Tanzania at Dar es Salaam (Unreported)
49 This position was aptly dealt with in the case of *Richard William Sawe v. Woitara Richard Sawe*, Court of Appeal of Tanzania at Dar es Salaam [Court of Appeal of Tanzania, Civil Appeal No. 38 of 1992]
50 Civil Appeal no 139 of 2002, High Court of Tanzania at Dar es Salaam, (Unreported)

prove the extent of her direct financial contribution to satisfy the requirements of section 114(2)b of the Law.

The appellate court allowed the appeal and set aside the trial court decision on the division of matrimonial assets on the reason that the trial court contravened the spirit of the above provision since it was proved that, apart from the appellants doing her housewifely duties she also engaged in the business of selling vegetables.

Therefore, the Appellate Court awarded each of them 50% of the share of the matrimonial assets because the properties in dispute were obtained by the joint efforts of both parties. Also the court considered the needs of the children of the marriage because each party was granted custody of one child.

6.0 Experience from other Jurisdictions

In the Ugandan case of *Bakiza vs Nafuna Bakiza*[51] Lady Justice Percy Night Tuhaise, referred to another *Ugandan case of Muwanga v. Kintu* [52] 'that matrimonial property is understood differently by different people. There is always property which the couple chooses to call home. The property to which each spouse should be entitled is that property which the parties choose to call home and which they jointly contribute to'

The Ugandan case may be persuasive in our jurisdiction as to what are the assets which are subject to division when the decree of separation or divorce is granted by the court. Thus in view of the above decision, the property which are held in trust for a clan by one of the spouses or the property which is owned by a spouse before the marriage cannot be termed as matrimonial assets and therefore should not be subject to division.

One of the most difficult legal challenge which this article is trying to address is the extent to which the Court uses Legislation and Case Laws to address the issue of division of matrimonial assets on just and equitable basis which is the baseline of the Feminist standpoint instead of exercising a wide discretion which the court is enjoying on division of matrimonial assets at the moment which cannot be exercised judicially.

The discretion exercised by the Judge or Magistrate to divide the matrimonial assets in many aspects is done not in accordance with the law. In most cases, it favours the patriarchy system and men as they head the family and does not much appreciate the double contribution of women in terms of domestic works and proceeds from their engagement in formal/informal employment.

In Kenya, the division of matrimonial assets is based on the contribution of the parties in acquisition of the property. This is because ownership of matrimonial assets is vested in the spouses.[53] Unlike Tanzania, the Kenya legislation has gone far by defining contribution to include domestic work and management of domestic home, child care, companionship, management of family business or property and farm work.[54] Furthermore, it defines matrimonial property to mean matrimonial homes, household goods, any other movable and immovable property jointly owned and acquired during the subsistence of the marriage[55].

51 (Divorce Cause No.22 of 2011) (2015) UGHCFD 26 (20 August, 2015) available at www.ulii.org/ug/judgement//high-court-family-division/2015/26 accessed on 18th April, 2018

52 High Court Divorce Appeal No 135/1997

53 S 7 of the Matrimonial Property Act, No 49 of 2013

54 *Ibid* Section 2

55 *Ibid* Section 6(1)

The above Kenyan Legislation should be regarded as a model to our jurisdiction as it clears doubts on the interpretation of matrimonial assets and the contributions which is the best way to determine the rights of spouses in relation to the matrimonial properties.

Apart from the above credit, the Legislation failed to percentage the extent of contribution in performing domestic work and farm work. There was need to go a mile further to percentage the domestic work performed by the wife. This has resulted in gender biased decisions. For example, in the case of *GAA Vs ZTG*[56] the Justice appreciated the indirect contributions of the wife based upon the evidence adduced by both parties before the court which showed that the wife was a great home maker, cared for their children, made food and tea and took it to the husband and their staff at their business. Despite the above contributions, the court held that the wife was only entitled to 10% of the matrimonial assets.

It must be noted that the above decision was before the coming into force of the new Legislation. However, neither the Legislation nor the case laws specifically apportioned the contributions of domestic work in acquisition of matrimonial assets.

7.0 Conclusion

Apart from addressing the issue of divorce, a number of matrimonial causes filed in the courts also entertain the division of matrimonial assets acquired by the spouses. The division is based on a number of considerations one of which is the contribution made by the spouses through domestic work. The court's guidance on adjudicating the relief sought by the parties is the Law and case laws. The Law is not much clear since some of the issues are not clearly defined; it is through case laws which clear doubts on the interpretation of the law. Unfortunately, on the issue of accounting the contribution in terms of domestic work a clear guidance is missing. The case laws appreciate the contribution realized through domestic work but fail to apportion it in terms of percentage. This contributes to discrimination of women in acquisition of matrimonial assets since they end up getting small portions. The article has shown that in most cases women double their contributions to the matrimonial property (contribution by works and monetary) but this is taken as a single contribution by the courts. It is advanced by the article that the portion of domestic work should be known and quantified before distribution. This will bring in fairness in the division of property as it will be treated separately from other types of contribution such as monetary contributions.

8.0 Recommendations

The LMA cannot be silent ***sine die***. There is an impelling thrust to explicitly attribute meaning to the statute book as to what entails " contribution towards acquisition of matrimonial property and/ assets".

The court should consider the length of the marriage in valuing the contributions made by the spouse particularly on evaluating contributions made in domestic work. The longer the spouse stayed in the marriage the more they make the home comfortable which has a positive impact on acquisition

56 . Nairobi, ELC NO.675 of 2011

of matrimonial assets. This should be subject to proof that the parties were not in separation.

The value of the matrimonial assets should be evaluated from the date when the suit was filed in the court since there might be a significant change from the date the suit was filed to the date of the final decision. This is because it is very rare for the spouse to be in a friendly relation when the matter is before the court. That is to say there is a possibility for one spouse to make substantial change in the property with exclusion of the other. Therefore, it will be unfair to divide the property as if the other had contributed, but again this is subject to concrete proof.

The judicial officers should consider gender factors in interpreting the contributions. This should be a key factor when dividing matrimonial properties. Purposive interpretation may help to reach a fair and reasonable decision.

There is an impelling need to incorporate International Human Rights Instruments particularly those which Tanzania had signed and ratified when adjudicating cases. These may act as a catalyst to the judicial officers and other justice stakeholders when adjudicating cases.

The Government and those advocating for human rights particularly women's rights should make awareness of the gender issues to judicial officers, officers of the court, and the entire public in order to sensitize them. Also more encouragement should be directed to Tanzanians to have the culture of valuing domestic work and to eliminate the belief rooted in the patriarchal system which considers domestic work as part and parcel of the woman and having no bearing on acquisition of the matrimonial properties.

PREFERENCE FOR SONS

A Principal Form of Gender Discrimination and Violation of Women's Rights in Tanzania

Norah Msuya[1*]

Abstract

Preference for male children is a powerful traditional belief, prevailing in numerous tribes in Tanzania. It is tied to inheritance and has remained inviolable because of the desire for a son to carry on the family name and guarantee its lineage. Females are generally viewed as inferior and subordinate to males. The huge pressure on women to produce a son not only directly affects their reproductive decisions, with implications for their health and survival, but it also puts them in the position of perpetuating the lower status of girls through the preference for sons. It is also women who have to bear the consequences of giving birth to an unwanted girl child, which include violence, abandonment, divorce or even death in some case. It perpetuates the lower status accorded to girls by the family, community and society. This article examines the issue of preference for sons as a pernicious violence inflicted on women in Tanzania. It highlights how preference for sons reflects and fuels a culture of discrimination and violence, and should be addressed as a matter of human rights.

Key words: Gender, discrimination, women's human rights harmful cultural practices.

1 * Norah Hashim Msuya, PhD is a Legal Lecturer of Mzumbe University and Postdoctoral Researcher of School of Law, University of KwaZulu Natal, South Africa. Email: noranewtz@yahoo.com.

1. Introduction

The tendency of parents to prefer sons to daughters is referred to as preference for sons.[2] It exists in many societies and cultures in the world, making it an issue with local and global dimensions.[3] Preferring sons does not necessarily mean that daughters are completely unwanted or disliked, although it can mean this of course. But there is a range of psychological, social and material outcomes of preferring sons, such as double standards are applied to schools and daughters, who are treated differently in terms of restrictions, freedom and taboos. Boys and girls are expected to, and indeed do, behave differently, undertake different physical and emotional tasks, and participate in and perform different practical and ritual activities within families and kinship groups.

While the culture of preference for male children is not a new phenomenon but has existed in many parts of Africa and Asia for hundreds of years, its contemporary expression is seen in the gendered outcomes of social power relations as they interact and intersect with the economy, culture and technology.[4] It is considered an important component of patriotic marriages and the patrilineal kinship system.[5] It emanates from the broader system of norms governing family formation, practices and attitudes in a given cultural setting.[6] The underlying workings of female discrimination are indisputably complex.[7] There is no doubt that, as a result of the prejudice against women, their social and legal status over the ages has been a cause of grave concern in every culture, and in some areas the move has been from merely showing sympathy for this issue to engaging in aggressive feminism.[8] Though families in urban areas of Tanzania have in many ways become westernised, they have not accepted the concept of equality.[9] Traditional marriage customs vary according to the ethnic group, but the tradition of preferring sons is common in many tribes. It is more prevalent in tribes around the lake zone, and in north, south and central Tanzania. [10] The preference for sons also prevails in North Africa (Morocco, Tunisia, Egypt, Mali and Senegal), as well as in the Great Lakes region (Burundi, Kenya and Uganda). However, Southern Africa (Namibia and South Africa) is characterized by a preference for variety, and Central Africa (Cameroon, Chad, the DRC, Gabon and Central African Republic) by the absenceof gender preference[11].

The culture manifests itself in deprivation, neglect and discriminatory treatment of daughters to the detriment of their mental and physical health.[12] The preference for sons is a most pernicious violation of women's human rights. It comprises economic, physical, psychological and sexual abuse, and cuts across the strata of age, status, culture, wealth and educational background.[13] The practices that expose women to degradation, indignity and oppression on account of their sex need to be independently identified, condemned, compensated for and, preferably, prevented. This article seeks to provide a brief but comprehensive overview of the practice in Tanzania of preferring sons, and its impact on women and young girls. It aims both to identify and address the ways in which human rights are violated through the preference for sons. It seeks to answer the following questions. What underlies the practice of preferring sons? How does this impact women and children in Tanzania? What human rights are breached by this practice? The study adopted the doctrinal research approach to investigate legal propositions, and in so doing literature on the subject as well as primary sources such as domestic statutes and international human rights instruments were reviewed.

2. An overview of preference for sons

The preference for sons is a powerful tradition which begins at the first signs of pregnancy, when a woman receives unsolicited prayers from her husband and the husband's family for the safe delivery of a baby boy.[14] Usually the birth of a son is welcomed with celebration as an asset, whereas that of a girl is seen as a liability and an impending economic drain. It is commonly said that *bringing up girls is like watering a neighbour's garden*, meaning that eventually a girl will be married and considered a member of another family, so investing in her is like working hard for others.[15] Therefore, investing in a daughter is considered an investment in another family's daughter-in-law. A girl child is made to accept that the purpose of her life is to get married and raise children.[16]

Thus, in response to the attitudes and behaviours that reinforce women's subordination, an expectant mother would also wish that her first born would be a boy.[17] Women are likely to keep on bearing more children than initially planned hoping to have a son, with the attendant consequence of the mother and female siblings feeling inferior.[18] A considerable number of men look outside their matrimonial home so as to father a male child.[19] As a result, many marriages become shaky simply because the woman is unable to bear a son.[20] The Ilorin culture believes a woman is just an extra to humanity.[21] It is the traditional structure of family systems that men are the fixed point in the social order.[22] A sterile wife is liable to be divorced and returned to her father's homestead in disgrace.[23] In some tribes, a bride price is paid to the wife's family, which ensures the legitimacy of the offspring as members of the husband's lineage. This is why the bride price is sometimes not paid in full until after the birth of one, or even two children.[24] If the wife is sterile, her father would have to repay all of the bride price upon her return. The culture of preferring sons has prompted some men to marry a second or third wife so that they can have a male child.[25]

2 Douglas, A., Lena, E., Kevin, M., *Son Preference and the Persistence of Culture: Evidence from South and East Asian Immigrants to Canada*, Population and Development Review, 2013, Vol.39, No. 1, pp.75-95.
3 Rossi, P., Rouanet, L., *Gender Preferences in Africa: A Comparative Analysis of Fertility Choices Display the resource,* World Development, Elsevier, 2015, Vol. 72, pp. 326-345.
4 Purewal, N. K., *Son Preference Sex Selection, Gender and Culture in South Asia*, 2012 ,Retrieved from http://www.bergpublishers.com/?TabId=11824
5 *Ibid*
6 *Ibid*
7 Maloney, M., Male Preference. Retrieved November, Berg, New York, 2010, p. 17.
8 Oputa, C., Women and children as disempowered groups. In Women and children under Nigerian law. Lagos: Federal Ministry of Justice 1989, p. 27.
9 Ross, H., *What It's Like to Be a Woman in Tanzania,* Pink Pangea: The Community of women who love to Travel, 2015, p.2.
10 Mulema, J., *Son preference, childbearing behavior and respondent socio-demographic characteristics in Morogoro, Tanzania,* ABC Journal of Advanced Research, 2014,Vol. 3 No. 1, pp. 9–13. Amor, A., *Study on freedom of religion or belief and the status of women in the light of religion and traditions*, Addendum submitted to the Special Rapporteur in accordance with Commission on Human Rights resolution 2001/42, p.12.
11 Save the Children, *Children's situation in Tanzania* 2003, p.2 Available at *http://resourcecentre.savethechildren.se/start/countries/tanzania* accessed on August 2018; Amor, A., *Study on freedom of religion or belief and the status of women in the light of religion and traditions*, Addendum submitted to the Special Rapporteur in accordance with Commission on Human Rights resolution 2001/42, p.12.
12 Ibid.
13 Osarenren (note 15 above) p.2.
14 Mulema, (note 9 above) p.10.
15 Save the Children (note 10 above) p.1.
16 Mulema, (note 9 above) p.10.
17 *Ibid*
18 Osarenren, L., *Tradition at the heart of violence against women and girls in Africa* Inter-African Committee on Traditional Practices (IAC) *Issue 351*,2008, p. 3
19 Dickens, B.M., Serour, G. I., Cook, R.J., and Qiu. R. Z., *Sex selection: Treating different cases differently*, International Journal of Gynaecology and Obstetrics, 2005, Vol. 90 No. 2, p. 17
20 United Nations, Selected factors affecting fertility and fertility preferences in developing countries, World Fertility Survey Conference 1980: Record of Proceedings, New York: United Nations 1982, Vol. 2, pp.141–227.
21 Repetto, R., *Son preference and fertility behaviour in developing countries,* Studies in Family Planning, 1972, Vol. 3 No. 4, p.70–76.
22 Mwageni E.A., Ankomah, A., Powell, R.A., *Attitudes of men towards family planning in Mbeya region, Tanzania: a rural-urban comparison of qualitative data*, Journal of Biosocial Science 1998 Vol. 30 pp. 381–392.
23 *Ibid*
24 Mulema (note 9 above) p.10.
25 *Ibid*

Some general factors have been identified, which together create a situation where sons are preferred, and daughters suffer discrimination and neglect. They have been analysed along with different social, economic, political and cultural reasons that significantly determined couples' desire for a male child. Most of these factors are deeply rooted in cultural assumptions about gender identity and relations. The underlying patriarchal attitudes and behaviour, as well as discriminatory gender norms and structures, are the root cause of preference for sons in many societies. Many tribes in Tanzania are patriarchal, whereby men control and dominate all spheres of women's lives.[26] The belief that husbands are the head of the family and their decisions are final pervades in Tanzania.[27] Women are required to is unable to bear a son.[28] The Ilorin culture believes a woman is just an extra to Women are in a subordinate position, particularly at the community and household level.[29] The impact of the mother and father is particularly powerful on the way in which patriarchy is shaped and sustained. The mother is the role model for daughters, while the father shows his sons what it means to be a man.[30] Ideas about manhood are deeply embedded. From an early age, male children may be socialized into gender roles aimed at keeping men in power and maintaining control.[31] Most men grow up believing that dominating girls and women is what makes them a man, and so they regard their wives as dependent and inferior partners, who need to listen to them and follow their instructions.[32] Wives are not supposed to question what their husbands choose to tell them and to do so is to show disrespect.[33] Most societies have constructed what role is feminine or masculine, and so have apportioned different roles to men and women. In most cases, a girl or woman is seen but not heard. She knows her place, which means doing all the domestic chores, such as fetching water, cooking, scrubbing, cleaning and looking after the children and other family members.[34]

Other factors that determine couples' preference for sons are family and peer pressure and the need for a successor.[35] Sons are preferred because they perpetuate the family name, while girls lose their identity upon marriage by adopting their husbands' name. Many families want a son so that they will not lose their family name, which gives them a sense of prestige.[36] The fear that one's family will become extinct if they give birth to female children only is widespread.[37] The tradition which forbids women from bearing their father's name after marrying also exists.[38] Some traditions maintain that only sons can perform certain religious and cultural functions, such as rituals for the death of parents. For instance, the Kurya from Mara have a custom whereby, when a man dies without a male heir, the family selects one of his daughters to remain in his house and choose a lover with whom she cohabits to raise a male successor.[39]

26 Arnold, F., Gender Preferences for Children, DHS Comparative Studies No.23. Calverton, Maryland: Macro International Inc., 1997, p. 12: Pande R.P., Selective *Gender Differences in Childhood Nutrition and Immunization in Rural India: The Role of Siblings* Demography Vol. 40, No. 3 2003, pp. 395-418.

27 Msuya, N. H., Tradition and Culture in Africa: Practices that Facilitate Trafficking of Women and Children, 2017, Dignity: A Journal on Sexual Exploitation and Violence: Vol. 2, No. 1. Pp.1-36.

28 United Nations, Selected factors affecting fertility and fertility preferences in developing countries, World Fertility Survey Conference 1980: Record of Proceedings, New York: United Nations 1982, Vol. 2, pp.141–227.

29 Fuse K. *Variations in attitudinal gender preferences for children across 50 less-developed countries*, 2010, Vol. 23, No.36, pp. 1031-1048.

30 Leaper, C., *Parents' Socialization of Gender in Children,* Encyclopedia on early child wood development 2014. p.3.

31 Msuya, N. H., Harmful cultural and traditional practices: a roadblock in the implementation of the Convention On The Elimination of Discrimination Against Women And the Maputo Protocol on women's rights in Tanzania, 2017, PhD Thesis, University of KwaZulu Natal, p.114.

32 Msuya (note 26 above) p. 27.

33 Msuya (note 30 above) p. 115.

34 Msuya (note 26 above) p. 26.

35 Save the Children (note 10 above) 2.

36 Ibid.

37 Msuya (note 30 above) p. 114.

38 Bussey K., Bandura A., *Social cognitive theory of gender development and differentiation*. Psychological Review. 1999 Vol. 106 pp. 676-713.

39 UNICEF, Son preference perpetuates discrimination and violations of women's rights: It must and can end, UNICEF, Press Release, Geneva, 14 June 2011.

Likewise, sons are usually responsible for caring for aging parents and performing their burial rites.[40] The economic obligation of a son to look after his parents is greater, because he is considered to be the pillar of the family, ensuring the continuity and protection of its property. He has to provide the workforce and bring a bride to the family as an extra pair of hands. Children are valued as economic assets in rural areas.[41] In the subsistence rural economy, children are an important source of labour, especially in assisting their mother with farm and household work. Parents expect their children, particularly the boys, to provide for them in their old age.[42] Families in Tanzania also consider that the burden of grandchildren born to unmarried daughters is one of the reasons for preferring sons. Many daughters who become mothers without stable partners continue to live with their parents.[43] Unable to achieve economic independence, they become a financial burden. Therefore, not having a son is viewed as a source of vulnerability for parents in Tanzania, and those having only daughters are stigmatized.

Furthermore, sons are also preferred because they are expected to inherit their fathers' property, unlike daughters who do not. In most traditional societies, women are not allowed to inherit property, and so male members retain the right to own and use the property. Female children are often denied the right to inherit from their family as they are regarded as belonging to their husbands, and so they get less than male children.[44] A male child serves as insurance for his widowed mother, because her claim on her deceased husband's property is regarded by society as more legitimate if she has a son. This traditional practice is recognised and enforced under Tanzania Customary Law, which stipulates that a widow cannot inherit the property of her deceased husband.[45] This existing law of succession openly limits women from inheriting property due to their gender. This discrimination impoverishes women by limiting their access to land, a major economic resource, leaving them at the mercy of men with regard to their survival. Women have been kept in a state of perpetual dependence by this law.

The preference for a male rather than a female child is also connected to religion. Almost all the major religions of the world appear to be controlled by men in the form of clergy and religious authorities. Most religions have a male-dominated imagery and language relating to God.[46] It is asserted that an understanding of certain portions of holy books has fuelled the notion of women's submission to men.[47] Although recently some of these religious texts and doctrines have been highly disputed, the continuation of patriarchy, mostly through religious conservatism, still significantly influences the persistence of unequal gender relations and the preference for sons.[48] The teachings of religious leaders, especially Christian and Islamic, have often espoused dogma that reinforces women as minors in

40 Osarenren (note 15 above) 4.

41 Mbilinyi, M.J., *The state of women in Tanzania,* Canadian Journal of African Studies Vol.6 No.2 Special Issue: The role of African Women Past Present and Future 1972, pp. 371-377.

42 *Ibid*

43 Mwangeni (note 21 above) p.383.

44 Alan Guttmacher Institute, Hopes and Realities: Closing the Gap between Women's Aspirations and Their Reproductive Experiences. New York, NY: The Institute (1995) p. 127.

45 The Statement of Islamic Law Order No. 121 of 1962 (GN No. 222).

46 Onwutuebe, J. C., *Religious Interpretations, Gender Discrimination and Politics in Africa: Case Study of Nigeria*, 2013; Cooey, P. M., Religious Imagination and the Body, A Feminist Analysis, 1994, New York: Oxford University Press p.8.

47 Lukale, N., *Harmful Traditional Practices: A Great Barrier to Women's Empowerment* 1994 Girls Globe, p. 3.

48 Clark, S., *Son Preference and Sex Composition of Children: Evidence from India*. 2000, Demography Vol. 37 No. 1 pp. 95–108.

the sphere of religion,[49] and have emphasized some religious texts while disregarding others in a bid to sustain patriarchy, which is the main reason why sons are preferred.

3. Impacts of preference for sons

The practice of preferring sons is one of the principal forms of discrimination, which has far- reaching implications for women. It is a symptom of the pervasive social, cultural, political and economic injustice experienced by women, and a manifest violation of their human rights. It denies the girl child good health, recreation, economic opportunities and the right to choose her partner.[50] A female child is disadvantaged from birth due to the lack of the quality and frequency of parental care and the limited investment made in her development.[51] The preference for sons also affects girls' nutrition and education. In most homes, sons are given bigger portions of food than daughters and are more likely to be enrolled in better schools and encouraged to complete their studies.[52] When funds are short, daughters are normally withdrawn from school to allow the sons to be educated, irrespective of whether the daughters are naturally intelligent and the sons are dull.[53] The preference for sons has thus led to acute discrimination, particularly in resource-constrained societies. In extreme cases, it results in selective abortion and female infanticide in these days with access to technology.[54] The educational and economic impacts of preference for sons are huge.[55] There are far fewer females than males enrolled in secondary schools in Tanzania, despite a substantial increase in the number of women who have attained at least seven years' primary education.[56]

The inequality between the opportunities for males and females to access education causes women to experience lifelong economic and social disadvantage.[57] However, access to education by itself is not enough to eliminate the unfavourable values held by society, because some of these values seem to have been incorporated in educational curricula and textbooks.[58] Women are portrayed as passive and domestically oriented, whereas men are portrayed as dominant and the breadwinners of families.[59] Girls of a young age in rural and poor urban homes are burdened with domestic tasks and child care, which leaves them no time to play, while young boys have fewer demands made on them and are allowed to engage in activities outside the home.[60]

The status of girls is linked to that of women, and a woman's work is never done, especially in rural areas and poor urban households.[61] Women have fewer livelihood options in Tanzania, particularly as they are less likely to own land and capital.[62] Childhood experiences of discrimination have a strong bearing on adult men and women's attitudes and behaviour with regard to masculinity and control. The preference for sons thus reinforces a girl's low self-worth, low self-esteem, depression and eventually low productivity in adulthood.

49 Jayachandran, S. & Rohini, P. *Why Are Indian Children So Short? The Role of Birth Order and Son Preference* American Economic Review 2017, Vol. 107 No. 9, 2600–2629.
50 The culture of preference for sons violates Articles 3, 4, 10 and 12 of CEDAW, Articles 2, 3, 12, 13, 14 and 15 of the Maputo Protocol, and Articles 2, 6, 12, 19, 24, 27 and 28 of the Convention on the Rights of the Child.
51 UNICEF (note 39 above) p. 12.
52 *Ibid*
53 Save the Children (note 10 above).
54 UNICEF (note 39 above) p. 10.
55 *Ibid*
56 Mulema J (note 9 above) p.10.
57 *Ibid*
58 Osarenren (note15 above) p. 2.
59 *Ibid*
60 Mwangeni (note 21) above).p. 382.
61 UNICEF (note 39 above) p. 7.
62 Mulema J (note 9 above) p.10.

Moreover, this culture has a negative impact on women's social development in societies where it is strong, as their security and status depend on their producing sons.[63] The more sons a woman produces, the greater her security and the higher the status accorded by her in-laws and her community. This culture not only affects women's potential for benefiting her immediate family and community, but also the nation. Fewer women than men are found in high status occupations, or top managerial and administrative positions in Tanzania.[64] Because childbearing directly affects women, men's preference for sons may be deleterious to women's reproductive health.[65] In an effort to fulfil her husband's desire for sons a woman may be compelled to bear more children. Constant child bearing may not only affect a woman's physiological well-being, but may also increase the risk of morbidity and mortality.[66] This culture that puts enormous pressure on women to produce sons not only directly affects their reproductive decisions with implications for their health and survival, but also puts them in a position of perpetuating the lower status of girls.[67] Some women have borne the consequences of giving birth to an unwanted girl child, which include abandonment, divorce, violence and even death.[68] Men continue to be the primary decision-makers, both in public and at home, as well as being the income earners, and so their attitude to reproductive matters is substantially influenced by their preference.[69]

4. Preference for sons and infringement of human rights.

Non-discrimination is a fundamental principle of international law. Human rights law prohibits discrimination on the basis of a wide range of prohibited grounds, and Tanzania has ratified all the main human rights instruments.[70] Equality and non-discrimination are foundational principles of the international human rights legal framework.[71] This was first set out in the Universal Declaration of Human Rights (UDHR), and all the core human rights instruments adopted since the UDHR contain legal obligations relating to equality and non-discrimination.[72] The preference for sons is a pervasive social, cultural, political and economic injustice affecting girls and women. It is a violation of the right of women not to be discriminated against. The UDHR, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) prohibit discrimination on the grounds of sex, religion, property, birth or other status. [73] The ICCPR and ICESCR include further an undertaking to *ensure the equal right of men and women to the enjoyment of all* rights in their respective covenants.[74] The international human rights instruments which specifically provide for children's rights require children to be protected from discrimination on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal

63 Mulema (note 9) above 4.
64 Osarenren (note 15 above).
65 Alan Guttmacher Institute. *Hopes and Realities: Closing the Gap between Women's Aspirations and Their Reproductive Experiences.* New York, NY: The Institute (1995) 127.
66 *Ibid*
67 Mwangeni (note 21 above) p. 382.
68 *Ibid*
69 Save the Children (note 10 above) p. 2.
70 Africa for Women's Rights, Ratify and Respect Report of Women's rights protection instruments ratified by Tanzania. Available at http:/www.africanforwomensrights.org accessed on 11 February 2019; Peter, C. M., Human Rights in Tanzania: Selected Cases and Materials, Rudiiger Verlag, Koln, 1997, p. 8.
71 Ibid.
72 De Albuquerque, C., Report to the General Assembly. 2010 UN Doc. No. A/65/254. http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/477/84/PDF/N1047784.pdf?O... Accessed on 8 January 2019.
73 Article 2 of Universal Declaration of Human Rights (UDHR) of 1948; Article 1 and 2 of International Covenant on Economic, Social and Cultural Rights (ICESCR), of 1966; Article 2,3 and 26 International Covenant on Civil and Political Rights (ICCPR) of 1966
74 Article 2 and 3 of the ICESCR; Article 2 and 3 of the ICCPR.

guardians, or family members.[75]

While the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child of 1990 acknowledge the rights and duties of the family to nurture, socialise and develop their children in a manner consistent with local values, customs and traditions,[76] Article 24(3) of the CRC obliges state parties to take all effective and appropriate measures to abolish traditional practices prejudicial to children. Likewise, the first article of the African Charter on the Rights and Welfare of the Child obliges state parties to discourage any custom, tradition, cultural or religious practice that is inconsistent with the rights provided therein. Similarly, Article 21 insists that Governments should do what they can to stop harmful social and cultural practices which affect children.

It should be noted that the preference for sons is a form of violence against women, which is defined by Article 1 of the UN Declaration on the Elimination of Violence Against Women of 1993 as *any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women.* The definition focuses on violence which happens to women because of their being women, like the preference for sons. Violence against women is a manifestation of historically unequal power relations between men and women that has led to domination over and discrimination against women by men and has prevented the full advancement of women.[77] This legal instrument declares that violence against women is one of the crucial social mechanisms by which women are forced to be subordinate to men.

State parties also have an obligation under international human rights law to respect, protect and fulfil the human rights of girls, as elaborated in the ICCPR, ICESCR, CRC and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[78] Therefore, state parties have an obligation to take active steps to counter discrimination and to uphold women's rights. The major international and regional women's rights instruments, CEDAW and the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol) guarantee equality for all and condemn all forms of discrimination.[79] More relevant is Article 5(a) of CEDAW that requires states parties to modify social and cultural patterns of conduct with a view to achieving the elimination of prejudices and customary practices based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles of men and women.

Although the Constitution of the United Republic of Tanzania is clear on the right to equality for all human beings, the culture of male preference is still prevalent.[80] However the Article of the Constitution which bars discrimination on the basis of sex addresses only the *de jure* (letter of the law) and not the *de facto,* i.e. the practical effect of the law on the intended population.[81] This falls short of the definition of CEDAW, which requires state parties to address both the law and practice.[82] Finding out the sex of a child before birth is not illegal in Tanzania and there is no law that criminalizes the abortion of a female child due to gender preference.[83] However, some laws have been passed in Tanzania to address gender equality and to promote and protect women's interests, such as the SOSPA (1998),[84] the Law of the Child Act, 2009,[85] the Employment and Labour Relations Act 2004,[86] the Land Act (1999)[87] 1 girls' essential right to equality, dignity, and access to education, and contravened Tanzania's Law of the Child Act. The High Court pointed out that while the Law of Marriages Act might have been enacted with good intentions in 1971, this intention was no longer relevant because the effects of the Act now discriminated against girls by depriving them of opportunities that are vital for all Tanzanians. The Attorney General was given one year from the date of the decision to make arrangements for amendments of that law, and to put 18 years as the minimum age for one to contract a marriage. However, the Attorney general filed a notice of intention to appeal against this decision by the High Court on 20 July 2016.[88]

Additionally, the preference for having more sons than daughters influences fertility and contraceptive behaviour as articulated above, which means that women are valued when they are able to produce a male child. Women's sexual and reproductive health is related to multiple human rights, including the right to life, the right to be free from torture, the right to health, the right to privacy, the right to education, and the right not to be discriminated against. Both ESCR and CEDAW Committees have clearly indicated that women's right to health includes their sexual and reproductive health. This means that state parties are obliged to respect, protect and fulfil the rights relating to women's sexual and reproductive health.[89] Women's reproduction decisions are advanced by CEDAW under article 16, which guarantees women equal rights in deciding freely and responsibly on the number and spacing of their children. The human rights of women include their right to have control over and decide freely and responsibly on matters relating to their sexuality, including sexual and reproductive health, and freedom from coercion, discrimination and violence.[90]

The foremost effect of the preference for sons is the denial of the inheritance rights of the girl child. It is the traditional practice of many tribes in Tanzania that only a son can inherit, but if the deceased father had no son, then his brothers or their sons would inherit. It is sad that the law continues to enforce the culture of

75 Convention on the Rights of the Child (CRC) of 1989

76 Article 5, 18(1) & 27(2) of the CRC and Article 18 of the African Charter on the Rights and Welfare of the Child of 1990.

77 Preamble of that declaration of the UN Declaration on the Elimination of Violence Against Women of 1993

78 This was clearly recognized at the International Conference on Population and Development (ICPD) in 1994 and in the associated Programme of Action that enjoined governments to: . . . eliminate all forms of discrimination against the girl child and the root causes of son preference, which result in harmful and unethical practices regarding female infanticide and prenatal sex selection. United Nations (1994); paragraph 4.16

79 Article 3 of CEDAW and Article 2 of the Maputo Protocol.

80 Article 12(1) & (2) of the Constitution; Legal and Human Rights Centre, Tanzania Human Rights Report 2012 LHRC 2013, pp. 107.

81 Tanzania Women Lawyers Association (TAWLA), Gender Equality and Women Empowerment (GEWE II) Review of Laws and Policies related to gender based violence of Tanzania mainland, 2014, TAWLA, p. 3.

82 Article of CEDAW.

83 UNICEF (note 39 above) p. 12.

84 The miscellaneous amendment baptized as Sexual Offences Special Provisions Act (SOSPA) of 1998 amended the Penal Code, Criminal Procedure Act, Cap. 20; Evidence Act, Cap. 6 and Children and Young Persons Ordinance, Cap. 13.

85 Law of the Child Act No. 21 of 2009 incorporated most of the child rights enshrine in CRC and African Charter on the Rights and Welfare of the Child. It integrated the principles of the permanent best interests of the child as elaborated in the Convention of the Rights of the Child of 1989 and African Charter on the Rights and Welfare of the Child of 1990.

86 Employment and Labour Relations Act No. 6 of 2004 prohibits discrimination on the basis of one's sex or gender role in Sections 7(1), (4) and (5), 20 and 33. Also, Section 7 of the law prohibits direct and indirect discrimination in the workplace including discrimination on the basis of sex, gender, pregnancy, marital status. Other gender-related issues addressed in this law include; i) prohibition of harassment which is regarded as part of the discrimination in Section 7(5).

87 Section 22(1) of the Village Land Act no. 5 1999 provides for group registration of a family unit in the village. It is a good opportunity for women to acquire legal rights concerning village land which would put them on par with male family members and save them from the requirement to be inherited by a male relative of the deceased husband in order to maintain their interest in land.

88 Mhagama H 'Tanzania: Network Asks Government to Rethink Decision on Early Child Marriages' *AllAfrica Report* 5 August 2016. Available at http://allafrica.com/stories/201608050234.html .

89 UN Human Rights, *Sexual and reproductive health and rights,* 2015 UN Human Rights https://www.ohchr.org/en/issues/women/wrgs/pages/healthrights.aspx Accessed on 27 March 2019.

90 UN Human Rights (note 95 above)

denying women the right to inherit in Tanzania. The Local Customary Law of succession, which governs the day-to-day lives of the majority of rural women and children in the country, denies women access to land and property upon divorce or the death of the husband.[91] The law and the culture of preventing women from inheriting because of their gender impoverishes them by limiting their access to economic resources and leaving them at the mercy of men for their survival. Women have been kept in a state of perpetual dependence by this practice. Further, the Customary Law of Succession grades women at the lowest level, and children are graded according to their birth line and their mother's position in a polygamous marriage. The existence of the gender discriminatory provision in the law is evidence of how deeply rooted is the preference for sons in the country.

5. Recommendations for action

Tanzania is required to take every possible measure to eliminate all forms of discrimination against women such as that of the preference for sons. To successfully address such a hugely challenging issue will require a multifaceted approach. The impact of laws and policies on gender equality need to be analysed and modified to ensure that they are consistent with human rights commitments. Some domestic laws, such as the Customary Law Order, which endorses preference for male children, need to be revised. As a matter of priority, Tanzania should domesticate the CEDAW, Maputo protocol and other relevant international instruments dealing with discrimination against women.

91 The Local Customary Law (Declaration No. 4) Order [CAP 35 R.E. 2002], (GN No. 436 of 20 September 1963).

Challenging an entrenched mind-set and traditional beliefs cannot be achieved easily. If change is to effectively take place, it must be done gradually. Vigorous and concerted efforts are needed by all concerned. The government and civil society should join hands to address the deeply rooted issue of gender discrimination which lies at the heart of preference for sons. It is also suggested that the government should develop and promote pragmatic policies that will reform the inheritance laws and take other measures to protect women, which will reflect its commitment to protecting human rights and promoting gender equality. Continuing advocacy and awareness-raising activities and campaigns that stimulate discussion on the equal value of boys and girls should be intensified. This is supported by what is happening in South Korea, where the preference for sons has largely been overcome through a combination of strategies, such as enshrining gender equality in laws and policies, advocacy, media campaigns and economic growth.[92]

Programmes which challenge men's attitudes towards having a one-sex family need to be initiated. Men should be taught and persuaded that male and female children are equally important, which would help to reduce men's bias against girls, minimise marital problems, and improve women's status. Measures that support girls and women and other legal and awareness-raising actions are also needed. State parties should support advocacy and awareness-raising activities that stimulate discussion on the equal value of boys and girls. These

92 Cai, Y. P., *Isis International. Feminist Approach to Sex Birth Ratio in China.* 2012, http://www.isiswomen.org/index.php?option-com content&view-article&id=1287: feminist-approach-to-s ex- birth-ratio-in-china&catid=22:movements-within&Itemid=229 Accessed on 27 February 2019.

measures should focus on ensuring the self-determination of girls and women by improving their access to information, health care services and nutrition, education and personal security, including protection from coercion.

Additional measures may also need to be taken in the form of policies that are implemented and monitored to ensure that no matter whether girls are born second, third or fourth in a family they have equal access to education and health services. For instance, short-term measures, such as providing incentives for families with daughters only, may help to increase the perceived value of girls, while longer-term efforts to change deep-rooted thinking and attitudes take effect. Addressing the imbalanced sex ratios at birth is a key opportunity for state parties to examine their current legislative framework and the extent to which laws and policies are in line with their human rights commitments.

Advocacy to change attitudes towards girls and women needs to take place to address men's preference for sons. It would therefore be very important to give maximum publicity to leaders and other personalities and influential groups that support the fact that human rights should be enjoyed by girls and boys equally, and who therefore oppose the pre-natal selection of gender. With the aid of other agencies, governments should give their full support to the development of innovative activities that stimulate discussion that will bring about a consensus on the equal value of girls and boys. As with all programmes that aim to encourage behaviour change, it would be essential to complement national-level activities with mutually reinforcing activities at the local level in order to fully engage communities.

Particular attention would also need to be given to engaging health care professionals to ensure that they are fully aware of the issues concerning sex selection, and are in a position to act responsibly in accordance with the guidelines. Measures would also need to be put in place to ensure that more girls have access to higher education, so that gender equity is achieved in education and thereby when it comes to employment. The last measure would ensure the independence and self-reliance of women, and help ensure that girls are regarded as an asset rather than a liability. It should be borne in mind that, although Tanzania has developmental goals, if they do not address the issue of discrimination, they will surely fail to achieve their objective. The social norms that govern the preference for sons will ultimately need to change within families as well as social networks.

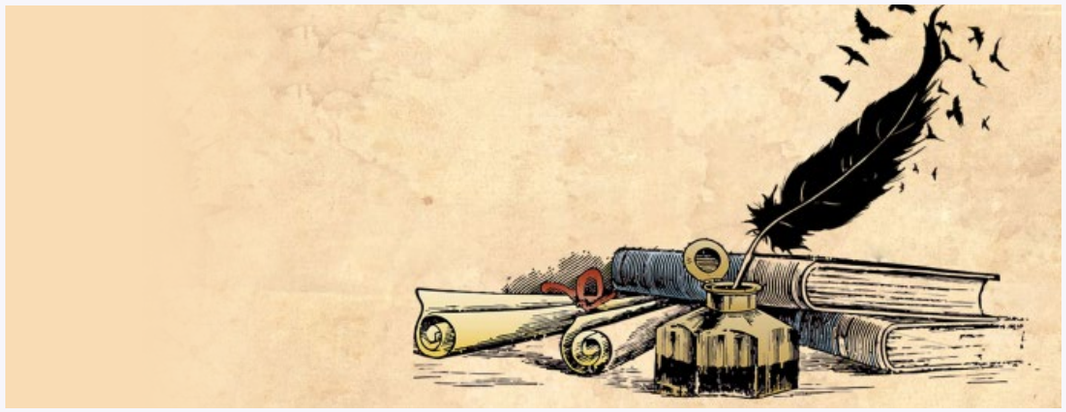
6. Conclusion

The preference for sons is one of those stubborn cultural norms that are in conflict with implementation of the provisions of the Constitution and some national legislation, and which undermine international human rights standards. Although it is important and legitimate to celebrate and respect the diversity of cultures, it cannot be allowed to undermine the fundamental human rights principle of non-discrimination that upholds human dignity, wellbeing and integrity in the context of human rights protocols that Tanzania has ratified. Discriminatory and inhumane harmful practices, such as preferring sons and the ongoing oppression of girls and women, are tolerated and

explained away by the fact that they are culturally determined, which makes such behaviour and even gender-based violence totally acceptable. As a result, female children are not protected from harm, and are denied their human rights, especially their right to a life free from violence.

It is apparent that patriarchy is at the heart of the violence inflicted on females, which is often compounded by different cultural, economic and other factors. Safeguarding human rights and gender equality will require a more informed analysis of the root causes of violence and discrimination against girls, particularly in relation to equity, deeply-rooted patriarchal attitudes, and the perception that males are superior and females are vulnerable and weak. Greater efforts are needed to ensure that those whose work brings them into contact with children embrace human rights principles. However, because laws alone cannot stop this practice, the mind-set that boys are more important than girls needs to be gradually but rigorously challenged in strategic ways. It is anticipated that, by removing the reasons for preferring sons and exposing their negative effect on women, the importance and value of women will be endorsed by society.

INSTITUTE OF JUDICIAL ADMINISTRATION LUSHOTO
JOURNAL POLICY



Introduction

This policy may be cited as the *IJA Journal Policy*.

1.0 Name and Publication of the Journal

1.1 The name of the Journal shall be the Institute of Judicial Administration Lushoto Journal and its mode of citation shall be *IJA-JOURNAL*.

1.2 The Journal shall publish quality scholarly articles from Judicial Officers, academics, students, legal practitioners and other professionals in interdisciplinary works of relevance to law and practice in Tanzania.

1.3 The Journal shall be published in print and electronic form (online).

1.4 The Journal shall be published twice in a year.

2.0 Management and Administration of the Journal

2.1 The Administration and Management of the Journal shall be vested in the Editorial Board.

2.2 The Editorial Board shall comprise of members from IJA, The Judiciary of Tanzania, external members from institutions of higher learning and legal practitioners.

2.3 The Editorial Board shall comprise of Chief Editor and other members who shall not exceed eight.

2.4 The Chief Editor and other members of the Editorial Board shall be appointed by the IJA Deputy Rector – Academic, Research and Consultancy after consultation with the Principal.

2.5 There shall be an Advisory Board of not more than six members who shall be appointed by the Editorial

Board.

2.6 The tenure of the Editorial Board and the Advisory Board members shall be three years subject to renewal for another term of three years. No member shall be allowed to serve more than three terms. However, the tenure of an individual member may be shortened or terminated due to failure to perform his/her duties, resignation or any other good cause.

2.7 The Chief Editor 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. However, 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 and approving management and production reports of the Journal submitted by the Chief Editor,

iii. Advising on matters pertaining to quality improvement and circulation of the Journal,

iv. Determining and directing all forms of subscriptions to the Journal.

2.10 The Chief Editor shall be responsible for distribution and circulation of the Journal.

3.0 Editorial Policy

3.1 The Journal shall address a wide range of 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 Journal invites authors to submit manuscript based on the following:

a) ***Comment on articles***

Manuscripts for comment, articles analyzing and commenting on recent cases, legislation and other topical matters must range between 1500 and 2500 words. No footnote shall be allowed in comment articles. References, case citation, legislation and relevant literature should appear in brackets in the main text. All comment on articles should be accompanied by a short abstract not exceeding 50 words. The comment must bear the following headings;

- Title (descriptive)
- Name/Citation of relevant case/ legislation/material
- Legal context
- Facts
- Analysis
- 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 Review

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;

- The intended audience of the book
- The main argument and objective of the book
- The soundness of the argument and the research methods used
- The strength and weakness of the book as a scholarly piece of work.

3.5 While authors shall retain the copyright in their work, by publishing with IJA JOURNAL authors automatically grants IJA JOURNAL an exclusive license to publish their work in print and in electronic form and distribute it.

4.0 Submission guidelines

4.1 All manuscripts 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 12 and in the footnotes use font size 10.5.

4.2 The following rules of citation shall be applicable to submissions;

- Books should be cited starting with author's surname followed by initials. The title of a book should follow, edition, with publisher, place of publication, and year of publication, finalized by page number. Example: Peter C. M., Human Rights in Tanzania: Selected Cases and Materials, Rudiiger Verlag, Koln, 1997, p.11.
- 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 page of chapter. Example: Othman, H.H., *The State of Constitutionalism in Tanzania* 2008 in Khot Chilomba Kamanga, 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', 'loc cit', 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 1.5 cm. Longer quotations should be avoided, where necessary authors should paraphrase them.

4.4 Name (s) of author (s), academic tile 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.

4.7 All manuscripts shall further be subjected to editorial review for style, arrangement, literary quality and scholarly contents. The Editorial Board serves the right to reject, edit or shorten any submission approved for publication.

4.8 A decision on every manuscript shall be made in a timely manner and communicated to authors.

4.9 No two manuscripts of the same author shall be published in one journal issues. However, a co-authored manuscript may be published alongside a sole authored manuscript.

4.10 Upon publication of their submission, authors will receive one hard copy of the issue of the Journal where their submission appears and/or be allowed to access their published articles electronically.

4.11 The Journal shall provide a vibrant forum for discussions, study and research; where contributors may freely express their opinions on legal and other related matters.

4.12 Manuscripts must be submitted in word format (soft copies) and all correspondence must be addressed to the Chief Editor, in the following address;

The Chief Editor
Institute of Judicial Administration Lushoto Journal
P.O. Box 20 Lushoto,
Tanzania.
Tel: +255 (0) 27 2640133
Mobile: +255 (0) 768612984
Fax: +255 (0) 27 2640287
e-mail: editor@ija.ac.tz or
archibald.kiwango@ija.ac.tz

The Chief Editor

The Institute of Judicial Administration Lushoto Journal
P.O Box 20, Lushoto
Tanzania.
Tel: + 255 (0) 27 264 0133
Mob: + 255 (0) 768612984/ (0) 684576766
Fax: + 255 (0) 27 264 0287
e-mail: archibald.kiwango@ija.ac.tz / cc: archibaldkiwango@yahoo.co.uk

Institute of Judicial Administration Lushoto
P.o.Box 20 Lushoto
Tel: (+255)-27- 2660133
Email: info@ija.ac.tz / Website: www.ija.ac.tz