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TABLE OF CONTENT

FOREWORD

Welcome to the Tanzania Lawyer Journal, 2019.

One of the functions of the Tanzania Lawyer Journal is to update the legal fraternity on emerging legal issues within and without our country.

This first issue of the Tanzania Lawyer 2019 has largely fulfilled that function. Some works published in this Journal include: Counterfeiting, Defective Products and Consumer Safety under Fair Competition Act of 2003 which provides protection of consumers from unfair and misleading market conduct; Regulation of Legal Practice in Tanzania Mainland which discusses the challenges found in the regulations of the legal Practice and the way forward. The author has analyzed such challenges from all regulatory frameworks how they operate and so forth. Lawyers might find this article very interesting as it touches very sensitive issues of compliance in the legal practice.

This Journal also offers an opportunity for the legal fraternity to share knowledge and experience on matters of Oil and Gas. In this context, we have an article entitled 'The Petroleum Local Content Regime of Tanzania' in here opportunities and challenges have been discussed and well analyzed.

We have a voluminous edition this time. This volume consists of five articles and one case notes. This is a result of the level of interest by people wishing to write for the Tanzania Lawyer. So, as always, I wish to thank all contributors, our blind peer reviewers, the Chief Editor, the Editorial Board and the Secretariat for the job well done. Special appreciations goes to Ms. Mabhezya Rehani who has been the Secretary of the Editorial Board for a number of years but has now moved on to higher career challenges abroad.

Prof. Cyriacus Binamungu

Chairperson

Policy, Research and Publication Committee

EDITOR'S NOTE

Welcome dear readers!

In this issue, I am pleased to present to you a publication that contain articles relevant to your day to day legal practice. The foreword by Prof. Cyriacus Binamungu provides a summary of the contents of the present issue. I hope you will enjoy reading this issue and consider submitting your own work for future publication in our journal, whether it is a book review, original research or case commentary that relates to our legal practice.

Enjoy your reading!

Prof. Dr. Alex B. Makulilo
Chief Editor

THE FORMAL *VIS-À-VIS* THE SUBSTANTIVE APPROACH TOWARDS THE ELIMINATION OF CHILD MARRIAGES FOR GIRLS IN TANZANIA

Isabela Warioba·

Abstract

This article is about two approaches which are formal and substantive, employed to eliminate child marriages being looked upon from the perspective of the circumstances in Tanzania. It aims at assessing which of the two approaches is more likely to achieve progress in the quest for elimination of child marriages. It asserts that in the fight against child marriages, as useful as the formal approach may be, it is unlikely that it will make headway, thus the substantive approach has a better chance. Before embarking on the specific discussion on the two approaches, the article covers the prevalence of child marriages in Tanzania, followed by a brief overview of the causes of child marriages. Thereafter, a discussion on the approaches follows and finally, a conclusion.

Keywords: Child marriage, Elimination, Formal Approach, Substantive approach

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1.0. Introduction

Child marriage, also known as early marriage, is defined as any marriage carried out involving a girl below the age of 18, before the girl is physically, physiologically, and psychologically ready to shoulder the responsibilities of marriage and childbearing.[1] It is a global issue, but varies dramatically within and between countries.[2] In both proportions and numbers, most child marriages take place in rural sub-Saharan Africa and South Asia.[3]

Over the years, child marriage has gained increased prominence on the international agenda and has now reached an all-time high.[4] In 2015, the United Nations Human Rights Council by consensus adopted the first-ever substantive resolution on child marriage.[5] An explicit target under goal five in the new sustainable development agenda is to eliminate all harmful practices, such as child, early and forced marriage.[6] Against this international backdrop, a number of countries have developed approaches, initiatives, strategies and plans on how to end child marriage.

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[1] UNICEF, Child Marriage, available at https://www.unicef.org/protection/57929_58008.html, accessed on 6 January, 2019; see also the The Inter-African Committee (IAC) on Traditional Practices Affecting the Health of Women and Children, Newsletter No. 15, December 1993 as quoted in Somerset, C, Early Marriage: Whose Right to Choose?, Forum on Marriage and the Rights of Women and Children, London, 2000.

[2] WHO, Child Marriage, available at www.who.int, accessed on 29 August 2017.

[3] Ibid.

[4] Wang, V, Ending Child Marriages - New Laws Bring Progress but Hurdles Remain, CHR Michelsen Institute, Bergen, 2016 available at https://www.cmi.no/publications/5802-ending-child-marriages-new-laws-progress-malawi, accessed on 16 October 2017.

[5] A/HRC/29/L.15, adopted on July 2, 2015, available at https://documents-dds-ny.un.org/doc/UNDOC/LTD/G15/139/78/PDF/G1513978.pdf?OpenElement, accessed on 17 September 2017.

[6] Sustainable Development Goals officially known as Transforming our World: the 2030 Agenda for Sustainable Development contained in the United Nations Resolution A/RES/66/288 of 25 September, 2015.

There are two approaches which are generally used in the quest to eliminate child marriage, namely the formal approach and the substantive approach. The words 'formal approach' and 'substantive approach' are borrowed from formal equality and substantive equality paradigms.[7] A formal approach means using law in its strict sense to address human rights violations. A substantive approach entails the use of law, while taking into account the reasons behind views in support of cultural values when implementing human rights.[8] Therefore, in the context of elimination of child marriages, the formal approach entails the categorical prohibition of child marriages, whereas the substantive approach would include addressing the socio-economic circumstances behind the support and perpetuation of child marriages.[9]

2.0. Child Marriages Prevalence in Tanzania

Tanzania has one of the highest child marriage prevalence rates in the world.[10] On average, almost two out of five girls will be married before their 18th birthday.[11] While child marriage is common in Tanzania, prevalence is highest in the following regions: Shinyanga (59%), followed by Tabora (58%), Mara (55%), Dodoma (51%) Lindi (48%), Mbeya (45%), Morogoro (42%), Singida (42%), Rukwa (40%), Ruvuma (39%), Mwanza (37%), Kagera (36%), Mtwara (35%), Manyara (34%), Pwani (33%),

[7]Mwambene, L, *Marriage under African Customary Law in the Face of the Bill of Rights and International Human Rights Standards in Malawi*, African Human Rights Law Journal, 2010, Vol. 10, No. 1, p.103.
[8] Ibid.
[9] Ibid.
[10] Ministry of Health, Community Development. Gender, Elderly and Children (MHCDGEC), National Survey on the Drivers and Consequences of Child Marriages in Tanzania, 2017, available at http://www.mcdgc.go.tz/data/national_survey_, accessed on 8 March 2018.
[11] Ibid.

Tanga (29%), Arusha (27%), Kilimanjaro (27%), Kigoma (26%), Dar es Salaam (19%), and Iringa (8%)[12]. Therefore, Dar es Salaam and Iringa have the lowest rates.[13] Child marriage is more prevalent among the rural population, although it is also found among the urban population, but mainly limited to those with poor economic conditions and strong religious and cultural ties.[14]

According to United Nations Children's Fund (UNICEF), urgent action is needed to take solutions to scale and prevent thousands of girls in Tanzania today from being married in the next decade(s).

3.0. Causes of Child Marriages

3.1. Child Marriage as a Strategy for Economic Survival

Poverty is one of the major factors underpinning early marriage.[15] Where poverty is acute, a young girl may be regarded as an economic burden and her marriage to a wealthy, much older, sometimes even elderly man may be seen as a family survival strategy. In some cultures, a family may receive cattle from the groom or the groom's family, as the bride price for their daughter.[16] For example, for the pastoralist communities in Tanzania who are highly patriarchal, girls are viewed only as source of income to exchange for cattle and other wealthy assets

[12] MHCDGEC (n 10).
[13] Ibid.
[14] Ibid.
[15] Bunting, A, *Stages of Development: Marriage of girls and teens as an international human rights issue*, Social and Legal Studies, 2005, Vol. 14, No. 1, pp.17–38, p .29.
[16] Rwezaura, B, '*The Changing Context of Sub-Saharan Africa*' in Alston, P, The Best Interests of the Child, Clarendon Press, Oxford, 1994 as quoted by Innocenti Research Centre, *Early Marriage*, Innocenti Digest, No.7, March 2001.

in the form of bride price.[17] Therefore, parents marry off their young girls so that they can get bride price.[18]
Furthermore, a larger population of Tanzanians live in rural areas and depend on traditional livestock keeping and crops cultivation for survival.[19] However, due to climatic change, the dry season affects both, livestock keeping and crops cultivation, hence, leading to food shortage and grazing areas. As a result, they may marry off their young girls as a means to survive.[20]

According to the United Nations Population Fund (UNFPA) report,[21] child marriages in Tanzania occur more frequently among girls who are the least educated, poorest and living in rural areas. Sixty one (61) per cent of women with no education and 39 per cent with primary education were married or in union at age 18, compared to only five per cent of women with secondary education or higher.[22] Household wealth also influences the prevalence of child marriage among all wealth quintiles. Girls from the poorest 20 per cent of the households were more likely to be married/in union before the age of 18 than girls from the richest 20 per cent of the households.

[17] Kambaulaya, G, *Child Marriages, Scourge to the Nation*, The Guardian, 11 May 2016, available at http://ippmedia.com/en/features/child-marriages-scourge-nation, accessed on 5 January 2017.
[18] Shagata, S, *Tanzania: AACP Rescues 122 Girls from Early Marriage in Shinyanga Region*, Tanzania Daily News, 16 December, 2016 available at http://allafrica.com/stories/201612160397.html, accessed on 17th April, 2017.
[19] Shagata (n 18).
[20] Ibid.
[21] UNFPA, UNFPA Annual Report 2011, available at https://www.unfpa.org/publications/unfpa-annual-report-2011, accessed on 3 January, 2019.
[22] Ibid.

3.2. **Protecting Girls**

Another reason put forward for marrying girls at an early age is that it helps prevent premarital sex.[23] This cause is heavily linked with gender stereotypes about women's position and roles in society. Many societies prize virginity before marriage and this can manifest itself in a number of practices designed to 'protect' a girl from unsanctioned sexual activity.[24] Some parents worry that if they delay their daughters' marriage they might get pregnant.[25] In some parts of Tanzania, it is believed that if a girl conceives while at parents' home without being married, she will bring shame, remove the honour of the family and her own and reduce the bride price payable to her parents if she ever gets married.[26] Furthermore, this 'protection' is also done after a girl gets pregnant. Thus, once a girl gets pregnant, parents marry her off to her sexual partner.[27] Therefore, rather than confront teenage sexuality and encourage safe and protected sex, elders, parents, and sometimes even religious leaders, promote early marriage for girls.[28]

3.3. **Gender Discrimination**

Throughout the world, families and societies treat girls and boys differently, with girls disproportionately, facing lower levels of investment in their health, nutrition and education.[29] Gender

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[23] Innocenti Reserch Centre (n 16).
[24] Ibid.
[25] MHCDGEC (n 10).
[26] Agape Aids Control Programme, Presentation at REPSSI Forum, available at www.firelightfoundation.org, accessed on 17 April, 2018.
[27] Ministry of Health, Community Development. Gender, Elderly and Children (n 10).
[28] Bunting (n 15) p.28.
[29] UNICEF, *Child Marriage and the Law Legislative Reform Initiative Paper Series*, 2008, p .33.

based discrimination continues in adolescence and is often a constant feature of adulthood. Prevailing gender norms also inhibit adolescent girls' access to schooling and employment opportunities therefore end up in child marriages.[30] This is, especially so, when poverty intersects with gender dynamics in the family which in turn affects choices about education and marriage.[31]

Therefore, economics alone, do not explain why poverty leads to child labour in factories or in the informal economies of the street for both boys and girls in some cultures, while poverty leads to early marriage for girls and teens in other cultural contexts.[32] Factors such as the social shame associated with pregnancy out of wedlock, cultural traditions, and the status and roles of girls and women in society, therefore, overlap with poverty and economic considerations to encourage the marriage of minor girls.[33]

Gender stereotypes about women's roles in society manifest themselves in legal provisions along with cultural norms about sexuality.[34] In many countries, the disparity between women and men is reflected and codified in law. It is common to find that the marriageable age for girls is one or two years less than that for boys. For example, in Colombia, a girl of 12 or a boy of 14 can marry with the express consent of their parents.[35] In Madagascar, the marriageable age for girls is 14 years and for boys 17,

[30] UNICEF (n 29) p. 33.
[31] Bunting (n 15) p .29.
[32] Ibid, p. 26.
[33] Ibid.
[34] Bunting (n 15) p .29.
[35] CEDAW/C/COL/2–3, Rev. 1 (21 September 1993): 72–73).

although the consent of the prospective spouse's parents is required when she is under the age of 18.[36]

This age disparity at marriage between men and women is rooted in stereo typical gender roles that remain in most cultures, which hold that women are to be mothers and wives and men are to be providers for the family unit.[37] Women therefore are deemed to be ready for marriage at an earlier age than men who ought to finish their professional training, and ideally, be financially secure.[38]

3.4. **Minimum Age for Marriage Laws**

Minimum age for marriage refers to the specific age where persons are allowed under the law to enter into a contract of marriage. International law prescribes that this age be set at 18 years.[39] Some states have responded, positively, to international law and set the minimum age for marriage at 18. However, among countries with laws that set the minimum age of marriage at 18, many allow exceptions to this general rule. Some countries

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[36] CEDAW/C/5/Add.65/Rev.2 (11 November 1993): 32).

[37] World Health Organization (WHO), Safe Motherhood: Health Day 1998: Delay Childbearing, 1998, available at: http://www.who.org/whday/1998/whd98_04.html, as quoted by Bunting (n 15) p.27.

[38] Bunting (n 15) p.27.

[39] UN Committee on Elimination of Discrimination against Women and UN Committee on Rights of the Child, *Joint General Recommendation/General Comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on Harmful P*ractices, CEDAW/C/GC/31-CRC/C/GC/18, available at https://reliefweb.int/report/world/joint-general-recommendationgeneral-comment-no-31-committee-elimination-discrimination, accessed on 10 January, 2019 ; article 16 of the Convention on Elimination of Discrimination against Women (CEDAW); the African Charter on the Rights and Welfare of the Child (ACRWC) under article 21(2); The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) under Article 6(c).

allow children to get married at younger ages with parental consent.[40] In other countries, minimum age of marriage laws does not apply to groups governed by customary law and so on.[41] Some countries allow marriage under 18, in the case of pregnancy, under exceptional circumstances as identified by a court or if a court determines the girl is capable of assuming the responsibilities related to marriage.[42]

Therefore, regarding adoption of minimum age for marriage laws by States, States can be classified into three categories. These categories are; States which have adopted laws that strictly adhere to the current international standard by setting the minimum age at 18 and allowing no exceptions; States which have adopted laws which comply with the current international standard of 18, but allow for some exceptions; and States which have not adopted any laws to set the minimum age for marriage.[43]

Research has found out that countries with minimum age of marriage laws that set the minimum age of marriage at 18 are more effective than other countries at reducing rates of child marriages over time.[44] Research has also found out that the nature of the law matters in the sense that countries with laws

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[40] Boyle, E.H, *When Do Laws Matter: national minimum-age-of-marriage laws, child rights, and adolescent fertility (1989-2007*), Law and Society Review, 2013, Vol. 47, No. 3, pp. 589-620, p.593.

[41] For example, in Malaysia, although the official minimum age of marriage is set at 18 for both boys and girls, Islamic law permits girls to be married as early as age 16.

[42] Boyle (n 40) p.593.

[43] Boyle (n 40) p. 601.

[44] Kaufman, J et al, *Minimum Marriage Age Laws and the Prevalence of Child Marriage and Adolescent Birth: evidence from Sub-Saharan Africa*, International Perspectives on Sexual and Reproductive Health, 2015, Vol. 21, No. 2, pp. 58 – 68 ,available at https://www.guttmacher.org/journals/ipsrh/2015/07/minimum-marriage-age-laws-and-prevalence-child-marriage-and-adolescent-birth, accessed on 10 December 2018.

that provide exceptions to international standards, such as allowing earlier marriage with parental consent, were less successful at reducing early marriages than countries which had laws that adhered strictly to those standards.[45]

4.0. Formal vis a vis Substantive Approaches of Elimination of Child Marriages

Hereunder follows a discussion on the formal approach as well as the substantive approach of elimination of child marriage. The formal approach will entail a discussion on the law on child marriages, both international and domestic. Thereafter, a discussion on the substantive approach will follow.

4.1. The Formal Approach

4.1.1. International Human Rights Law on Child Marriages

Tanzania is party to many human rights treaties which are relevant to child marriage. These include the following; the Convention of the rights of the Child (CRC), the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, The Convention on the Elimination of all forms of Discrimination against Women (CEDAW), The International Covenant on Economic, Social and Cultural Rights (ICESCR), The International Covenant on Civil and Political Rights (ICCPR), The African Charter on the Rights and Welfare of the Child (ACRWC), The African Charter on Human and Peoples' Rights (ACHPR) and the Maputo Protocol.[46] Therefore, Tanzania has acquired obligations in relation to child marriage from these instruments.

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[45] Ibid.

[46] CRC (ratified 10 June 1991), Op-Protocol (ratified 24 April 2003), CEDAW (ratified 20 August 1985), ICESCR (acceded 1976), ICCPR (acceded 11 June 1976), ACHPR (ratified 31 May 1982), ACRWC (ratified 16 March 2003), Maputo Protocol (ratified 3 March 2007).

International human rights law frowns upon child marriage. Child marriage is considered both, a harmful cultural and traditional practice[47] as well as gender based violence,[48] from which children should be protected from by, among other things, enactment of laws which set the minimum age of marriage at 18 years.[49]

International human rights law concerns about child marriage centre on the patriarchal values pervading this custom;[50] the relative powerlessness of the girls involved; that marriage under the age of majority which is set at 18 is illegal; that early marriages involving bride price payments are akin to selling young girls and increasing their vulnerability to violence;[51] and that young girls cannot give meaningful, informed consent and indeed, are often not even consulted and are especially vulnerable to manipulation or control.[52] Other concerns on child

[47] UN CEDAW Committee and UN CRC, (n 39).
[48] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, 1992, available at https://www.refworld.org/docid/52d920c54.html, accessed on 22 January, 2019.
[49] UN Committee on the Rights of the Child (CRC), *General comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 1 July 2003, CRC/GC/2003/4, available at https://www.refworld.org/docid/4538834f0.htm, accessed on 22 January, 2019; UN CEDAW Committee and UN CRC Committee, (no 39).
[50] Boyden, J, Pankhurst, A and Tafere,Y, *Child Protection and Harmful Traditional Practices: Female early marriage and genital modification in Ethiopia*, Development in Practice, 2012, Vol.22, No.4, p.512.
[51] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation on Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic Consequences of Marriage, Family Relations and their Dissolution)*, October 3,2013, CEDAW/C/GC/29, available at https://www.refworld.org/docid/52d903bd4.html, accessed on 22 January, 2019.
[52] See art 16(2) of UDHR; Art. 16 of CEDAW; Art 1 of ICESCR; Art 6(a) of Maputo Protocol; UN CEDAW Committee, *CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations*, 1994, available at https://www.refworld.org/docid/48abd52c0.html, accessed on 22 January, 2019;

marriage are the known adverse health consequences, particularly the dangers of early pregnancy and childbirth; maternal mortality and morbidity (including obstetric fistula, difficult labour), and infant mortality.[53] Early marriage is also linked with a raised incidence of violence,[54] abuse of women and isolation from family and community.[55] Additionally, early childbearing correlates with lower levels of female education.[56] Statistics show an inverse relationship between education and marriage such that where school enrolment especially in secondary school is very low, incidence of early marriage is high.[57] Also, as noted by the CEDAW Committee and the CRC Committee, early marriages also contribute to higher rates of school dropout, particularly among girls.[58]

Therefore, among other things, states are obligated to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage.[59] Furthermore, states are required to make sure that the betrothal and the marriage of a child shall

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Jensen, R and Thornton, R, *Early Female Marriage in the Developing World*, Gender, Development and Marriage, 2003, Vol. 2, No. 11, p.14.

[53] Greene, M, Malhotra, A and Mathur, S, Too Young to Wed: The Lives, Rights, and Health of Young Married Girls, International Center for Research on Women, Washington DC, 2003, available at http://www.issuelab.org/resources/11421/11421.pdf, accessed on 28 August, 2018.

[54], Kurz, K and Saranga, J, New Insights on Preventing Child Marriage: A Global Analysis of Factors and Programs, International Center for Research on Women, Washington DC, 2007, p. 8.

[55] Greene, Malhotra and Marthur, (n 53).

[56] Jensen and Thornton (n 52) p.14.

[57] Bunting (n 15) p.28.

[58] UN CEDAW Committee and UN CRC Committee (n 39) para 6.2 (21).

[59], UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, Paras 22 and 1, available at http://www.refworld.org/docid/4538838d0.html, accessed on 20 January, 2019.

have no legal effect, and all necessary action, including legislation, is taken to specify a minimum age for marriage which should be 18 or above for both man and woman.[60]

*4.1.2. **Domestic Law on Child Marriages***

Tanzania has various statutory laws that in one way or another concern the issue of child marriages. These laws however, are neither in synch with international law, nor with each other as discussed hereunder and hence are not a strong tool to be used in the quest for the elimination of child marriages because these legal inconsistencies threaten the enforcement of the law.

a. The Law of Marriage Act[61]

The current law regulating marriage matters in Tanzania is the Law of Marriage Act, 1971 (LMA) which was enacted by Parliament in 1971. The law was enacted with the view of unifying and harmonising the then existing multiple regimes of law of marriage. It aimed at bringing the law of marriage into accord with Tanganyika African National Union's (the then only political party in the country) aspirations of fostering equality, individual dignity, freedom and respect to the people; to provide for freedom of marriage and equal recognition of all marriages however, celebrated, whether it be a Christian, Islamic, Civil or Customary.[62]

However, this aspiration of fostering equality, dignity, freedom and respect to the people was not quite realised, when it comes to a girl child, due to the minimum age of marriage that was set by the law, specifically by sections 13 and 17 of the LMA. Section

[60] CEDAW, Art 16; Para 36, UN CEDAW Committee (n 52) para 36.
[61] Cap 29 R.E 2002.
[62] Yashi Ghai Y.P, *The New Marriage Law in Tanzania*, Africa Quarterly (New Delhi) , 1971, Vol. 11, pp. 101-109.

13 sets the minimum age for marriage for girls at 15 as opposed to 18 which is set for their counterparts, boys. The provision also gives discretion to courts to lower this age to 14 under special circumstances. S.17 talks about consent for marriage. That if a girl who is below the age of 18 wants to get married; then she needs to obtain consent from a parent or guardian.

There has been an outcry about this law for many years within the country, especially from Non-Governmental Organisations dealing with rights of girls and women and human rights activists but nothing was done about it. In fact, in 1986, the Law Reform Commission responding to public concern, initiated an inquiry on the application and effectiveness of the LMA and reported on the same to the Attorney General.[63] One of the issues that they flagged needing amendment was the provisions dealing with the minimum age of marriage. They recommended that the age be raised to 21 for both boys and girls.[64] However, nothing was done about it by the Government and the law remained the same.

In 2016, these two provisions[65] of the LMA were challenged in the case of *Rebeca Z. Gyumi v. Attorney General*.[66] The Court was petitioned to strike out all provisions in the Law of Marriage Act, which allow a girl under 18 to get married with her parent's consent, specifically sections 13 and 17. The petitioner argued that, the two sections contravened Articles 12, 13 and 18 of the Constitution of the United Republic of Tanzania,[67] which give people equal rights before the law and the right not to be

[63] The Law Reform Commission, Inquiry and Report on The Law of Marriage Act, 1971, The Law Reform Commission, Dar es Salaam, 1986, p.21.
[64] Ibid.
[65] Secs. 13 and 17 of LMA.
[66] Misc. Civil Cause no. 05 of 2016.
[67] 1977, as amended from time to time

discriminated against. The court in this landmark decision, ruled that the two sections contravened the Constitution by being discriminatory and unfair as they 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, hence they did not qualify to be part of the Law of Marriage Act. The court went further to state that, it was unfair to subject a girl aged 14 to marriage as stated in one of the sections, and that such a child has no wide understanding and could hardly comprehend her responsibilities and obligations as a married person. Therefore, the court ordered that the Law of Marriage Act be revised to eliminate the inequality between the minimum age of marriages for boys and girls and that parents and other community members who facilitate child marriage could be liable to up to 30 years in prison.

Unfortunately, the government, through the Attorney General, filed a notice of appeal against the High Court decision at the Court of Appeal. The notice has since then been withdrawn, but the law is yet to be amended by the parliament.[68]

Even though the LMA was enacted in 1971 before some developments at international law for example the enactment of CEDAW in 1979, when a State becomes a party to CEDAW, it becomes obligated as per article 2 to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which contradict the provisions of CEDAW and failure to do this amounts to a violation of CEDAW. This position was also taken by the CEDAW Committee in *E.S and C.S versus United Republic of*

[68] Art. 30(5) of the Constitution of the United Republic of Tanzania, 1977 (as amended from time to time).

Tanzania[69] whereby Tanzania was found in violation of CEDAW for failure to take measures to abolish customary inheritance laws which are discriminatory against women.

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[70]

b. The National Education Act

The Education Act[71] is another statutory law that has covered the issue of child marriage. First, it provides for compulsory primary education.[72] The provision also empowers the Minister to make rules to ensure compulsory primary education. Rule 3 of the Primary School (Compulsory Enrolment and Attendance) Rules[73] also provides for the compulsory enrolment and regular attendance of every child in primary school. Fees in primary schools were abolished in 2001.[74] Secondary school education was also made free in 2015.[75] Free education is important on the issue of child marriage because it counters the argument of

[69] UN Committee on the Elimination of Discrimination against Women, Communication No. 48/2013 (CEDAW/C/60/D/48/2013), United Nations, Geneva, 2013.
[70] 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 on 6 March, 2018, para 14.
[71] Cap 353 R.E 2002.
[72] Section 35.
[73] (1979) (G.N. No. 280 of 2002).
[74] This was done by Primary Education Development Programme launched in 2001.
[75] Via Circular 5 of 2015 which implements the Education and Training Policy 2014.

poverty as a driver of child marriage. Ideally, parents can no longer hide under the excuse that they cannot afford to send their girl children to school. However, parents still endure other costs such as costs for school uniforms, travelling to and from school (where appropriate), learning materials as well as various contributions for things like renovations, part time teachers as well as their meals.[76]This makes education in Tanzania not so free after all.[77]

The Education Act also provides a penalty against anyone who impregnates a primary school pupil or secondary school student. Previously, it provided a penalty of Tanzanian Shillings (TSh) 500,000 or a three-year jail term for offenders. However, the law was revised in 2016,[78] to provide stiffer penalties.[79] The amendment imposes a jail sentence of 30 years to persons who will marry or impregnate primary and secondary school pupils and students and a five-year jail term or a TSh 5 million fine to be applied to persons who will facilitate, persuade or take part in a move to marry off a primary or secondary school pupil or student.

This law therefore protects girls who are in school. The spirit of LMA is not in line with this law and other government efforts[80] which aim to keep girls in schools in the quest to eliminate

[76] Davén, J, *Free Primary Education in Tanzania? – A case study on costs and accessibility of primary education in Babati town*, Södertörn University College, School of Life Sciences Bachelor's Thesis, 2008, p. 10.
[77] Human Rights Watch, I Had a Dream to Finish School: Barriers to secondary education in Tanzania, 2017, p. 49 available at https://www.hrw.org/sites/default/files/accessible_document/tanzania0217_-_accessible.pdf, accessed 1 February, 2019.
[78] With the Written Laws Miscellaneous Act (No. 2) Act of 2016.
[79] S.60A of The Written Laws (Miscellaneous Amendment) (No.2) Act, 2016.
[80] These efforts include the construction of schools for girls from 2000 onwards; construction of dormitories for girls; gender policies in universities which favour girls when on admission the two tally points.

gender disparity because the minimum age for marriage set by the LMA is an age for girls who are either in primary or secondary school.

c. The Penal Code

The Penal Code[81] is another law that has covered the issue of child marriages. It has created the offence of statutory rape whereby a male person commits the offence of rape if he has sexual intercourse with a girl or a woman with or without her consent when she is less than eighteen years of age.[82] Therefore, consent does not matter when a girl is below the age of 18 and this offence is punishable with a 30 years imprisonment term as was stated in the case of *Galus Kitaya v. Republic*.[83] However, the same provision of the Penal Code has made an exception to the offence in a situation whereby the woman is the wife of the accused who is fifteen or more years of age and is not separated from the man which was also the defence raised by the accused in the *Galus Kitaya* case.

This provision of the Penal code creating an exception under circumstances where the girl is his wife and above 15 years old is in line with the LMA, and actually fosters child marriages in the sense that if one wants to escape the consequences of engaging in a sexual act with a girl of less than 18, then they have to marry them. This law has not provided an exception for students as per the Education Act.

It is also important to note that even statutory rape cases which are provided for in the Penal Code are generally difficult to

[81] Cap 16 R.E 2002.
[82] S.130(2)(e).
[83] Criminal Appeal No. 196 of 2015.

prosecute.[84] This is because of the preference to settle out of court mostly at the family level.[85] In these cases, elders, parents or traditional leaders will carry out the settlement.[86] The assailant will mainly be asked to pay a small sum of money to the elders or the parents or husband of the victim. [87] 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.[88] For example, in the case of *Galus Kitaya*, part of the appellant's defence was that even though he was involved, sexually, with the complainant, when the parents became aware, the father of the complainant demanded an amount of Tshs. 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 judicial system in upholding their duties in enforcing laws and bringing perpetrators to justice.[89] 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.[90]

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[84] 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.
[85] 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. 101.
[86] 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 on 11 June 2018.
[87] Ibid.
[88] 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.
[89] Percy-Smith (n 85) p.169.
[90] Percy-Smith (n 85) p.169.

Sometimes, girls would refuse to cooperate with the prosecution side because, in their opinion, they had not been raped but had consensual sexual intercourse, and that, in any case, the men involved would be their boyfriend.[91] In such a situation, police officers are of the opinion that it becomes futile to take the case to court since the 'star witness' would turn hostile.[92]

d. Child Development Policy

The Ministry of Community Development, Women's Affairs, and Children[93] adopted the Child Development Policy in 1996.[94] The policy acknowledges that inconsistencies in laws concerning the status of children lead to the treatment of children as adults, and the deprivation of those children's rights.[95] It cites, as an example, the LMA's provisions allowing girls to marry as young as age fifteen, in contrast with the UN CRC, which Tanzania ratified in 1991 and which stipulates that persons below 18 are children.[96] It also recognises that a lack of community awareness of children's rights, as well as weak enforcement of laws protecting children, contributes to the denial of children's rights.[97]

The policy acknowledges that gender discrimination disproportionately harms the girl child in Tanzania, stating explicitly, that society values boys more than girls.[98] The policy cites several issues that threaten girls' survival, protection and

[91] Ibid.
[92] Percy-Smith (n 85) p.169.
[93] Currently the Ministry of Health, Community Development. Gender, Elderly and Children.
[94] The policy was amended in 2008.
[95] Art. 12.
[96] Ibid.
[97] Ibid.
[98] Arts. 15- 16.

development: the expectation that a girl will become responsible for reproduction and family care at a young age; gender discrimination in education; a heavier domestic workload as compared to a boy child; and female genital mutilation, which endangers her health, and even causes her to be infected by HIV/AIDS, early pregnancy and mistreatment such as rape, defilement, harassment, molestation and abuse.[99]

Recognising Tanzania's obligation to protect children's rights under the CRC, the policy outlines several steps Tanzania should take to guarantee children's rights, including to educate and mobilise the community about children's rights to properly enforce the laws protecting children and to revisit, review and abandon outdated laws, pass appropriate laws and take strong action against violators of children's rights. Among other things, it urges efforts to encourage communities to abandon harmful traditional practices.[100] It states that children need protection from gender abuse and cruelty, including female genital mutilation and forced early marriage.[101] However, the policy does not include specific plans for implementation.[102]

e. The Law of the Child Act (LCA)

The Law of the Child Act[103] was enacted in 2009 in order to domesticate Tanzania's international human rights obligations in relation to the protection of the rights of children, particularly, those contained in the CRC and the ACRWC.[104] The LCA defines

[99] Ibid.
[100] Arts. 23(x), 75.
[101] Art. 86.
[102] Avalos, L et al, *Ending Female Genital Mutilation & Child Marriage in Tanzania*, Fordham International Law Journal, 2015, Vol. 38, No. 3, p.676.
[103] 2009.
[104] Avalos et al (n 102) p.676.

a child as a person below the age of 18 years.[105] This law does not have a specific provision on child marriages. However, it aims to protect children from violence and other abuses. It requires parents or guardians to protect children from neglect, discrimination, violence, abuse, exposure to physical and moral hazards and oppression.[106] It forbids any person from subjecting a child to torture or other cruel, inhuman punishment or degrading treatment, including, any cultural practice which dehumanizes or is injurious to the physical and mental wellbeing of a child,[107] and prohibits sexual exploitation of children.[108] The Act obliges local governments to monitor and safeguard the wellbeing of vulnerable children,[109] and it creates a general duty for community members to report the infringement of children's rights.[110]

The Act also includes specific measures to protect female children.[111] It prohibits discrimination against a child on the basis of gender and other characteristics, ensuring that the aforementioned duties apply to parents of daughters as well as parents of sons.[112]

The law also has encompassed the principle of best interests of the child under section 4(2). The article states that "The best interest of a child shall be the primary consideration in all actions concerning a child whether undertaken by public or private social welfare institutions, courts or administrative bodies." This provision means that in every situation involving children, for

[105] S.4(2).
[106] S. 9(3)(a).
[107] S.13(1).
[108] S.83.
[109] S.94.
[110] S.95.
[111] Avalos et al (n 102) p.677.
[112] S.5(2).

example, in the issue of child marriages, best interests of the child should first be assessed. Assessing the best interests of a child means to evaluate and balance all the elements necessary to make a decision in a specific situation for a specific individual child or group of children.[113] Therefore, according to this provision, in the issue of child marriages and age of consent, best interests of the child should be taken as a decisive standard. Therefore, marrying a girl child at an age where she is supposed to be in school and where she is not physically, physiologically, and psychologically ready to shoulder the responsibilities of marriage and childbearing does not seem to be in her best interests.

However, although the Law of the Child Act amends certain provisions of the Law of Marriage Act, it purposely fails to address the inherent contradiction between the Act's protections for all children and the Law of Marriage Act's provisions allowing child marriage.[114] Civil society organizations, legal experts, academics, and children advocated to include a ban on child marriage in the Law of the Child Act during public hearings before passage of the bill, but conservative forces blocked these efforts.[115]

f. Legal pluralism governing marriages in Tanzania

Another issue worth exploring in relation to the law regarding child marriage is legal pluralism. Legal pluralism is the

[113] UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the Right of the Child to have his or her Best Interests Taken as a Primary Consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, para 47, available at https://www.refworld.org/docid/51a84b5e4.html, accessed on 22 January, 2019.
[114] Avalos (n 102) p.678.
[115] Cameron, S, Tanzania Passes Landmark Law of the Child, UNICEF, 6 November, 2009, available at http://www.unicef.org/infobycountry/tanzania 51662.html, accessed 11 November, 2018 (quoting UNICEF Representative in Tanzania Heimo Laakkonen the day the Law of the Child Act was enacted).

coexistence of two or more legal orders in the same field of social relations.[116] Tanzania exercises normative legal pluralism in personal matters such as marriage and succession which means that the co-existence of these legal orders is embodied in legislation stipulating how the different non-state legal orders are accommodated within the state and interact with each other. What this means is that marriages are regulated by different legal orders such as Customary law, Islamic law and Statutory law. All these laws have different prerequisites for marriage even the age of consent which makes children more vulnerable to child marriages.[117]

For a State that exercises normative legal pluralism, it becomes the duty of the State to regulate these non-state legal orders and make sure that they comply with human rights and that, mechanisms for redress are in place.[118] From this viewpoint, the question shift towards the role of the State,[119] that is if the State has granted non-state legal norms official status, how does it guarantee that they abide by human rights? One of the methods that the State guarantees that the multiple orders comply with human rights is by having the bill of rights in the supreme law of the land and guaranteeing the possibility of redress by giving access to the High Court to anyone who feels that any of these

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[116] Corradi, G, *Can Legal Pluralism Advance Human Rights? How international development actors can contribute*, European Journal of Development Research, 2014, Vol. 26, No. 5, p. 78, doi:10.1057/ejdr.2013.46, published online 28 November, 2013.
[117]This bifurcated where customary and religious law still govern areas like family law except where specifically overridden by statutory law system inherited from British colonialism. As a result, customary and religious law which often afford women fewer rights and protections than statutory law remain important and entrenched in Tanzania, and may render statutory provisions promoting women's rights ineffective as stated by Daugherty, A.L, '*Overview of History and Legal Systems: Ghana, Tanzania, and Uganda*' in Bond, J, Voices of African Women: Women's Rights in Ghana, Uganda, and Tanzania, Academic Press Ltd, Durham, 2005.
[118] Corradi (n 116) p.78.
[119] Ibid.

regimes is violating their basic human rights.[120] But the question remains, how effective is this mechanism?

The mechanism is not very effective due to the fact that the mechanism is only triggered when an affected party actually petitions the court so that the particular law can be invalidated on the grounds of being unconstitutional. Therefore, if a law is not challenged in court, even though it violates basic rights, it will still be valid and applicable. Moreover, it is not always a guarantee that a human rights petition will be decided by our courts in line with the Bill of Rights in the Constitution as well as Tanzania's international human rights obligations.[121] Furthermore, even when a law has been challenged and the court has actually declared it unconstitutional, it is not guaranteed that, that the judgment will have actual effects on the ground and actually change the application of the law to the concerned. What the court succeeds is changing the fate of the concerned party.

Therefore, even in child marriage issues, the State has put up mechanisms to make sure that these other legal orders do not violate human rights. However, as discussed above, the mechanism is not without its challenges, hence making the formal approach weak in the fight against child marriages.

Another mechanism that has been put in place is declaring that when these legal orders contradict statutory law, then they become null and void on that particular issue.[122] This mechanism is also challenged by the weaknesses discussed above. Also, the

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[120] The supremacy of the Constitution is declared by the Constitution itself under art. 64(5). Furthermore, art 30(5) of the Constitution gives the mandate to the High Court of Tanzania to invalidate any law which violates basic human rights.

[121] See for example the case of *A.G V Reverend Christopher Mtikila* Misc. Civil Cause No. 10 of 2005 and the case of *Elizabeth Stephen and another v. Attorney General* [2006] TLR 404.

[122] S.11(3) of the Judicature and Application of Laws Act [Cap R.E 2002].

fact that statutory law is on child marriage has not been harmonised, weakens the formal approach further.

4.2. The Substantive Approach

This section discusses the substantive approach towards the elimination of child marriages in Tanzania. As discussed earlier, a substantive approach entails the use of law, while taking into account the reasons behind views in support of cultural values when implementing human rights. Thus, this approach recognises that the law per se is not enough. An analysis has to be done to find out the root causes of child marriage and deal with them as well.

Research shows that even though child marriage has been a prevalent custom for many years, traditional and cultural practices are constantly changing with time.[123] This is exemplified through other harmful traditional practices that were once widespread and now are abolished or moving toward significant decrease such as slavery and female genital mutilation.[124] However, research also shows that the law per se usually falls short in these circumstances.[125] For example, despite decades of campaigns to restrict or forbid it through legislation, marriage under the age of 18 is still common in sub-Saharan Africa and the continent in general is predicted to have the largest global share of child brides by the year 2050.[126]

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[123] Rivera, E, *The Implementation of the Rights of the Child; Transcending the traditional practice of child marriage in Niger, Yemen, and Thailand*, Master's diss, City College of New York, 2011, p. 91.
[124] Keck, M and Sikkink, K, Activists Beyond Borders, Cornell University, New York, 1998, p.25.
[125] Ibid.
[126] UNICEF, A Profile of Child Marriage in Africa, UNICEF, New York, 2015, p.6.

Although these laws represent an important precedent for the protection of human rights and can create an 'enabling environment' and strengthen those who seek the elimination of child marriage,[127] they are insufficient to eliminate the practice. A legalistic approach backed by punitive measures like imprisonment and fines is not suitable for addressing practices of such social significance and intricacy as child marriage. Research shows that rather than bringing an end to prohibited practices, punitive measures tend to either transform them or drive them underground.[128]

Furthermore, considering the numerous exceptions to the minimum age laws adopted by various States, even rigorous enforcement of existing laws is unlikely to eliminate child marriage.[129] Thus more strategies are fundamental in changing those who lack the understanding of what to others appears to be 'common sense.'[130]

In support of the above, Bunting[131] argues that using law per se to categorically prohibit marriage below the age of 18 is not a good strategy. She argues that the socio-economic conditions in which girls, adolescents and young women live and marry, need to be examined and addressed in order to develop relevant and culturally appropriate international strategies. In particular, countries with very low levels of socio-economic development have very high incidence of early marriage or median age at first

[127] Grijns, M and Horii, H, *Child Marriage in a Village in West Java (Indonesia): Compromises between legal obligations and religious concerns*, Asian Journal of Law and Society, 2018, p.12, doi:10.1017/als.2018.9.
[128] Ibid.
[129] Clark, S, Koski, A and Nandi, A, *Has Child Marriage Declined in Sub-Saharan Africa? An analysis of trends in 31 Countries*, Population and Development Review, 2017, Vol. 43, No. 1, p.26.
[130] Rivera (n 123) p.91.
[131] Bunting (n 15) p.18.

marriage.[132] Thus, socio-economic development is a determining factor in age at first marriage.

She adds that, the problem of children's physical and psychological welfare in developing contexts cannot simply be solved by simplistic solutions, such as banning all child labour and placing these children, like their Western counterparts, in a position of social, economic and physical dependency. In ignoring the socially constructed character of childhood, through promulgating a culturally specific version, such an approach can have potentially devastating consequences for children.[133] James[134] cites data on the number of children who are heads of households to argue that banning child labour would only deepen children's poverty, not alleviate it. Similarly, to ban early marriage risks exacerbating, not alleviating, the underlying socio-economic problems facing girls and adolescents in developing countries.[135]

Mwambene[136] is also of the opinion that it is doubtful that a categorical legal prohibition of child marriages would yield the desired result of addressing human rights violations that come with child marriages and suggests a substantive approach.[137] This is because in some places child marriage is a result of local cultural frameworks and power relations. In this context, child marriage can be a response to poverty and be viewed by

[132] Bunting (n 15) p.18.
[133] James, A, '*From the Child's Point of View: Issues in the Social Construction of Childhood*' in Panter-Brick, C, Biosocial Perspectives on Children, Cambridge University Press, Cambridge, 1998, pp. 45 – 65.
[134] Ibid.
[135] Ibid.
[136] Mwambene (n 7) p.103.
[137] Ibid.

community members as a charitable act. In such countries, there may be resistance to minimum age of marriage laws.[138]

Identifying a specific practice for elimination, without considering children's wider social and economic circumstances, risks neglecting the most critical problems they face.[139] For example, enforcing the legal age of marriage in contexts where adolescents are sexually active well before the age of 18 and where there is a shortage of contraception, lack of abortion facilities and low support for young women who bear children out of wedlock and then often face divorce and/or become single parents, can result in serious adverse outcomes for young women and their offspring.[140] Moreover, in areas where prospects for girls to continue their education at secondary and tertiary levels are limited, as are meaningful employment opportunities for those girls, girls are unable to remain at school. This implies that health and other forms of advocacy around child marriage against girls might be more effective if associated with increased access for girls to quality schooling, vocational training, employment, regulation and promotion of appropriate forms of migration, contraception and so on.[141]

Research entitled Building an Evidence Base to Delay Marriage in Sub-Saharan Africa[142] which aimed at developing sustainable approaches to delaying child marriage in sub-Saharan Africa was conducted in Burkina Faso, Ethiopia, and Tanzania in particular. The research found out that child marriage is not an intractable tradition. That, when families and communities recognise the

[138] Boyle et al (n 40) p.596.
[139] Boyle et al (n 40) p.520.
[140] Ibid.
[141] Ibid.
[142] Population Council, Building an Evidence Base to Delay Marriage in Sub-Saharan Africa, available at http://www.popcouncil.org/research/building-an-evidence-base-to-delay-marriage-in-sub-saharan-africa, accessed on 4 January, 2019.

harms of child marriage, and have economic alternatives, they will delay the age at which their daughters get married.[143] It also showed that the best approaches to delay child marriages are those that elevate girls' visibility and status in their families and communities build their skills and knowledge and are cost-conscious and economical.[144] They reached this conclusion by taking a multi-faceted approach which involved engaging girls, their families and their communities to build adolescent girls' social, health, and economic assets and reduce their vulnerability.[145]

Families were offered school supplies to help overcome the economic barriers to sending girls to school, and families who kept girls unmarried during the two-year enrolment were provided with conditional economic incentives for example, awarding them a sheep or a goat. When these methods were used in combination, there were positive effects.[146]

The same conclusion was reached by the research conducted by the International Centre for Research on Women (ICRW) that in order to tackle child marriages, programmes need to target empowering girls with information and support networks, ensuring girls' access to quality education, engaging and educating parents and community members about child marriage, providing economic incentives and support to girls' families and establishing and implementing a strong legal framework such as a minimum age of marriage.[147]

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[143] Population Council (n 142).
[144] Ibid.
[145] Ibid.
[146] The approach resulted into girls ages 15 to 17 being significantly (specifically two-thirds) less likely to be married compared to those in a community not participating in the program.
[147] Lee-Rife, S, Malhotra, A, McGonagle, A and Warner, A, Solutions to End Child Marriage – What the Evidence Shows, ICRW, Washington DC, 2011, pp.11 – 20.

The role of education in delaying marriage for girls cannot be over emphasised. Education is a powerful positive predictor of female age at marriage.[148] Girls with no education are three times more likely to marry before the age of 18 than those with a secondary or higher education.[149] Research further suggests that programmes which provide or increase access to education for girls are crucial to delaying marriage because girls with eight or more years of schooling are less likely to marry early than girls with zero to three years of education.[150] But primary education is not enough.[151] Secondary education has more potential to defer girls' age at marriage.[152] Once the girls are no longer in school, however, they are more likely to be viewed as marriageable,[153] which leads to a heightened vulnerability to early marriage. Therefore, education should be accompanied by other programmes to support economic prospects of girls once they are out of school. As noted by Stark, in a situation where secondary school graduates are often unable to find work, some girls lose motivation and drop out of school.[154]

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[148] See for example Nepali, S, *How Useful are the Demographic Surveys in Explaining the Determinants of Early Marriage of Girls in the Terai of Nepal*, Journal of Population Research, 2008, Vol. 25, No. 2, pp.207-222; Hanmer, L, Klugman, J, McCleary-Sills, J and Parsons, J, *Child Marriage: A critical barrier to girls' schooling and gender equality in education*, The Review of Faith and International Affairs, 2015, Vol. 13, No. 3, pp. 69-80.

[149] UNFPA, Marrying Too Young: End Child Marriage, 2012, available at http://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf, accessed on 15 December, 2018.

[150] Birech, J, *Child Marriage: A cultural health phenomenon*, International Journal of Humanities and Social Science, 2013, Vol. 3, No. 17, p.101.

[151] Ibid.

[152] McDougal, L, Raj, A, Rusch, M.L and Silverman, J, *Cross-Sectional Time Series Analysis of Associations between Education and Girl Child Marriage in Bangladesh, India, Nepal and Pakistan, 1991-2011*, PLoS One, 2014, Vol.9, No. 9.

[153] Lee-Rife, S, Malhotra, A, McGonagle, A and Warner, A, *What Works to Prevent Child Marriage: A review of the evidence*, Studies in Family Planning, 2012, Vol. 43, No. 4, https://doi.org/10.1111/j.1728-4465.2012.00327.xPMID: 23239248.

[154] Stark, L, *Early Marriage and Cultural Constructions of Adulthood in Two Slums in Dar es Salaam*, Culture, Health & Sexuality, 2018, Vol. 20, No. 8, p.896.

These programmes which provide a substantive and holistic approach to end harmful traditional practices such as child marriage have enjoyed success in the respective regions they have been implemented.[155] This is in line with the Human Rights Council resolution which recognises the need for national action plans on child marriage, and encourages States to work with civil society to develop and implement a holistic, comprehensive and coordinated response to address child marriage and support married girls.[156]

The National Survey on the Drivers and Consequences of Child Marriages in Tanzania[157] also concluded that eliminating child marriages in Tanzania will take harmonisation of the laws to make sure that the minimum age for marriage is set at 18 with no exceptions, but this will not work alone.[158] It has to be accompanied by implementing strategies that will elevate the position of girls within their families as well as the community.[159] This can be done by first keeping girls in school longer, preferably by mandatory education. There is also a need to improve the economic status of girls, for example, through the provision of entrepreneurial skills that will give them an opportunity to engage themselves in income generating activities. This will provide an opportunity for girls to be independent and not to run or be forced into marriage as a means of financial security.[160] Furthermore, education should be provided to the children themselves, parents, as well as community members for better results.

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[155] Avalos et al (n 102) p.693.
[156] OHCHR, available at ap.ohchr.org/Documents/E/HRC/d_res_dec/A_HRC_35_L.26.doc, accessed on 3 January, 2019.
[157] MHCDGEC (n 10).
[158] Ibid.
[159] Ibid.
[160] MHCDGEC (n 10).

This substantive approach, as expounded in these studies may achieve results that legislative efforts have thus far been unable to produce. However, this requires willingness, on the part of governments, and donors to implement and fund such interventions.

5.0. Conclusion

In discussing the two approaches in the quest for elimination of child marriages, the paper has assessed which of the two has a fair chance of eliminating or at least reducing child marriage incidences. Therefore, from the discussion, it can be concluded that in the fight against child marriages, adopting and implementing cohesive national legal frameworks that uphold international human rights standards is fundamental. This includes making the age of 18, the minimum marriage age, avoiding loopholes such as exceptions for parental consent, ensuring the laws require free and full consent of both spouses, requiring proof of age before marriage licenses are issued, and imposing penalties on anyone who threatens or harms anyone who refuses to marry. Furthermore, there is a need to harmonise laws, to make sure that there are no loopholes for child marriages in accordance with international human rights obligations. However, the law per se is not enough. For elimination of child marriage, apart from application of the law, there is also the need to address the root causes of child marriages.

Tanzania's approach does not fit exactly in any of the two discussed approaches. It cannot be said that the formal approach is followed, considering that, there is a law that specifically allows child marriage which is yet to be amended. It can be appreciated that there are laws like the Education Act which strive to make a positive impact by keeping girls in school which can be a preventive measure against child marriage. However, the loophole of failing to amend the LMA shows a major

weakness in the implementation of the formal approach which requires harmonisation of laws to eliminate the gaps which foster child marriage. As for the substantive approach, as discussed above, this approach requires addressing the root causes of child marriage with concrete programmes and plans focused on elevation of the position of girls in the society. This can start with improving education opportunities for girls, but it cannot end there because education has to be accompanied with the possibility of future prospects as discussed above. The main challenge towards implementation of this approach is the funding of these concrete programmes. However, if child marriage is to be dealt with, then efforts must be directed towards the full implementation of the substantive approach, starting in regions with the highest prevalence rates.

REGULATION OF LEGAL PRACTICE IN TANZANIA MAINLAND: CHALLENGES AND WAY FORWARD

Kamru Habibu·

Abstract

The regulatory framework of legal practice in Tanzania was enacted by British colonialists in the 1950s. After independence, the framework was retained with minimal changes. The Judiciary, Council for Legal Education, the Tanganyika Law Society (TLS), Advocates Committee and the Law School of Tanzania regulate the legal profession in the country. However, the regulatory framework of legal practice faces some challenges. The legal framework is outdated since it was enacted in the 1950s, and does not suit the current situation. What is more, the law establishing the TLS does not give the law society regulatory powers it deserves. There is an increase of non-compliance with renewals of practicing certificates as well as incidents of unauthorized legal practice in the country. But measures to alleviate the situations are hampered by the weak regulatory regime. There is no registration requirement for law firms by regulatory authorities. And for that reason, it is not only unknown how many law firms exist in the country, but their respective locations are also unknown, and this ultimately affects the quality of legal services rendered. Furthermore, unlike

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Kenya, Tanzania does not have a mandatory requirement for professional indemnity, in the form of insurance cover, which could protect both practitioners and consumers of their legal services. Finally, the regulations on non-citizens practitioners are weak. The author recommends an overhaul of the framework regulating legal practice in Tanzania due to the current socio-economic changes which has a major bearing on the legal practice in Tanzania.

Keywords: Legal practice, regulatory, challenges, reforms

1.0 Introduction

The legal profession is one of the professions which are regulated in Tanzania. Other regulated professions are medicine, dentistry, engineers, architect, opticians and surveyors, just to mention a few. As already noted, the regulatory regime of the legal profession in Tanzania was inherited from Germans and the British colonialists most of such laws were enacted in 1920s and 1950s. However, the Germans did not leave much legacy in the legal profession compared with what the British did. Tanzania legal profession is a replica of the English law with some modification like the fusion of the roles of Solicitors and Barristers into Advocates. After the promulgation of the Tanganyika Order-in-Council, 1920[1]legal practice based on common law commenced in the territory. On January 14th 1921, the first advocate, Mahadeo Parashuram Chitale was admitted to the Bar.[2]The regulatory regime remains as it was with minimal amendments which have been made from time to time. Since its

[1] Of 1920. The Order in Council set the ''constitutional framework'' as well as the laws to be applied in the Tanganyika territory.
[2] See Tanganyika Law Society members database available at http://tls.or.tz/wakili/advocates_list.php accessed on 02/12/2018.

'import' in colonial Tanganyika, the legal profession was and has been self-regulatory. This means lawyers are supposed to regulate themselves and not to be regulated by other organs or persons.

Legal practice in Tanzania is not a Union matter. Each part of the Union maintains a separate regime, regulating legal practice. Admission to the Bar in Tanzania Mainland does not grant the admitted person the right of audience in Zanzibar and *vice versa*. For a person to practice law in both parts of the United Republic, he must be admitted to both Bars. It is for that reason that this paper will confine itself on Tanzania Mainland per se.

This paper will attempt to look into the challenges facing regulation of legal practice on Tanzania Mainland. The paper starts by pointing out procedures for joining the Bar on Tanzania Mainland. It will then provide a brief analysis of the institutional framework. Thereafter, the paper will present challenges facing the regulatory framework and the way forward.

1.1 Joining the Bar in Tanzania Mainland

In order for a person to be enrolled as an Advocate in Tanzania Mainland, first, he or she must be a holder of a degree in law or a legal practitioner having a right of audience before any court with unlimited jurisdiction in civil and criminal matters in any Commonwealth country or in any other country designated by the Minister.[3] Also a Solicitor in England, Scotland, Northern Ireland or the Republic of Ireland is qualified to be admitted to the Tanzanian Mainland Bar.[4]

[3] See section 8 of the Advocates Act [Cap. 341 R.E. 2002]

[4] Ibid. recently, the Judiciary of Tanzania has issued a Notice to the effect that the November 2018 sessions will be the last sessions for the Council of Legal Education (CLE) to conduct Bar Examinations to all pending petitioners/applicants. After the

For the holder of the above qualifications, prior to coming into force of the Law School of Tanzania Act,[5] such a person was required to sit for Bar examination organised by the Council for Legal Education.[6]The aim of the said examination is to satisfy the Council that the petitioner has sufficient knowledge of the laws of Tanzania and the practice and procedures of the courts.[7] With the coming into force of the Law School of Tanzania Act, aspirants who graduated in law from 2007 onwards, are not eligible to be admitted through the Bar examination route, but must be enrolled and attend practical legal training at the Law School of Tanzania.[8] Having met the foregoing requirements (both pre and post 2007 aspirants), they are required to apply to the Chief Justice for admission as an advocate.[9]

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said sessions, all petitioners/applicants shall be required to attend the Law School of Tanzania to obtain a qualification for admission and enrolment to the Bar

[5] Act No. of 2007

[6] See section 8 (1) (b) (i) of the Advocates Act [Cap. 341 R.E. 2002] which reads… ''he has complied with such requirements (whether relating to instruction or examination or otherwise) as to the acquisition of professional experience as may be specified in regulations made hereunder by the Council. Practically, the aspirant was supposed to undergo an internship supervised by the Attorney general chambers. Under the Advocates (Professional Requirements) Regulations, G.N. No. 395 of 1963 provided also the requirement of pupillage i.e. an aspirant must also study as a pupil of an advocate for not less than six months or having a professional experience in public service foe a period of not less than six months. For a detailed account of the weaknesses of the Council for Legal Education route to the admission to the Bar see Twaib, F., Legal Profession in Tanzania: Law & Practice, Law Africa Publishing (K) Ltd, Nairobi, 2008 at pp.206-211.

[7] See Regulation 2 (b) of the Advocates (Professional Requirements) Regulations, G.N. No. 395 of 1963

[8] Under section 12 of the Law School of Tanzania Act, 2007, upon successful completion of the practical legal training, the students will be awarded a postgraduate diploma in Legal practice which will entitle the holder thereof, upon clearance by the Honourable Chief justice, to practice as an advocate of the High Court and courts subordinate thereto or to be employed in public service.

[9] See section 8 (1) of the Advocates Act [Cap. 341 R.E. 2002]. Practically, the applications are made by a way of petition signed by the petitioner and accompanied by various documents like school/college/internship/law school of Tanzania results, certificate of character from a practising advocate and/or any other document that may be required.

After an application to the Chief Justice, according to practice, the names of all applicants (petitioners) are circulated to the legal fraternity and the general public so that whoever has an objection on the suitability or otherwise of any of the petitioner can raise it with the Chief Justice. The petitioner is invited for a *viva voce* interview with the Chief Justice so that the latter may be satisfied with his/her character.[10]Thereafter, a successful petitioner would be admitted as an advocate by the Chief justice and his/her name would be entered in the Roll of Advocates which is maintained by the Registrar of High Court.[11]Practically, admission to the Bar is culminated by the admission ceremonies which are held biannually, in June/July and December respectively.

However, being admitted to the Bar is not an automatic right to practice law in Tanzania Mainland. The newly admitted advocate must obtain the practicing certificate issued by the Registrar of the High Court. In order to obtain the certificate, such an advocate must apply to the Registrar in a prescribed form, paying the necessary fees and satisfying the Registrar that the fees of the Tanganyika Law Society were duly paid; and if employed, a clearance from the employer.[12]An Advocate in Tanzania is both a Notary Public and Commissioner for Oaths and acts as such and is also required to pay his or her fees to the Judiciary.[13]

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[10] See section 8 (3) of the Advocates Act [Cap. 341 R.E. 2002].

[11] See section 8 (3A) and (4) of the Advocates Act [Cap. 341 R.E. 2002].

[12] See section 35 (1) of the Advocates Act [Cap. 341 R.E. 2002]. Currently, under the Advocates (Admission and Practising Certificate) Regulations, G.N. No. 62 of 2015 provides for a payment of twenty thousand shillings as admission fees and fifty thousand shillings as a fee for a practising certificate. According to the Tanganyika Law Society (Annual Subscription) Regulations, 2007 G.N. No. 11 of 2017, a newly admitted advocate is supposed to pay Tzs 212,000/- as well as other dues as may be determined by the TLS.

[13] Under the Notary Public and Commissioner for Oaths, [Cap. 12 R.E. 2002] as amended by Act No. 2 of 2016, an advocate with less than 5 years of practice has to pay fees of Tzs 90,000/= whereas the one with more than 5 years of practice has to lay Tzs 140,000/=.

2.0 The Institutions Regulating Legal Practice in Tanzania.

There are various institutions that regulate legal practice in Tanzania Mainland. These are the Judiciary, the Council for Legal education, the Tanganyika law Society and the Law School of Tanzania. This part provides a discussion of the institutional framework, regulating legal practice in Tanzania.

2.1 The Judiciary

The Tanzania Judiciary is invested with much regulatory power over advocates in Tanzania. For Tanzania Mainland, advocates are subjects of regulation by the Chief Justice and the High Court, and in particular, the office of the Registrar of the High Court.[14] Under the law, an advocate is regarded as an officer of the High Court of Tanzania[15] The Tanzania Judiciary is therefore regarded as the major regulatory institution of the legal practice in the country. The Judiciary regulates the legal profession as follows:

Firstly, it admits prospective advocates to the Bar. As shown in 1.1 above, it is the Chief Justice who admits aspirants to the Bar. It is also the Chief Justice who has discretion on who can be admitted or otherwise as an advocate. And secondly, to keep and maintain the Roll of Advocates. Under the Advocates Act[16] it is the Registrar of the High Court who is entrusted with the task of keeping and maintaining the Roll of Advocates. Thirdly, the Registrar is responsible for the issuance of certificates that allow

[14] It shall be noted that the Court of appeal is not involved in regulation of legal practice because it was established in 1979 after the defunct of the East African court of appeal whereas since 1920, the Chief Justices of Tanganyika and later Tanzania were heads of the high Court.

[15] Under section 66 of the Advocates Act [Cap. 341 R.E. 2002], any person duly admitted as an advocate shall be an officer of the High Court and shall be subject to the jurisdiction thereof.

[16] [Cap. 341 R.E. 2002]

advocate to practice and also their (certificates) renewals. As shown above, a newly admitted advocate must procure a practicing certificate from the Registrar. Every year, a practicing advocate in Tanzania Mainland shall renew his/her certificate. Finally, the Judiciary enjoys disciplinary powers over advocates. Under the law, the Chief Justice or the High Court have powers, for any reasonable cause, to admonish any advocate or suspend an advocate from practice for any specified period or order the removal of his name from the Roll.[17]

2.2 The Council for Legal Education

The Council of Legal Education (henceforth the Council) is one of the bodies that regulate legal practice in Tanzania Mainland. The Council was established in 1963, two years after the independence of Tanganyika.[18]The Council is composed of the Chief Justice or his representative, the Attorney General or his representative, the Dean of the Faculty of Law of the University of Dar es Salaam or his representative[19]and two practicing advocates elected by the Tanganyika Law Society.[20]The members of the Council elected by the Law Society shall hold office for such period, not exceeding three years, as the Law Society may determine and shall be eligible for re-election.[21]

[17] Section 22 (2) (a) of the Advocates Act [Cap. 341 R.E. 2002]
[18] The Council was established by the Advocates Ordinance (Amendment Act, Act No. 16 of 1963. By virtue of the laws Revision Act [Cap. 4 R.E. 2002], now it is the Advocates Act Cap 341 R.E. 2002].
[19] In 1963 when the Council was established, there was only one University offering LL.B degree programme in the country. With more than ten institutions offering LL.B programme as well as the Law School of Tanzania, the section ought to be reviewed so that there shall be representation that reflects diversity of institutions providing legal education prevailing to date.
[20] The Bar Association for Tanzania Mainland.
[21] Section 5A (2) of the Advocates Act [Cap. 341 R.E. 2002]

The Council shall hold meetings at such times and places as the Chairman may determine.[22]At any meeting of the Council, three members thereof, of whom shall either be the Chairman or the Attorney-General or his representative, shall constitute a quorum.[23]Decisions before the Council shall be determined by a majority of votes of the members present and voting, but the Chairman shall have no casting vote.[24]The Council is left free to regulate its own procedure.[25]

2.2.1 Mandate of the Council

The law empowers the Council to exercise general supervision and control over legal education in Tanzania and to advise the government in relation thereto.[26] It is argued that the Council does not perform its functions as stipulated in the law. The mandate of the Council has been criticized by a number of authors. The leading author on the legal profession, Twaib, rightly pointed out that the functions of the Council were ambiguous, and that is why involvement of the Council on issues relating to legal education was minimal.[27]The author charged further that the Council does little, in terms of advising the Government as per the law, hence majoring on examining those who have petitioned to the Chief Justice for admission to the Roll of Advocates.[28] The fact that the Council concentrates only on scrutinizing and examining aspirants to the Tanzanian Bar, is

[22] Section 5A (3) of the Advocates Act [Cap. 341 R.E. 2002]
[23]Section 5A (4) of the Advocates Act [Cap. 341 R.E. 2002]
[24] Section 5A (5) of the Advocates Act [Cap. 341 R.E. 2002]
[25] Section 5A (6) of the Advocates Act [Cap. 341 R.E. 2002]
[26] Section 5B of the Advocates Act [Cap. 341 R.E. 2002]
[27] Twaib, F., Legal Profession in Tanzania: Law & Practice, Law Africa Publishing (K) Ltd, Nairobi, 2008 at pp.191-192. See Also International Development Law Organization (IDLO), Report on The National Rule of Law Stakeholders Forum "Strengthening the Rule of Law in Tanzania" December 10 – 11, 2015 Seascape Hotel, Dar es Salaam, Tanzania at page 16 where it was stated that there is a missing link between the Council and the la School of Tanzania as well as the law faculties in the country. Further, it was stated that the Council is inactive as compared to counterpart Councils of Kenya and Uganda.
[28] Ibid, p. 192

evidenced in various reports of the TLS representatives to the Council submitted to the TLS Annual or semi-annual conferences and General meetings.[29]

Furthermore, the Council operated, for a long time, without having an executive chairperson or an executive secretary for running day to day affairs of the Council.[30] The Council enjoys secretarial support from the office of the Registrar of the High Court of Tanzania which is however, inadequate in mounting effective monitoring and control of the quality of training of the legal education in the country.[31]

The Council operated for more than forty years without a permanent secretariat. It was until 2007 where the Advocates Act was amended to establish a permanent secretariat which is responsible for the day to day administration and management of the Council.[32] Despite those legislative efforts, the Council is still 'hosted' by the office of the Registrar of the high Court. The Council is also afflicted by financial and human resource constraints when it comes to discharging its functions.

Moreover, there is no harmonization of the regulatory functions of the Council with that of other bodies regulating tertiary or higher education in Tanzania. Currently, university education is regulated by the Tanzania Commission for Universities (TCU).[33]

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[29] See the Tanganyika Law Society Half Annual Report of the Governing Council to the 2016 Half Annual General Meeting August 2016 at p. 4. see also the Tanganyika Law Society Annual Report of The Governing Council to the 2016 Annual General Meeting March 2017 at p. 10. From, the two reports covering the period from February 2016 up March 2017, the Council held three administrative meetings, two interview sessions and one visit to the Law School of Tanzania!

[30] Ministry of Justice and Constitutional Affairs, The Legal Sector Reform Programme, Medium Term Strategy for Years 2005/2006 – 2007/08 Volume I, 2004.

[31] Ibid

[32] See section 30 of the Law School of Tanzania Act,2007 Act No. 18 of 2007 amending the Advocates Act by adding new section 5C and 5D.

[33] The TCU is established under section 4 of the Universities Act, Act No. 7 of 2005

Under the law, TCU is entrusted with regulatory powers over Universities offering various programmes, including legal education programmes. TCU accredits law programmes run by Universities. On the other hand, tertiary and technical education is regulated by the National Council for technical education (NACTE).[34] The law School of Tanzania as a technical institution is regulated by NACTE.[35]

There are presently three statutory bodies regulating legal education (practical legal education inclusive) in the country. However, lack of harmonization of the functions these two bodies may lead into conflicting decisions, guidelines or directives as far as legal training or education is concerned and which in long run, may adversely affect the quality of legal practitioners in the country. There is therefore a need to harmonize regulatory functions of the Council, TCU as well as NACTE. Further, it is the opinion of the author that the Council should have final say on issues relating to the structure and curriculum of the law programmes. This is because the law specifically vests the Council such powers compared to general regulatory powers of the TCU or NACTE.

2.3 The Tanganyika Law Society

The Tanganyika Law Society (TLS) is established under section 3 of the Tanganyika Law Society Act[36] as the sole Bar Association for Tanzania Mainland. The TLS is a body corporate with perpetual succession and a common seal, with power to sue and be sued in its corporate name. Among objectives for which the

[34] The NACTE is established under section 3 of the National Council for Technical Education Act [Cap. 129 R.E. 2002]

[35] http://nacte.go.tz/en/institute.php?nirid=16064606070305 accessed on 02/12/2018

[36] [Cap. 307 R.E. 2002] The Act was formerly enacted as an Ordinance No. 30 of 1955. By Virtue of section 8 (2) (e)of the Law Revision Act [Cap. 4 R.E. 2002] all Ordinances were styled as Acts.

TLS is established are to maintain and improve the standards of conduct and learning of the legal profession in Tanzania, to facilitate the acquisition of legal knowledge by members of the legal profession and others, to assist the government and the courts in all matters affecting legislation, and the administration and practice of the law in Tanzania Mainland, to represent, protect and assist members of the legal profession in Tanzania as regards conditions of practice and otherwise, and to protect and assist the public in Tanzania in all matters touching, ancillary or incidental to the law.[37]

Membership to the TLS is compulsory to all advocates, and it is automatic. The law provides that every advocate shall, without election, admission or appointment, become a member of the TLS from the date on which the practicing certificate is issued to him.[38]

The organ responsible for management of the affairs of the TLS is a Council. The TLS Council consists of a President, a Vice-President, a Treasurer and seven other persons; all of whom shall be members of the Society and elected, annually, by the Society in a general meeting.[39] The TLS has also established various committees as well as Chapters to assist the Council in the discharge of its mandate. Day to day activities of the TLS are performed by a Secretariat headed by the Secretary (also known as the Chief Executive Officer) assisted by a number of officers appointed by the TLS Council.[40]

[37] Section 3 of [Cap. 307 R.E. 2002]
[38] Ibid, section 7 (1).
[39] Ibid, section 15.
[40] Ibid, section 19. Currently, the Secretary of the TLS is also designated as the Chief Executive Officer of the TLS.

2.3.1 Regulatory Role

The TLS acts as a sole Bar Association in Tanzania Mainland. Its mandate is limited to its objectives under the law establishing it. This paper argues that the TLS regulatory role is limited by the statute only into maintaining proper conduct of legal professionals, dissemination of legal knowledge and protection of its members.

On maintaining proper conduct of legal professionals, it is the mandate of the TLS to maintain and improve the standards of conduct of the members of the legal profession.[41] The TLS has implemented this objective by promulgating its in-house Rules of Professional Conduct and etiquettes of the TLS.[42] There is also in operation, the TLS Ethics Committee. This is an in-house mechanism of curbing unethical conduct and behavior of advocates in Tanzania Mainland. This in-house mechanism compliments the disciplinary mechanism under the Advocates Committee.

On dissemination of legal knowledge, it is the mandate of the TLS to maintain and improve learning of the legal profession and to facilitate the acquisition of legal knowledge by its members and the public at large.[43] Here the TLS has in place, Continuing Legal Education which is enforced through the Continued Legal Education Regulations[44] which makes it mandatory for a member to acquire a minimum of 10 points in order to renew his/her practicing certificate. To the public at large, the TLS has been offering free legal aid to the needy and public legal education during the legal aid weeks, the Law Day as well as dissemination

[41] See section 4 (a) of the Tanganyika Law Society [Cap. 307 R.E. 2002]
[42] In the case of the case of *Mkono & Co. Advocate vs Ladwa* [2002] EA 1 EA 145. it was held that the rules have no force of law. Currently, the The Advocates (Professional Conduct and Etiquette) Regulations, 2018.G.N. No. 118 of 2018 acts as a major source of the rules of professional conduct for TLS members.
[43] See section 4 (a) and (b) of the Tanganyika Law Society [Cap. 307 R.E. 2002]
[44] Of 2012.

of simplified publication of important legal matters in Kiswahili language.[45]

On protection of its members, it is the role of the TLS to represent, protect and assist members of the legal profession in matters that relate to conditions of practice.[46] The TLS does that by assisting its members where they are in conflict with the law, promoting harmonious relationships with other stakeholders that touches legal practice.

2.4 The Advocates Committee

This is an organ that deals with hearing of allegations of professional misconducts or malpractices against advocates in Tanzania. The Committee is established under section 4 of the Advocates Act.[47] The Committee is composed of three members who are a Judge of the High Court nominated by the Chief Justice, the Attorney-General, or the Deputy Attorney-General or Director of Public Prosecutions (DPP) and a practising advocate nominated by the Council of the Law Society.[48] The Committee is chaired by the Judge nominated, and decisions are made by majority.[49]

The victim of advocate's professional misconduct or malpractices is required to report the alleged misconduct to the Attorney General. Apart from a formal report, the Attorney General may act upon information which is brought to his notice in any manner whatsoever.[50]

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[45] See http://tls.or.tz/our-publications/ where the there is a depository of various publications in Kiswahili like matters relating to criminal justice, succession, labour and social security, human rights etc.

[46] See section 4 (d) of the Tanganyika Law Society [Cap. 307 R.E. 2002]

[47] Cap 341 RE 2002

[48] *Ibid*

[49] *Ibid*. According to practice the Attorney General nominates the DPP to preside over the Committee's proceedings

[50] Section 11 of the Advocates Act [Cap. 341 R.E. 2002]

The Committee shall have jurisdiction to hear and determine any application by an advocate to procure the removal of his name from the Roll, any application by any person to remove the name of any advocate from the Roll or any allegation of misconduct made against any advocate by any person.[51]

The convener of the Advocates Committee Sessions is the Attorney General, in terms of section 5 of the Advocates Act. Currently, the Committee holds sessions of approximately two weeks in every quarter of the year.[52] The seat of the Committee is currently Dar es Salaam.[53] The procedures of the Committee are provided in the Advocates (Disciplinary and Other Proceedings) Rules, 2018.[54]

2.4.1 Regulatory Role

The major role of the Committee is to deal with cases/allegations of professional misconduct against advocates in Tanzania Mainland. The Committee has powers to receive the allegations and summon the advocate concerned and the complainant for a hearing. if an advocate is found guilty of misconduct, the Committee is empowered to punish that advocate. Where an advocate is found guilty for misconduct, the Committee may direct that the name of the advocate be removed from the Roll, admonish or suspend the advocate from practising for such period as the Committee may direct.[55]

[51] Section 13 (1) of the Advocates Act [Cap. 341 R.E. 2002]

[52] See The Tanganyika Law Society, Half Annual report of the Governing Council of Tanganyika Law Society to the 2015 half Annual General Meeting, September 2015, p. 32.

[53] *Ibid*

[54] G.N. No. 120 of 2018 were made under section 14 Cap 341.

[55] Section 13 (4) of the Advocates Act [Cap 341 R.E. 2002]

2.5 Law School of Tanzania

The Law School of Tanzania was established by the Law School of Tanzania Act.[56] The idea to establish a law school in Tanzania can be traced back from the Report on Private Legal Practice by the Law Reform Commission of Tanzania.[57] The Commission recommended that the Government should establish a Law School, to strengthen the practical training of newly qualified lawyers and enhance their awareness of various aspects associated with the practice of the profession, including professional ethics and etiquette.[58]

The Law School of Tanzania was established mainly for the purpose of offering, conducting, managing and imparting practical legal training in Tanzania.[59] On regulation of the legal profession, the law school of Tanzania mandate is minimal. Its mandate is limited to arranging conferences, seminars, workshops, meetings and consultations on matters relating to legal practice, researching and applying research findings for the betterment of practical legal training, literature, arranging for publication and dissemination of legal practice literature.[60]

3.0 Regulations of Legal Practice in Tanzania: Challenges and the Way Forward

3.1 Outdated Legal Framework

As earlier noted, the current legal framework regulating legal practice was enacted during the colonial rule in the 1950s.[61] By

[56] Act no. 18 of 2007

[57] United Republic of Tanzania, The Law Reform Commission of Tanzania, Report on Private Legal Practice: Presented to the Attorney General and Minister for Justice at page 8.

[58] Ibid

[59] See section 5 of the Law School of Tanzania Act, 2007.

[60] See section 5 of the Law School of Tanzania act, 2007, Act No. 18 of 2007

[61] The Advocates Ordinance, Ordinance No. 25 of 1954 and its subsidiary legislation to wit; The Advocates (Accounts) Regulations G.N. No. 207 of 1956, the Advocates (Professional Requirements) Regulations G.N. No. 395 of 1963. Also, the Tanganyika

that time, the Bar was predominantly Europeans and Asians. At the time Tanganyika gained her independence on December 9th 1961, there was only one Tanganyika lawyer out of 100 members in the Bar that existed at that time.[62] The size of the Bar was relatively small and concentrated in major towns. After independence, the same legal regime was inherited with minor amendments to suit the requirements of a particular time.[63] With the sharp increase of the size of the Bar, the existing legal framework could no longer afford to regulate. Ten years ago (2008), the Roll of Advocates stood at 1417. Currently, the Roll of Advocates stands at 8082 and there are 6312 practicing advocates in Tanzania Mainland.[64] The table below shows the status of the Roll of Advocates as of February 13th, 2019:

Total number of advocates on the roll since 1921	8082
Practicing advocates	6312
Non-practicing advocates	187
Deceased advocates	213
Advocates who suspended their practice	117
Advocates with unknown status	297

Source: TLS website[65]

Further, the existing legal framework does not distinguish between private and public Bar. Advocates practicing in public

Law Society Ordinance, Ordinance No. 30 of 1954, The Notaries Public and Commissioner for Oaths Ordinance, Ordinance No. 5 of 1928.

[62] Ross, S.D., *A Comparative Study of the Legal Profession in East Africa*, Journal of African Law, 1973 Vol. 17, No. 3 (Autumn, 1973), pp. 279-299 at p. 279 citing Report of Lord Denning's Committee on Legal Education for Students from Africa (Cmnd. 1255)

[63] The Ordinance (Act) was amended six times since independence by virtue of Acts Numbers 16 of 1963, 39 of 1969, 11 of 1971, 22 of 1983, 12 of 1990, 9 of 1996, 31 of 1997, 4 of 2005 and 18 of 2007

[64] http://tls.or.tz/wakili/advocates_list.php# accessed on 13/02/2019.

[65] http://tls.or.tz/wakili/advocates_list.php accessed on 13/02/2019.

or private sectors are governed by the same regime. But recently, a new regime regulating lawyers in the public service was enacted.[66] The following are changes brought by Act No. 7 of 2018 which will necessitate amendments to the current regime that is entrusted with the task of regulating the legal profession in order to avoid conflicts.

Firstly, it is the establishment of the Professional Association of Lawyers in Public Service which shall be established by the Attorney General.[67] The Association is expected to be a professional forum of lawyers in the public service. The Association will be meeting, once a year, and deliberate on various legal issues, including professional development and other matters of concern.[68] The management, leadership, organisation and conduct of the business of the association is presently awaiting Regulations to be made by the Minister responsible for legal affairs. Secondly, the establishment of the Roll of State Attorneys. Under the law, the Attorney General shall establish and keep a Roll of all State Attorneys. Therefore, there will be two Rolls in the country.

The above amendments are incompatible with the existing legal framework. It should also be noted that many lawyers in the public service are advocates and members of the TLS. With the establishment of the Professional Association of lawyers in the public service, it means that they will have double membership. Further, Attorney-General takes precedence over all other advocates in the Roll.[69] With the above developments, there is a

[66] Vide the Written Laws (Miscellaneous Amendments) (No.2) Act, Act No. 7 of 2018 amending the Office of the Attorney General (Discharge of Duties) Act, (Cap. 268)
[67] See section 16A of Cap. 268
[68] Ibid
[69] See section 9 of the Advocates Act [Cap 341 R.E. 2002]. In other words, the Attorney general is regarded to be advocate No. 1.

need to overhaul the existing legal framework so as to conform with the current situation.

3.2 Lack of Comprehensive Regulatory Mandate by the TLS

The TLS derives its mandate from the law creating it. As pointed above, the TLS regulatory role is limited by the statute only into maintaining proper conduct of legal professionals, dissemination of legal knowledge and protection of its members. The law is however, silent over the TLS' regulatory powers. Currently, most of the regulatory powers are vested with the Office of the Registrar of the High Court and not the TLS. Further, the law vests management of the affairs of the TLS on the President and the Governing Council who shall be elected annually. It is argued that one year is not enough for a leadership to plan, organize and implement accordingly.

The amendments should empower the TLS to preserve and protect the independence, integrity and honour of the profession as well as establishing standards for professional responsibility and competence of its members. Borrowing from our Kenyan counterparts, there is a clause allowing the Law Society of Kenya (LSK) to do all such other things as are incidental or conducive to the attainment of all or any of the foregoing objects of the society.[70] This general clause has granted the LSK wide regulatory powers over advocates in Kenya.

3.3 Compliance with Renewals of Practicing Certificates

Under section 38 of the Advocates Act[71] the practicing certificate of an advocate expires on December 31st, hence a requirement to renew it annually. It is found that most advocates did not comply

[70] See section 4 (i) of the Law Society of Kenya Act, Cap. 18.
[71] [Cap. 341 R.E. 2002]

with the law on renewal of practicing certificates, hence became unqualified advocates.[72] This problem is escalating from year to year. According to the TLS, in the past six years, the Society has experienced high rates of defaulters on the Roll of Advocates. In 2017 alone, there were 1,662 members on the defaulters list.[73] The following table shows the number of defaulters from 2012 to 2017:

Year	Number of defaulters
2012	400
2013	690
2014	1005
2015	1344
2016	1599
2017	1662

Source: TLS Semi Annual Report, 2018[74]

It is argued that the increase in defaulters is due to the sharp increase in the Roll of advocates in recent times as well as weaknesses in the regulatory regime to curb the unqualified from legal practice. Further, there is allegation, particularly, from junior advocates that the fees charged for renewal are exorbitantly high, hence unaffordable to them. They further argue that with the increase of the members of the Bar, there is a need to revisit the renewal fees payable to reflect the reality.

[72] Under section 39 of the Advocates Act [Cap. 341 R.E. 2002] a person may only be recognised as an advocate if his name is on the Roll, he has in force a practising certificate; and he has a valid business licence short of which such person becomes an "unqualified person".
[73] See The Tanganyika Law Society, the Semi Annual Report of the Governing Council of Tanganyika Law Society Presented at Half Annual General Meeting, September 2018, p. 42.
[74] Ibid

3.4 Unauthorized Legal Practice

There is also an increase of unauthorized legal practice in Tanzania Mainland. There are various incidents of unqualified, arrested persons, purporting to be advocates and representing clients in various courts and tribunals.[75] This led the TLS, in conjunction with other stakeholders, into holding a meeting in April 2018, to discuss the problem.[76] At that meeting, a Task Force was formed. However, it appears that the task force would require donor funding to implement its activities.[77]

But the argument is that the main problem could be curbed through the strengthening of legal and institutional framework for regulating legal practice. There are efforts on board like establishment of the database by the office of the Registrar of the High Court known as Tanzania advocates Management System (TAMS) where with a press of a button, one could easily get the status of an advocate on whether one is a qualified advocate or not.[78] But still many advocates are not aware of the existence and utilization of the system. For instance, some of the advocates interviewed said they had paid the requisite fees, but their information was not reflected in the system. The other thing which could help in curbing the problem is identity cards. However, the challenge is that there is delay by the TLS in issuing identity cards to advocates. There is therefore a need for strengthening legal and institutional framework, but efforts

[75] http://www.tanzaniatoday.co.tz/news/aliyekuwa-wakili-feki-atiwa-mbaroni accessed on 30/11/2018 where it was reported that one person called Jeremia Ragita was arrested at the High Court Land Division at Dar es Salaam purporting to represent a client in the land case.

[76] See The Tanganyika Law Society, the Semi Annual Report of the Governing Council of Tanganyika Law Society Presented at Half Annual General Meeting, September 2018, p. 25.

[77] ibid

[78] The system can be accessed via address https://tams.judiciary.go.tz/en/ and it has both English and Kiswahili versions.

towards that end could only be realised through joint efforts by all stakeholders.

3.5 The Absence of Requirement for Registration of Law Firms

A study of the legal and institutional framework shows that, that is intended to regulate the individual advocate and not those practicing, jointly, in an association with another or others, in the form of partnership.

As rightly pointed out by the learned author, an advocate is an Individual, a natural person who is expected to perform his functions as a person.[79] However, on commercial/business considerations, two or more advocates can form, under the relevant law, a partnership of their legal business.[80] Advocates who wish to engage in legal practice in partnerships, do register their firms with the Business Registration and Licensing Agency (BRELA), then they may start practicing law. There is however, no requirement of registering a law firm with the TLS or any other legal practice regulating body.

Registration of a law firm should have a checklist, for example, of important items such as a library, decent office, etc. The author has for instance, noted some law firms' offices being located in places/localities which raise the nobility of the legal profession into question.

Some advocates do not have offices for housing their law firms, but practice from their respective homes.

The above happens mainly because there is no mandatory rule that requires an advocate to register with the TLS, the chapter

[79] Mgongolwa, A., Developing and Strengthening Viable Solo Practice, A Paper Presented at the TLS Continuing Legal Education Seminar in Tabora, Tanzania 18th March, 2011, at p. 9.

[80] Ibid.

he/she belongs to as well as the firm one is practicing with or whether one practices as a solo practitioner.

Lack of registration has adverse effects on the legal profession generally. It affects the quality of legal services rendered;[81] it increases the problem of undercutting as well as putting the legal profession into disgrace.

Borrowing from other regulated professions, particularly, auditing, there is a statutory requirement of registering an auditing firm.[82] There are registers for practitioners and that of the audit firms. Audit firms must be registered and can also be de-registered for a number of reasons.[83]

Comparatively, the author made a cursory glance at Kenya and Uganda systems for regulating law firms. Starting with Kenya, there is a register of members (advocates) and register of law

[81] Since 1980s studies revealed that there is a problem of poor quality of legal services offered by some lawyers. See , The Law Reform Commission of Tanzania, Report on Private Legal Practice: Presented to the Attorney General and Minister for Justice at page 5. For a recent study on the quality of legal services in Tanzania see Mugyabuso, E., *Protection of Legal Service Consumers in Tanzania: An Examination of The Law*, Journal of the Law School of Tanzania, 2018 Vol. 2, No. 1, Available at: <http://journal.lst.ac.tz/index.php/lst/article/view/16> accessed on 29/11/2018.

[82] See section 7 (4) of the Accountants and Auditors (Registration) Act [Cap. 286 R.E. 2002]. Under the section, there shall be a register of firms in which every practising firm of Certified Public Accountants in Public Practice or Certified Public Accountants shall register their firms and the register shall contain names and qualifications of partners, members or associates of the firm, the address of the registered office where they carry on business, registration number under the Companies Act or Business Names (Registration) Act, if applicable; and the classification in which each of the partners, members or associates of the firm.

[83] According to Rule 10 of **the** National Board of Auditors And Accountants (Practising) Regulations, G.N. No. 316 of 1997 an audit firm may be de registered due to the reasons such as where the firm is convicted in a court of law for a criminal offence, where the actions of the firm's partners constitute a breach of professional conduct or ethics, death or significant period of absence of a registered partner in the firm, failure of the firm to pay the annual firm fees, failure of the firm to comply with the Accounting Standards and Guidelines issued by the Board et from time to time, failure of the firm to keep proper book of accounts as required by law and to pay the required tax to the Government, failure of the firm to maintain good quality work for its clients; or failure of the firm to participate in continuing professional programmes.

firms. The Secretary of the Law Society of Kenya is entrusted with powers of keeping a register of law firms, and it is compulsory to register a law firm in Kenya.[84] In Uganda, they went a step further. There is a requirement of inspection and approval of all law firms (chambers) annually by the law Council.[85] The approved chambers will be granted with the certificate of approval which will be valid for one year. Approval is conditional and may be revoked.

By registering all law firms and their partners, associates and practicing advocates, may smoothen regulatory function, curb the problem of unauthorized legal practice, non-renewals of practicing certificates, maintain the quality of legal services rendered and maintain the nobility of the legal profession.
Furthermore, it will improve income tax and other tax administration. Therefore, we may borrow from Kenya and Uganda experiences.

3.6 No Mandatory Requirement of Professional Indemnity

Current laws in Tanzania do not require a practicing lawyer in Tanzania to have a mandatory insurance cover. For example, in Kenya, it is mandatory for all advocates and law firms to hold a

[84] See regulation 5 of the Law Society of Kenya (General) Regulations, 2017. There is also a duty to inform the Secretary on the changes of the particulars of the firm or in case the firm cease to exist.

[85] This is per the Advocates (Inspection and Approval of Chambers) Regulations, 2005 available at https://ulii.org/ug/legislation/statutory-instrument/2004/200565 accessed on 25/11/2018.
According to the said rules for a law firm to be approved it shall meet the following requirements: (a) a suitable desk for an advocate; (b) a separate room for each advocate and another for a clerk, secretary and cashier; (c) a secretarial desk and computer or typewriter; a reception with chairs or benches for clients; (e) a bookshelf; (f) a chest of drawers or a filing cabinet; (g) a reasonable collection of reference law books including a full set of the Revised Laws of Uganda 2000; (h) access to a toilet and sanitary facilities; and (i) books of accounts.

professional indemnity cover.[86] This paper argues that it is time to adopt advocates mandatory insurance cover in Tanzania. The following are the reasons:

Firstly, it is the protection of members of the legal profession. Members of the legal profession in Tanzania are at risk of being made accountable for acts or omission in their legal practice. Their liability is not limited and if held responsible for negligence, the claimant may even attach their personal properties.

Secondly, the protection of consumers of legal services. Consumers of legal services also need protection, particularly when they suffer loss as a result of advocate's negligence in handling their affairs.

Thirdly, an increase in the demand for legal services. Currently, the demand of legal services is higher compared to the past 30 years. After adoption of economic liberalization policies in the early 1990s, a lot of investors in various sectors like banking and finance, insurance, oil and gas, mining, plantations, etc. came and opened business in Tanzania. Those investors have transactions worth millions of US dollars. In their countries of origin, the investors are used to professional indemnity cover. They will therefore be utterly surprised if they find out that mandatory professional indemnity cover does not exist in Tanzania.

[86] This is per the Kenyan Advocates (Professional Indemnity) Regulations, 2004 retrieved from www.kenyalaw.org accessed on 20/11/2018. According to those Regulations, every advocate practicing in Kenya shall purchase a policy of insurance (the professional indemnity cover) the value of which shall be not less than one million Kenyan shillings. For the case of lawyers practicing in partnership, such professional indemnity cover shall be purchased in common by the partners provided that the minimum value thereof shall be one million Kenyan shillings.

Fourthly, change of the role of legal profession. The Law Reform Commission of Tanzania admits that unlike in the past when the legal profession was still in its infancy, Tanzania was presently experiencing a decline in professional standards.[87] Now the legal profession is no longer a small, homogenous association of people undertaking similar type of work. There is a shift from regarding the legal work as a mere 'service' to 'business.[88]

Fifthly, emerging and development of new areas of practice. Lawyers in Tanzania were used to litigate in contract, tort, family matters, probate, etc. With the current socio-economic situation prevailing in the country, there are new areas of practice such as ICT law, e-commerce, DNA and forensic generally, aviation, international trade, competition, consumer protection, intellectual property, etc.

Lastly, no waiver of liability in negligence. Advocates in Tanzania cannot limit their liability in negligence even in a retainer agreement. If they attempt to do so, the provision in such an agreement shall not be liable for negligence, or that he shall be relieved from any responsibility to which he would otherwise be subject as an advocate, shall be void.[89]

3.7 Non-citizen's Legal Practice Regulation

Legal practice in Tanzania is open to Tanzanian citizens only. Tanzania has not adopted any cross-border or mutual recognition agreement.[90]Non-citizens may practice law in the country subject to the fulfillment of the requirements of the

[87] Law Reform Commission of Tanzania, Position Paper on the Reforms of Civil Justice System, December 2006 at p. 26
[88] *Ibid.*
[89] See section 56 (2) Advocates Act [Cap 341 R.E. 2002]
[90] Under the auspice of the East African Community.

Immigration Act as amended,[91] Non-Citizen (Employment Regulation) Act of 2015[92] as well as other laws binding citizen's practitioners. Recently, it has been noted that some non-citizen lawyers are practicing law as practitioners/advisors/employees in the country in law firms, other firms like audition/financial advisory, companies, organizations and Institutions employing foreigners. The TLS once issued a notice aiming at curbing this trend.[93] On the other hand, there is also a trend on the part of some law firms to enter into partnership or collaboration with foreign law firms. Though this trend is welcomed, it is not regulated. This can be used as a means of penetrating into Tanzanian legal market and later abandon those collaboration and establish themselves, fully, in the country.

Conclusion

The legal profession in Tanzania has grown steady in the past five years. There is also growth in demand for legal services in Tanzania. The foreign direct investments in mining, oil and gas as well as other big projects need a strong and competent Bar. As argued above, the legal and regulatory regime of legal practice in Tanzania Mainland is weak and outdated. It remained as it was with minimal changes for more than 60 years now. The existing regulatory framework cannot afford to regulate the current legal practice due to changes in socio-economic and political factors. Furthermore, there is internationalization of legal practice which Tanzania cannot afford to escape. Recently, global or international law firms have opened their offices and started

[91] [Cap. 54 R.E. 2002] as amended
[92] Act No. 1 of 2015.
[93]Tanganyika Law Society, Caution to Foreign Lawyers Practicing Law in Tanzania without Practicing Licences, 6th January 2016 retrieved from http://tls.or.tz/wp-content/uploads/2016/01/NOTICE-TO-FOREIGN-LAWYERS-PRACTICING-IN-TANZANIA-WITHOUT-PRACTICING-LICENCES-pdf.pdf
accessed on 27/11/2018 at 12;23 p.m.

offering legal services in Tanzania[94] and many others are expected to follow suit and competition with local law firms is inevitable. There is also the issue of cross-border legal practice under the auspices of the East African Community (EAC) where Partner States are expected to sign the Mutual Recognition Agreement (MRA) on legal services. This will ultimately allow legal practitioners to practice in the whole EAC region without restrictions. And all these will adversely change the landscape of the legal practice in Tanzania Mainland where regulatory framework would not be in a position to handle it if it remains as it is, unreformed.

[94] Some of those firms are NortonRoseFulbright, Bowmans, Clyde & Co., ENSafrica and Dentons.

THE PETROLEUM LOCAL CONTENT REGIME OF TANZANIA: OPPORTUNITIES AND CHALLENGES

Raphael B. Tweve Mgaya *

Abstract

Tanzania is endowed with significant hydrocarbon resources. The total volume of natural gas discovered in Tanzania so far stands at 57.25tcf. Following significant natural gas discoveries in the country, the Government initiated processes for the review of the petroleum industry legal and institutional framework, with a view to, among others, promoting local participation in the oil and gas industry. To that end, various policies were promulgated, including Energy Policy, which consolidated other energy-related policies.

The Petroleum Act, 2015 came into force on September 25th 2015, and the Petroleum (Local Content) Regulations, 2017 were made and came into force on May 5th 2017 respectively. The Act and the Regulations introduce a lot of local content requirements with the purpose of promoting the participation of Tanzanian citizens

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and Tanzanian businesses in the oil and gas industry. With the immense potential for investments in the oil and gas industry, Tanzanian citizens and Tanzanian companies stand to benefit enormously. This article identifies opportunities created by and examines the challenges in enforcing the local content in the oil and gas regime in Tanzania.

1. Introduction

Tanzania is endowed with significant natural gas resources. Since the end of 2010, Tanzania became one of the new frontiers for hydrocarbons explorations and development following discoveries of natural gas mainly in the offshore areas in the Indian Ocean. The massive discoveries has allowed Tanzania to join other Eastern African states like Uganda, Kenya and Mozambique[2] The current natural gas deposits in Tanzania presently stands at 57.25 TCF, of which 47.08 TCF is located offshore within the Indian Ocean and 10.17 TCF is located onshore, particularly in the South-Eastern regions of Mtwara and Lindi.[3] The Petroleum industry is arguably one of the most lucrative industries in the world with the potential to generate high revenues and for a long period, hence providing financial leverage to a host country on many fronts, including improving its balance of payments. However, unlike other industries such agriculture and manufacturing, the petroleum industry is time bound in the sense that hydrocarbon resources are finite, i.e. are exhaustible. This is one major reason why there is a need for ensuring that a sustainable programme of managing the existing

[2]See 'A New Frontier: Oil and Gas in East Africa' https://www.controlrisks.com/~/media/Public%20Site/Files/Our%20Thinking/east_africa_whitepaper_LR_web.pdf accessed on 7 October, 2017.
[3] Irene Florence M. Kasyanju, 'Tanzania Oil & Gas Sector' < http://www.diplomatmagazine.nl/2016/07/03/tanzania-oil-gas-sector/ > accessed 23 August, 2017.

petroleum resources is put in place in order to create value not only for the current generation, but also for the posterity.

Many hydrocarbon rich countries around the world have tried to develop petroleum policies, laws and regulations to ensure a mechanism is put in place for sustainable exploitation of petroleum resources. In essence, sustainable exploitation of petroleum resource entails that such a resource generates lasting value to economy of host state and its citizens. In order to achieve this paramount objective, there must be robust legal framework to ensure maximum benefits to the nation and its people from the oil and gas resources through what is technically referred to as "the local content regime." Tanzania as a newly, emerging hydrocarbon province, has also developed an oil and gas industry local content policy and legal framework to ensure that the petroleum wealth benefits the nation and its people, including the present and future generation. In this Article, authors analyse, critically, the regime by focusing on the opportunities and challenges that are likely to be encountered in its implementation.

2. Policy and Legal Framework

Many countries which are endowed with petroleum resources are introducing or have put in place local content regime. [4] Policy makers in petro states are concerned with maximizing benefits from non-renewable petroleum resources by developing appropriate instruments to realize the objectives.[5] Local content regime is usually embodied in the policies, legislations and

[4] IPIECA, "Local Content Strategy: A guide document to the oil and gas industry", 2011, p. 1. < http://www.ipieca.org/resources/good-practice/local-content-strategy-a-guidance-document-for-the-oil-and-gas-industry-1st-edition/ > accessed 14 October, 2017.

[5] Tordo, S., Warner, M., Manzano, O.E. and Anouti, Y., "Local Content Policies in the Oil and Gas Sector", *A World Bank Study,* The World Bank, Washington, D.C., 2013, p. 1.

regulations. In the immediate paragraphs, below, a local content regime is examined in the context of the Tanzania's oil and gas industry.

2.1 The Oil and Gas Industry Local Content Policy

Generally, local content policies are one of the instruments adopted in the petroleum industry to maximize benefits for the local economy from petroleum development in the country. In the hierarchy of legal instruments, policies are developed by the particular department of the Government for which the subject matter of the policy relates. On the basis of the policy principles, the parliament makes the legislation in a particular industry in order to realize the policy objectives. In the case of Tanzania, the Local Content Policy for Oil and Gas Industry (hereinafter "the Policy") was promulgated in April 2014.[6] This followed major discoveries of natural gas in the country, particularly from 2010 onwards.

The main objective of the Policy is to build capacity of local manpower, promote transfer of technology and skills for the local economy and promote the participation of local businesses in the petroleum industry. Implicit in the Local Content Policy is to prevent the pitfall countries have experienced, including avoidance of Dutch Disease, hyperinflation and the economic and financial volatility which is usually associated with petroleum economy.

[6] The Local Content Policy for the Oil and Gas Industry 2014 can be freely downloaded at < https://mem.go.tz/wp-content/uploads/2014/05/07.05.2014local-content-policy-of-tanzania-for-oil-gas-industry.pdf > accessed 23 August 2017.

The coming into force of the Energy Policy in December 2015[7] took over all energy related policies, including the Natural Gas Policy 2014, the Petroleum Policy 2014 and the Oil and Gas Local Content Policy. This policy was formulated to provide a framework for Tanzanians' participation in the oil and gas industry. Key focus areas of the Policy include promoting capacity building and technology acquisition; participation of Tanzanians and Tanzanian owned entities; procurement and usage of locally produced goods and available services as well as fabrication and manufacturing of machinery products within Tanzania.[8]

2.2 Petroleum Act

Accordingly, on September 18th, 2015, the Government published the Petroleum Act, 2015 (hereinafter "the Act") which, among others, set out the legal and institutional framework for the local content in the petroleum industry.[9] The main local content requirement are set out in the Act, namely, that license holder, contractor and subcontractors (hereinafter collectively referred to as "the participants") '*shall*' give preference to goods produced or available in Tanzania and services rendered by Tanzanians or local companies.[10] The use of the term "shall" connotes that the requirement is mandatory. Therefore, must give preference to goods produced or available in Tanzania and services rendered by Tanzanians or local companies.

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[7] National Energy Policy 2015 can be downloaded at < http://africaoilgasreport.com/wp-content/uploads/2017/10/Tanzania-National-Energy-Policy_December-2015-1.pdf > accessed 28th February 2019

[8] National Energy Policy 2015, p. 5.

[9] The Upstream Regulatory Authority (PURA) was established and empowered to regulate among others, the local content in the upstream. On the other hand, the Energy and Water Utilities Regulatory Authority (EWURA) was empowered to regulate *inter alia* the local content in the midstream and downstream segment of the petroleum industry.

[10] Petroleum Act, 2015, Section 219(1).

In cases where goods and services cannot be obtained in Tanzania, the Act provides that such goods and or services *'shall'* be provided by a Joint Venture with a local company, whereby such a local company must hold at least 25% of shares or as set out in the Regulations.[11] For the purpose of local content requirement, the local company is defined as a company or subsidiary company incorporated under the Companies Act, CAP. 212 of the Revised Edition 2002 of the Laws of Tanzania which is one 100% owned by a Tanzanian citizen or a company that is in a joint venture with a Tanzanian citizen or citizens whose participating share is not less than 15%.[12]

2.3 The Petroleum (Local Content) Regulations

The Petroleum (Local Content) Regulations, 2017 in Oil and Gas Industry, 2017 (hereinafter "the Regulations") were made by the Minister for Energy and Minerals and came into force o May 5th 2017.[13] The Regulations govern local content matters related to upstream, midstream and downstream activities in Tanzania Mainland.[14]

3. Conceptual Context

Local content generally means the development of local skills, oil and gas technology transfer, and use of local manpower, goods and services and promotion of local manufacturing.[15] Local content has also been defined as the extent to which the output of the extractive industry sector generates further benefits to the

[11] Petroleum Act, 2015, Section 219(1).
[12] Petroleum Act, 2015, Section 219(9).
[13] The Petroleum (Local Content) Regulations, 2017, Regulation 1(2).
[14] The Petroleum (Local Content) Regulations, 2017, Regulation 2.
[15] Joe Asamoah, 'Local Content in the Oil and Gas Industry', *Oil and Gas Oil,* < https://www.oilandgasiq.com/strategy-management-and-information/articles/local-content-in-the-oil-and-gas-industry > accessed on 31st August, 2017.

economy beyond direct contribution of its value-added, as it links to other sectors.[16]

In the Tanzanian context, the term Local Content has also been defined under Section 3(1) of the Act and Regulation (3) to mean "the quantum of composite value added to or created in the economy of Tanzania through deliberate utilization of Tanzanian human and material resources and services in the petroleum operations in order to stimulate the development of capabilities of indigenous Tanzanians and to encourage local investment and participation." This entails, among other things, giving of priority to goods and services produced or provided by local companies and also giving Tanzanian citizens preference in employment in the oil and gas sector. Within the context of the local content regime, Tanzanian company or local company means a company or subsidiary company incorporated under the Companies Act, which is one hundred per cent (100%) owned by a Tanzanian citizen or a company that is in a joint venture partnership with a Tanzanian citizen or citizens whose participating share is not less than fifteen percent (15%).[17]

4. Perspectives on Local Content Requirement

Properly framed local content regime creates several advantages to the country's economy, most noticeably, through forward and backward linkages which ensure synergies in the economy. Backward linkages happen when the "demand of one industry for the output of another industry to be used as input for its output", forward linkages refers to output of one industry which is supplied to other industries as input to their production. For instance, natural gas is used as a feedstock for cement and

[16] Tordo, Silvana and Warner, Michael, "Local Content Policies in the Oil and Gas Sector", *A World Bank Study,* 2013, p.1
[17] Petroleum Act, 2015, Section 219(9).

fertilizer plants that means, natural gas processing plant can have a forward linkage with cement and fertilizer plants. The case of Dangote Cement in Mtwara is a perfect example. Forward linkage is possible if natural gas is locally available for use by local industries as a feedstock; this helps local industries to expand production, thus creating more job opportunities. This is why local content regime is so important in making sure that the produced natural gas is not shipped, in its entirety, outside the country.

A robust local content regime also ensures more revenue flow to the host government as a result of synergic effects in the economy, which leads to high tax revenue. Similarly, increased employment for locals, means that the amount of PAYE which flow every month to tax authorities increase revenue both for companies operating in the petroleum industry and

those that supply goods and services to companies operating in the petroleum industry.

Local content requirement are basically "a trade-off between the short – term efficiency and long term economic development". Therefore, care must be exercised to make sure that proper balance is established between short-term efficiency that is compromised and the long term economic development that are expected. Onerous local content requirement to investors may stifle the industry by discouraging foreign investors.[18]

5. The Regulatory Framework

The local content regulatory role in the oil and gas industry is carried out by Petrouleum Upstream Regulatory Authority (PURA), which regulates upstream petroleum activities[19] and the

[18] Tordo, Silvana and Warner, Michael, *Op. Cit,* p.10.
[19] Petroleum Act, 2015 Sect. 11(1).

Energy and Water Utilities Regulatory Authority (EWURA), regulates the midstream and downstream petroleum activities.[20] These authorities are obliged to make sure that local content objectives are achieved. To this end, PURA and EWURA (hereinafter referred to as "the Authorities") are required to develop a baseline data and information to identify the current capacity and capabilities of Tanzanians to be employed and local (Tanzanian) companies to become suppliers. The Authorities must also undertake needs assessment of the required capacities to deploy Tanzanian experts in the petroleum sub-sector.[21]

Furthermore, Authorities are obliged to develop local content framework on transfer of technology and strategies for monitoring and evaluating local content plan on transfer of technology in collaboration with other relevant authorities.[22] The relevant authorities in this case are many and include the Ministry of Energy, the National Economic Empowerment Council (NEEC), the Association of Tanzania Oil and Gas Suppliers (ATOGS) , the Tanzania Private Sector Foundation (TPSF) and the Oil and Gas Association of Tanzania (OGAT). The Authority is obliged to review, and where appropriate, approve the local content plan within twenty eight days (28) after the local content plan has been submitted to it. The Authority is required to (in consultation with other relevant stakeholders in the industry) establish and manage a common qualification system. The objective of the system is to serve as the sole system for registration and pre-qualification of service providers in the petroleum industry. The common qualification system shall be specifically used for the following purposes: verification of

[20] Petroleum Act, 2015 Sect. 29(1).

[21] The Petroleum (Local Content) Regulations, 2017, Regulation 4(2).

[22] One of the important authorities in this case is the National Economic Empowerment Council which is under the Prime Minister's office has been advocating for a long time on the participation and empowerment of Tanzanians to participate into the petroleum sector.

contractors' capacities and capabilities through relevant authorities; evaluation of applications of local content submitted by a contractor, subcontractor or licensee; the tracking and monitoring of performance and provision of feedback; and the ranking and categorization of suppliers in the industry.[23] The Authorities are obliged to maintain a database of local supplier and such a database should be accessible to the public during working hours or online.

In terms of developing a database for local suppliers, EWURA has done a commendable job by establishing Local Suppliers and Services Providers (LSSP) database in accordance with Regulation 38(1) of the Petroleum (Local Content) Regulations, 2017[24]. Currently, there are 272 firms listed in the LSSP of which 17 are law firms.[25] This obviously indicates that there is a lack of awareness amongst law firm owners regarding the need to register with LSSP and the benefits associated with it. Clear guidelines are provided on how to register in the LSSP[26] and the procedure is quite simple, though it could be simplified more by allowing total on-line application. Petroleum Authority of Uganda (PAU) has simplified the registration process for suppliers and service providers by providing an on-line registration platform on its website.[27]

[23] Petroleum (Local Content) Regulations, 2017, Regulation 37(2).
[24] LSSP 2018 was initially published on 11th June 2018. Since the registration is an on-going exercise, EWURA updates the LSSP2018 from time to time as fresh applications are received and processed. LSSP was updated for the months of July, August, September, October, November and December 2018.
[25] See at https://www.ewura.go.tz/wp-content/uploads/2019/02/Tanzania-LSSP-Database-as-of-December-2019-1.pdf
[26] The Guidelines for application for Tanzanian local suppliers and service providers in the petroleum subsector are available at: http://www.ewura.go.tz/wp-content/uploads/2018/02/Guidelines-for-Application-for-Tanzanian-LSSP-Databases.pdf
[27] See at: https://pau.go.ug/public/ accessed on 6 October, 2017.

The Authority are also obliged, under Regulation 39, to educate the public and ensure that sensitization programmes are carried out to relevant stakeholders on the local content policy on the oil and gas industry and the implementation of the Regulations. The Authority is also mandated to undertake the assessment of the Local Content Performance report within sixty (60) days following its submission. While undertaking the assessment of the performance report, the Authority has the power and mandate to access company facilities, documents and other information as it may deem necessary. The Authority may undertake investigation on fronting[28] or bid rigging and cartelization. In order to effectively operationalize Regulations, the Authority is obliged to make various guidelines, including bid valuation guidelines and guidelines on electronic filing of documents.

6. Opportunities for Suppliers

There are a lot of opportunities for Tanzanian companies in the oil and gas industry in the upstream, midstream and downstream. There are going on petroleum explorations in several areas in the country, including, along Kilombero Basin by Swala Oil and Gas Limited, Ruvu Block by Dodsal Group where it discovered 2.7tcf[29], Eyasi-Wembere Basin, where Tanzania and Uganda team have stumbled on "all signs" of presence of hydrocarbons[30]. The development operations going on along the offshore blocks, Block 2 by Equinor and ExxonMobil joint

[28] The term 'Front' is a legal term which means to deceive or behave in a particular manner so as to conceal the fact that a company is not a Tanzanian company.

[29] TanzaniaInvest, 'Dodsal Group Discovers 2.7 TFC Onshore Gas Deposit in Ruvu Basin in Coastal Tanzani' See at < https://www.tanzaniainvest.com/energy/dodsal-group-discovers-2-7-tfc-onshore-gas-deposit-in-tanzania > accessed on 20th December 2018.

[30] See 'Petroleum exparts reports signs of oil in Eyasi-Wembere Basin' See at <https://www.ippmedia.com/en/news/petroleum-experts-report-%E2%80%98signs%E2%80%99-oil-eyasi-wembere-basin > accessed on 19th December 2017.

venture and in Block 1 and 3 by a consortium of Shell, Ophir Energy and Pavillion. The negotiations for a host government agreement between the Government and Block 1, 2 and 3 partners are on-going with the plan to construct a $30bil LNG project in Lindi region. Pan African Energy Tanzania Limited is producing natural gas at the Songo Songo gas field and is transporting most of the gas to Dar es Salaam via the Songas pipeline for power generation at the Ubungo Complex and for sales to industries and households also in Dar es Salaam. Maurel & Prom and Wentworth consortium is producing natural gas from Mnazi Bay gas field. The first gas was delivered to Dar es Salaam via the TPDC natural gas pipeline on August 20th 2015.[31]

The East African Crude Oil Pipeline (EACOP) Project presents another amazing opportunity to Tanzanian companies. The pipeline will have a total length of 1, 443km and will transport crude oil from Kabaale-Hoima in Uganda to Chongoleani near the Tanga port in Tanzania.[32] The project is expected to be commissioned in 2020 and it is estimated to cost a total of $ 3.5bil. During operation, the pipeline is expected to transport 216,000 barrels of crude oil per day. This project presents enormous opportunity, in terms of employment, to locals, opportunities for locals to supply goods and services to oil pipeline operators.

The services covered under the local content regime includes, among others, engineering services, insurance, financial and legal services. One of the objectives of the Regulations is to achieve minimum local employment levels and the amount of money spent in the country for the provision of the stated services and provision of specified goods in the petroleum industry value

[31] TanzaniaInvest, 'Tanzania Mnazi Bay Gas Field', < https://www.tanzaniainvest.com/mnazi > accessed on 19 December 2018.
[32] See at http://eacop.com/about-us/overview/ Visited on 22nd December 2018.

chain.[33] Specific content levels that must be achieved are divided into ten main categories as set out in the First Schedule to the Regulations namely: FEED[34], detailed engineering and other engineering services; fabrication and construction services such as drilling modules or packages, anchors, buoys, jackets, flare brooms, storage tanks, pressure vessels umbilical, accommodation modules, pipeline networks, risers, sub-sea systems; material procurement including steel pipes, voltage cables, valves, pumps, cement and protective paints; well drilling services, including reservoir monitoring, well completion, production/drilling, seismic data acquisition, well simulation, pumping services, well crisis management and data interpretation.

Local content regime also covers research, development and innovation relating to services within Tanzania, which basically, include engineering studies (i.e. reservoir, facilities, drilling etc), geological and geophysical studies, safety and environmental studies and local material substitution studies. The exploration, subsurface petroleum engineering and seismic services are also subject to local content laws in Tanzania. These ranges from services such as data acquisition, data processing, geophysical interpretation services, mud logging, coring services, well testing, drilling rigs and work-over rigs. The other category of services is the health, safety and environment services. This covers a wide range of services, including site clearance. Waste water treatment and disposal, fire and gas protection system, industrial cleaning, temporary accommodation camp services,

[33] The Petroleum (Local Content) Regulations, 2017, Regulation 4 (1) (c).
[34] FEED (Front End Engineering Design) means Basic Engineering which is conducted after completion of Conceptual Design or Feasibility Study. At this stage, before start of E.P.C (Engineering, Procurement and Construction), various studies take place to figure out technical issues and estimate rough investment cost. For detailed explanation see at < https://www.chiyoda-corp.com/service/en/onshore/plant/feed.html > accessed on 31st August, 2017.

catering, cleaning and laundry, medical services and security services.

The last two main categories of services covered under the local content Regulation are the information systems, information technology and communication services on one hand and marine operations and logistics on the other. The former includes services such as network installation support, software support and development, computer-based modeling, computer-based simulation, hardware installation support, Operating system installation and support, information technology management consultancy and telecommunication installation. The latter entails services such as telecommunications, supply of crewmen for domestic coastal service, hook-up and commissioning, dredging, grave land rock dumping, FSU[35], subsea pipeline protection services, installation of subsea packages and mooring system services.

All these services require a minimum percent of local content that must be met. The thresholds rise up with time, from start to five years and then ten years. The services are measured either on man-hour basis or on the basis of the amount of cash to be spent or which have been spent, depending on the type of service.

7. Compliance Issues

The Local Content Law requires licence holder, contractors and sub-contractors to comply with various requirements. These requirements include submission of local content plan which sets out the forecasts of procurement, employment, technology transfer and research and development opportunities.

[35] FSU (Floating Storage Unit) are floating vessels used by the offshore drilling industry for the storage of oil and gas.

The submission of local content plan by the licensee, contractor and sub-contractors is an important component under the local content regime. The applicant of an exploration license must submit a local content plan as part of the application package.[36] The local content plan must comprise of various matters specified under the law, including employees and training; succession plan, if applicable; research, development and innovation; procurement of goods and services; transfer of technology; legal services expected to be procured ; engineering services; financial services; and insurance services.[37] The same applies when a company makes an application for the approval of construction of a petroleum installation from EWURA; it must include the local content plan. Before granting the construction approval, EWURA considers the applicant's local content plan.[38] Failure to comply with what is provided in the local content plan has serious consequences to the company, including the risk of having the license revoked or cancelled by the authority.[39] In this regard, it is therefore crucial to note that while submitting local content plan, a company must be quite sure that it will be able to undertake commitments contained therein.

Apart from submission of local content plan, companies are also required to submit a procurement plan for at least five years.[40] The Annual procurement plan must also be submitted by the licensee or the contractor at least ninety (90) days before the commencement of each calendar year.[41] Besides, for each proposed contract or purchase order which is either petroleum activities which is to be sole sourced or is competitively sourced, but it is in excess of USD 100, 000, in case of upstream petroleum

[36] Petroleum Act, 2015, Section 51(2)(v).
[37] Petroleum (Local Content) Regulations, Regulations 11.
[38] Petroleum Act, 2015, Section 126(3)(c).
[39] Petroleum Act, 2015, Section 143 (1)(d).
[40] Petroleum Act, Section 219 (4).
[41] Petroleum (Local Content) Regulations, Regulation 31(4).

activities, and USD 50, 000 in case of downstream petroleum operations; the licensee and or contractor must inform the Authority in writing of such proposed contract or purchase order.[42]

Companies operating in the petroleum industry are obliged to establish a bidding process for acquisition of goods, works and services that give priority to local company. Such bid evaluation process should take into account the fact that the principle of the lowest bidder does not apply in procurement in the oil and gas industry. Besides, the bid evaluation should be designed such that a local bidder is not simply disqualified on the ground that it is the lowest bidder. In case of tied-bids, the one with higher local content should be selected.[43] Where, goods cannot be supplied and or services cannot be provided by a local company, then a non-local company must form a joint venture with a local company for the purposes of supplying such goods and or providing the services. In such a joint venture, a local company must hold at least twenty five (25%) of the shares in the joint venture. It is important that companies operating in the oil and gas industry, while procuring goods and services from foreign companies, must ensure that foreign companies have entered into joint venture with local companies or local companies holding not less than twenty five (25%) in the joint venture.[44]

The foreign company may provide goods and services without entering into a joint venture with a local company as long as it obtains the approval of the Authority to enter into "*any other business arrangement which will guarantee a local participation of at least ten percent (10%) shares, interest or equity of the contract value*

[42] Petroleum (Local Content) Regulations, Regulation 31(1).
[43]Petroleum (Local Content) Regulations, Regulations 30(1)-(5).
[44] Petroleum Act, 2015, Section 219 (1), Petroleum (Local Content) Regulations, Regulations 30(6) & (7).

for provision of works, goods and services".[45] The exception of this requirement is possible only where the formation of joint venture or other business arrangement has failed, and in such a case, the contractor or licensee should apply to the Authority for grant of approval of the "*said applicant to source such works, goods and services through any other arrangement which will provide the local company with a transfer of competence and technology*".[46]

The licensee and contractor are obliged to submit local content performance report to the authority within sixty (60) days after the commencement of a calendar year. The local content performance report must specify the local content, in terms of the expenditure, both current and cumulative. The report must also state levels of employment of Tanzanians in terms of number of hours worked by Tanzanians *vis-a-vis* foreigners. The training, R & D, innovation, technology transfer and actual procurement of goods and services must also be provided. Lastly, the report must show the deviation in implementation of the approved local content, indicating reasons from the deviation thereof.[47] The requirement to submit local content information extends to third parties with "*a contractual affiliation with a contractor, subcontractors, licensee or any other relevant person*".

8. Obligations of Oil and Gas Industry Participants

Companies operating in oil and gas industry in Tanzania whether as contractors, subcontractors, licensees or in any other capacity are required to communicate local content policies, procedures and obligations to any person who is engaged by them. The companies are also obliged to ensure that local content procedures and obligations of those third parties are made

[45] Petroleum (Local Content) Regulations, Regulations 15(4).
[46] Petroleum (Local Content) Regulations, Regulations 15(5).
[47] Petroleum (Local Content) Regulations, Regulations 34(1) & (2).

available on their respective websites. Apart from above obligations, any company that carries out petroleum activity in the country is obliged to comply with local content requirements and also to ensure that the third party involed in any activity in the petroleum industry, complies with the local content requirements.[48]

As part of undertaking local content obligations, companies in the petroleum industry must make sure that priority is given in employment and training of Tanzanians who are qualified. Where Tanzanians are not employed due to lack of expertise, the contractor, subcontractor, licensee or any other person engaged in petroleum activity is required, by law, to take reasonable efforts to train Tanzanians both locally and overseas to the satisfaction of the relevant Authority.[49] Similarly, companies are also obliged to give preference to goods and services that are manufactured or locally available in Tanzania. In the same vein, a person conducting petroleum activity is obliged as well to ensure that Tanzanian citizens are given priority in matters relating to transfer of technology, research, development and innovation in the petroleum industry.[50]

During employment, the contractor, subcontractor, licensee or other person engaged in petroleum activity is required to employ Tanzanians only in semi-skilled or unskilled labour. According to the law, semi-skilled means a job which requires basic knowledge in a given profession. But unskilled labour means a job which does not require special training or skills. Where there are no Tanzanians with required semi-skills, approval must be

[48] Petroleum (Local Content) Regulations, Regulations 7 (1).
[49] Petroleum (Local Content) Regulations, Regulations 12(6).
[50] Petroleum (Local Content) Regulations, Regulations 8.

sought by the company from the Authority to employ a non-Tanzanian in the semi-skilled labour.[51]

The law also requires that the insurance in the petroleum industry must be through Tanzanian insurers. Where there are no local insurers with the required capacity, an approval must be sought from the relevant insurance authority to derogate from the requirement.[52] The Tanzanian law of insurance is well established on this principle. Under Section 133 of the Insurance Act[53] the law requires that the insurance in respect of a risk that may arise in Tanzania, must be placed in Tanzania. In case there is no locally available insurer with the ability to insure a particular risk, then a person requiring such insurance must obtain a prior written consent of the Commissioner for Insurance[54]. Before giving his consent, the Commissioner for Insurance must be convinced that there is no registered insurer in the country with the ability to provide adequate insurance cover.[55]

This exception is crucial given the industry's perceptions and the low level of development insurance in the industry in the country, and its potential to cover risks associated with oil and gas projects.[56] In the light of this legal avenue, "Tanzanian insurers are developing an insurance pool for local insurers to benefit from the oil and gas industry". The petroleum industry is a lucrative industry and experts estimate that the nation's annual

[51] Petroleum (Local Content) Regulations, Regulations 14(3).
[52] Petroleum (Local Content) Regulations, Regulations 21(2) and (3).
[53] Act No. 10 of 2009.
[54]Insurance Regulations, 2009, Regulation 37 (2).
[55] Insurance Regulations, 2009, Regulation 37 (3).
[56] Amedeus Shayo, 'It is doubtful if the local insurance sector is ready for oil, gas economy', *The Citizen*, Sunday, 10 November, 2013.

gross premium with the booming oil and gas extraction, will reach a 2trn Tzs (1.2bn USD) during the coming five to 10 years.[57]

The law also requires that legal services must be procured locally, i.e. from Tanzanian legal service providers.[58] There is no exception which provide for procuring legal services from outside Tanzania. The assumption is that legal services can adequately be provided by local law firms. This is quite a fair assumption. In recent years, we have witnessed the movement, into the country, of leading international law firms that have established their base in Dar es Salaam, primarily to tap into the growing market, especially in the oil and gas industry. These top-notch international law firms that have established their base in Tanzania and the East African region at large include Clyde & Co, Bowmans Tanzania Limited and ENSafrica.

The participants in the oil and gas industry are further obliged to ensure that local engineering firms are procured, and in case of the absence of local capacities, a written approval must be sought from the relevant authority.[59] The participants are also required to procure financial services from local financial firms, and there is no exception on this requirement. The Big Four audit firms, namely, KPMG, PwC, Deloitte and Ernst & Young are not wholly owned by Tanzanian citizens, hence they do not qualify for preference as local companies. Thus, to enjoy the preference under the local content regime, these Big Four must get into a Joint Venture with a Local Company in which at least 10% of

[57] See at 'Tanzania: Insurers develop pool to benefit from oil, gas industry', http://www.businessinsurance.com/article/00010101/STORY/140709875/Tanzania-Insurers-develop-pool-to-benefit-from-oil,-gas-industry accessed 3rd October 2017; See also 'Tanzania to launch new oil and gas insurance risk pool' http://www.riskafrica.com/tanzania-to-launch-new-oil-and-gas-insurance-risk-pool/ accessed 3rd October, 2017.

[58] Petroleum (Local Content) Regulations, Regulation 22.

[59] Petroleum (Local Content) Regulations, Regulation 24(1) & (2).

their equity shares of the Joint Venture will be owned by Tanzanians

Companies operating in the petroleum industry are obliged to maintain a bank account with a Tanzanian bank and must transact business through the bank in Tanzania.[60] This is not good news to foreign companies which mostly prefer to keep their accounts with relatively more secure and low interest in offshore jurisdictions.

Companies are obliged to maintain a minimum local content level as specified under the *First Schedule* to the Regulations. The levels of minimum local content required vary, depending on the category of goods or services. It remains to be seen how the relevant authorities will be able to monitor the implementation of such detailed and stringent requirements.

9. Sanctions for Violations

The Regulations note several offences and prescribe tough penalties which are important for companies operating in the petroleum industry to know. Failure to observe local content requirements stipulated under the Regulations, poses serious challenge for companies with the potential of increasing the cost of doing business. For instance, the submission of false information, including information associated with plans, returns and report under the Regulations is an offence punishable by not less than twenty million (20m Tanzanian shillings) or a jail sentence of not less than 5 years or both.[61]

Any collusion with a foreign or a local company in order to deceive the Authority is an offence whose fine is not less than one hundred million shillings (100m/-) or a jail term of not less

[60] Petroleum (Local Content) Regulations, 2017, Regulation 28(1).
[61] Petroleum (Local Content) Regulations, 2017, Regulation 47(1).

than 5 year or both. The other offences include failure to support and carry out a transfer of technology programme; failure to ensure that partners, contractors and subcontractors report on the local content; failure to communicate local content policies, procedures and obligations to any person engaged by the contractor or licensee. All these offences attract a penalty of 100m/- in the first instance and a further penalty of 5% for each day (equivalent to 5m/-) that the contravention of the regulation continues.

The participants in the petroleum industry are obliged to comply with the minimum local content requirements, any failure of which is an offence. Any procurement of goods and services contrary to the Regulations is an offence. A company which fails to operate a bank account, according to the Regulations, commits an offence and where the contravention continues after the time specified for remedying, if it is a contractor, approvals and permits may be withdrawn by the Authority. In case of a subcontractor or licensee, it may be expunged from the list of registered suppliers in the oil and gas industry.[62]

The company which fails to submit a local content plan, as required under Regulation 9(1); or fails to comply with the requirement of the submitted local content plan, commits an offence whose fine is 5% of the value of the proceeds of the petroleum activity in respect of which the breach is committed, but shall not exceed 100m/-. Fronting, bid rigging and cartelization are offences whose fine is up to 100m/- or not less than 5 years prison term or both.[63]

Any outstanding fine is a debt to the United Republic of Tanzania, and may be recovered by the Authority under the law.

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[62] Petroleum (Local Content) Regulations, 2017, Regulation 47(5) (g).
[63] Petroleum (Local Content) Regulations, 2017, Regulation 47() (g).

Any person who is dissatisfied by the decision of the Authority may appeal to the Fair Competition Tribunal.

10. Challenges of Implementing and Enforcement

The enforcement of local content regime must involve the balance of interest of both the country and investors who are equally significant for the development of a sustainable oil and gas industry. Building of local knowledge and skills is crucial in order to narrow the information gap or asymmetry between the State and the international oil companies. Blind enforcement of the local content regime without considering the practical implications of the industry may be a recipe of inefficiencies and capital flight, in what is figuratively referred to as 'the killing of a golden goose'. As such, building of local capacity is essential to ensuring effective enforcement of the local content regime.

There is no doubt that emphasis on local content in the oil and gas industry is important and has a long-term benefit to the local economy. But care must be exercised to make sure that there is no rush into the petroleum sector at the expense of the other sectors such as manufacturing, fishing, tourism, agriculture and service sectors. There must be diversification of the economy to avoid the Dutch Disease.[64] Revenues from oil and gas industry must be properly managed through, among others, economic diversification and support to other sectors supporting other. *The Oil and Gas Revenue Management*[65] *Act* lays down some quite important policies for managing oil and gas revenues in the country to ensure financial stability, sustainable development of

[64] Dutch Disease is the negative impact on an economy of anything that gives rise to a sharp inflow of foreign currency, such as the discovery of large oil reserves. The currency inflows lead to currency appreciation, making the country's other products less price competitive on the export market.
[65] Act No. 22 of 2015.

the petroleum industry and diversification of the economy.[66] These principles, the safeguard of the economy against inherent volatility of the oil and gas revenue; presence of uncertainty of the timing and size of the revenue flow; adherence to fiscal convergence criterion for East Africa Monetary Union; maintenance of expenditure growth that is consistent with the absorption capacity of the economy; avoidance of borrowing where government holds financial savings; diversification and unlocking of the economy for sustainable development; ensuring collection efforts of revenue from non-oil and gas sources are not neglected; and safeguard interests of future generation through expenditure on alternative investments, including human capital development and financial savings. It remains to be seen how this well-intentioned legislation will be enforced to realize noble objectives.

11. Conclusion

The thinking on the development of local content regime in Tanzania started following the significant discoveries of natural gas marked from 2010. The Natural Gas Policy was promulgated in 2013 and a New Model Production Agreement was also made in the same year. The Petroleum Policy and the Oil and Gas Industry Local Content Policy followed in 2014. The Energy Policy came in 2015 and replaced all previous policies associated with the energy sector. The Petroleum Act was enacted in 2015, together with Oil and Gas Revenue Management Act, 2015 and the Local Content Regulations, were published two year later via the Government Notice No. 197 on 5th May 2017.

- The local content regime for oil and gas industry in Tanzania has the potential to empower Tanzanians and Tanzanian companies to participate in and benefit from

[66] Oil and Gas Revenue Management Act, 2015, Section 16(3).

booming petroleum industry in the country. However, this opportunity will only be realized if two important things are accomplished namely, the relevant Authority making all the required guidelines and procedures that are necessary for efficient operationalization of the regime and enforcing the rules to the letter. On the other hand, public awareness programme and educational programmes must be carried out to sensitize members of the public and local entrepreneurs and businesses on the existing opportunities in the petroleum industry. Equally, sensitization on various local content requirement should also include the oil and gas industry participants who are the main stakeholders if the Government objectives to promote the participation of Tanzanians and Tanzanian businesses in the oil and gas economy, are to be realized.

LEGAL IMPLICATION OF MULTIPLE REGULATIONS OF THE PRINT MEDIA IN TANZANIA

Thomas Masanja*

Abstract

Media regulation envisages administrative measures to oversee daily media activities. Regulation of the media like other professions is mandated to a specific regulatory body vested with powers to enforce professional ethical standards. Thus, in order to ensure that the media performs its duty correctly, it should adhere to the requirements of accuracy, objectivity and truth. Media regulation can take different approaches. It can be through a statutory body or non-statutory body. Likewise, media regulatory approach can either be a co-regulatory or no regulatory body at all. These approaches are dependent on the socio-legal environment and political culture of a given society. International community standards and practice show that there is no specific regulatory approach which is uniform to all. The intention of this article is to determine the extent of the mandates and efficacy of media regulatory mechanisms in Tanzania. Statutory regulatory procedures and institutions as established by the Media Services Act, are highlighted together with the nature and mandate of voluntary self-regulatory body, Media Council of Tanzania. The two regulatory institutions seem to have similar duties and they are in a conflicting relationship. At the end, the author suggests an appropriate model for media regulation in Tanzania. The arguments and suggestions base on socio-legal environment and contemporary political culture and the experience from other jurisdictions.

Key words: Freedom of expression, press freedom, media regulation, political culture

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1. Introduction

Media has rights as well as a social and legal duty to inform the populace and in turn the populace has a social and legal right to be informed.[1] Thus, in order to ensure that the citizenry enjoy their right to information, at the first place, the media should be guaranteed their freedom to seek, collect and disseminate information[2] and thereafter be guided by a regulatory institution. Regulatory institutions are there to ensure media professionalism.

In Tanzania, two regulatory approaches and institutions co-exist.[3] There are statutory regulatory mechanisms established by the Media Services Act[4] and a voluntary non-statutory mechanism(s) under the Media Council of Tanzania. As is further discussed herein below, this co-existence of print media regulatory bodies in the country may lead to a legal controversy as to which body is mandated to regulate the media in the country.

Before turning to what is happening in Tanzania, international legal standards and best practices are visited to show requirements for the right to freedom of the press and its extent and how it can be regulated. Thereafter, because international legal standards and best practices do not, explicitly, say a mode

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[1] See Nation Human Rights Committee decisions in Gauthier v Canada, Communication No. 633/95. Also United Nation Human Rights Committee General Comment No. 34 on Article 19 on Freedom of Expression and Opinion, HRC, 102nd Session, Geneva, 11 - 29 July 2011 which replaced Committee General Comment No. 10 (Nineteenth Session). CCPR/C/GC/34 (2011) at para 13 and United Nations General, Report of the Special Rapporteur on promotion and protection of the right to freedom of opinion and of expression, UN GA, 17th Session 8 September 2015 (following Human Rights Council Res. 25/2).A/70/361, 2015 at para 7.

[2] General Comment No. 34 (n 1) at para. 13 and 18.

[3] See Mrisho, D, Masanja, T and Domic, N. A, International and Comperative Law on Media and the Position in Tanzania, JURIS: Dar es Salaam, at pp. 97 and 105

[4] No. 12 of 2016.

through which the media should be regulated, different known modes of media regulations across different jurisdictions are also discussed.

2. Established Legal Standards and Practices on Media Regulation

Our world today is a 'village'.[5] States as members of this village live in a common life all over. Due to this, there are internationally established legal standards and developed best practices on media regulation.[6] Press freedom is a way through which freedom of expression is enjoyed.[7] The right to freedom of expression should be enjoyed by all individuals because its importance in a democratic society cannot be under estimated.[8] It is through the right to freedom of expression that the society gets involved in the governance of their country through participating in political campaigns, voting and at the end, vetting the function of their government. Thus, the UN Human Rights Committee has opined that;

> "The freedoms of opinion and expression form the basis for full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment of the right to freedom

[5] The world is made a village through globalization and advancement in technology. For more discussion on press freedom and globalization see Barland, J, 'Press Freedom and Globalisation: Scandinavia and East Africa Compared', A thesis submitted to fulfill the degree of Masters of Arts in International Relations, United States International University – Africa Nairobi, Kenya, May 2005 especially pp. 21 – 45.

[6] Barland (n 5), p. 38

[7] See Inter-American Court of Human Rights reasoning in Compulsory Membership in an Association Prescribed by LawFor the Practice of Journalism, Advisory Opinion, OC-5/85 of 13 november, 1985, Series A, No. 5

[8] See General Comment No. 34 (n 1) at para 13.

> of assembly and association, and the exercise of the right to vote."[9]

However, the right to freedom of expression is made practical and realizable in many ways, including through the press.[10] That is, it is through free press that effective rule of law is possible, transparency and accountability is assured and an informed citizenry is encouraged. It is through free press, likewise, that the government understands the interests and the needs of its people and thus works towards their well-being.[11]

Because of the importance of the right to freedom of the press, there are well established legal standards at both global and regional levels. Both global and regional legal instruments in place take a common approach as to what is guaranteed to ensure that the right to freedom of expression is functional. At global level, relevant international legal instruments include the Universal Declaration of Human Rights, 1945 (UDHR) in its article 19 which is made enforceable through article 19 of the UN International Covenant on Civil and Political Rights, 1966 (ICCPR). UDHR is considered just a political statement which is unenforceable as it does not bind states.[12]

At regional levels, there are in existence, the African Charter on Human and People's Rights, 1982[13], the Arab Charter on Human Rights, 1995[14], the European Convention on Human Rights, 1952[15] and the Inter-American Convention on Human Rights,

[9] Ibid, para 4
[10] Refer Inter-American Court of Human Rights (n 7), para 34
[11] See proclamation in the twenty-sixth session of UNESCO's General Conference in 1991 while declaring 3rd of May of each year to be Press Freedom Day available at https://en.unesco.org/commemorations. (Accessed on 4 June 2018 at 2:45)
[12] See Robertson A. H et al Human Rights in the World, Manchester: MUP, 1996, pp. 27-28.
[13] Article 9
[14] Article 32
[15] Article 13

1967.[16] Going through these legal instruments, it can be discovered that the right to freedom of expression and therefore the right to freedom of the press is a four faceted, phenomenon having four stakeholders who should work together for the enjoyment of the right.

Firstly, the government as representing the state is given a duty to ensure that it refrains from unnecessarily abridging the right to freedom of expression and it is therefore given the duty to protect the freedom. Going through the legal instruments above, state parties to the said instruments are required to make sure that the rights and freedoms as contained in the treaties are made enjoyable at domestic level. For instance, the International Covenant on Civil and Political Rights in giving obligation to state parties provides as follows;

> "… to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present convention.[17]
>
> To ensure that any person whose rights or freedoms as herein recognized are violated shall have effective remedy, notwithstanding that the violation has been committed by a person acting in an official capacity"[18]

Due to the fact that the right to freedom of expression is a derogable right, state parties to the above mentioned treaties are given guidelines or interpretative principles on limitations to the right. The major guideline is prescribed by ICCPR which is a

[16] Article 10
[17] Art. 2(2)
[18] Art. 2(3)(a)

globally accepted treaty on human rights.[19] Interpretative principles of the covenant are provided by the Siracusa Principles on Interpretation on Limitation and Derogation provisions on International Covenant on Civil and Political Rights of 1984.[20]

Article 19(3) of the ICCPR requires states which want to limit the right to freedom of expression to ensure that there is an established legal norm for that purpose and that the norm is necessary to ensure functioning of a democratic society. Further, any such norm's mischief protected should be public order, national security, rights and reputation of others, public morals or public health.

According to Siracusa Principles, a norm established to limit freedom of expression and of the press is recognized as legitimate if it is accessible and it is clear as to what is protected.[21] People should be able to understand what behaviour is prohibited. This will assist individuals to adjust themselves without rights being affected. Likewise, according to Siracusa Principles, for a norm limiting freedom of expression to be legitimate, it should respond to society's social or pressing needs.[22] The society should be in need of the norm so as to ensure that there exists peace and tranquility, that public morals and public health are protected or that rights and reputation of others are protected.

Secondly, legal instruments which protect freedom of expression should give freedom to each individual to air out his or her opinion, ideas and thoughts. Right to freedom of thought is absolute, and therefore, cannot be taken away from any

[19] Status at 4th June, 2018 05:00:29 EDT was signatories 74, Parties 171. See https://treaties.un.org/pages (Accessed on 4/6/2018 at 3:27pm)
[20] Visit https://www.icj.org/siracusa-principles . (Accessed on 4/6/2018 at 3:33pm)
[21] See Principle I(A)(i)(15)
[22] See Principle 10

individual. The Rationale behind is that freedom of conscious is a fundamental human right which cannot unnecessarily be abridged.[23] What is very important to note further is that freedom of expression is given to every individual without discrimination.[24] The freedom likewise is not limited to a certain kind of information and it is regardless of frontiers.

Thirdly, while everyone is entitled to the freedom of opinion, ideas and thoughts, the public has collective right to receive information. In other words, according to the reasoning of the Inter-American Court on Human Rights in the case of *Olmedo Bustos et al v Chile:*

> "[Freedom of expression] requires on one hand, that no one should be arbitrary limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. In its second aspect, on the other hand, implies a collective right to receive any information whatsoever, and to have access to the thought expressed by others."[25]

Lastly, the right to freedom of expression gives freedom to the press to seek, collect and disseminate information. The freedom encompasses two things: one, to seek and collect information, and two, to disseminate information to the public. This is a legal and social duty which is given to the press. This duty, which is

[23] See Principle 58 of Siracusa Principles and jurisprudence in Herrera Ulloa v Costa Rica. Judgment of July 2, 2004. Series C No. 107, para 113(Inter American Court on Human Rights), Perozo et al v Venezuela, Preliminary Exceptions, merits, Preparations and Costs. Judgment of January 28, 2009. Series C No. 195, para 116 (Inter American Court on Human Rights). AlsoTumwine-Mukubwa G. P. *"Opening floodgate of freedom of expression"* in East Afr. J of Peace and Hum. Rights, 2005, Vol. 11, No.1, p. 44.

[24] Refer Art. 1 of ICPPR

[25] Judgment of February 5, 2001, Series C No. 73, para 64 (Inter- American Court of Human Rights)

guaranteed by above mentioned legal instruments, can be limited. In other words, the press while carrying out its duty and exercising its rights to seek, collect and impart information, should ensure that it functions within the law and within professional ethics. As far as the law is concerned, there are established offences which a media house or a journalist can commit. And such offences are sedition, incitement to violence, publication of false news and publication of obscene materials. Likewise, there are civil wrongs which can be committed by the media. These are mainly publication of defamatory matters and invasion of privacy. Commission of such offences and civil wrong may attract legal action in the courts of law.

3. Media Regulatory Approaches

Obligations and duties of the media are regulated by requirement for professionalism. Accordingly, the press is required to act accurately, objectively and responsibly.[26] In its performance, the press should refrain from reporting news which it is not reasonably sure that it is true so as to avoid publishing defamatory statements.[27] Likewise, the press is obligated to ensure, unless the victim is a public figure, that no information on private life of individuals is published.[28] Furthermore, the press should publish information without favour or malice. Going beyond these requirements is a professional malpractice and it will attract administrative or disciplinary action against the media house or the journalist concerned.

[26] See regulation 5(1) of the Media Services Regulations. Also reference can be made to Code of Ethics for Media Professionals, 2016 edition of the the Media Council of Tanzania

[27] Ibid. Also section 35(1) of the Media Services Act

[28] (n 26). See also United Nation Human Rights Committee General Comment No. 35, 2011, CCPR/C/GC/34 at para. 38.

It is very important that the media should be regulated so as to protect the final consumers' of information, namely, the public. Going through legal instruments guaranteeing press freedom, nowhere is stipulated on how media operation should be regulated. However, basing on experiences from different jurisdictions, it is clear that there are different modes of regulation of the press. In most cases, a media mode regulation is an approach taken by a state in a given period of time, basing on social and political culture of that given state.[29] So, a media regulation model in a socialist country is different from a western, liberal democratic state. Likewise, media regulatory approach in a totalitarian state will be different from a dictatorial regime. It follows then that while Scandinavian countries score higher in world press freedom index, China, North Korea and Eritrea are at the bottom. Such media regulatory models include the following.

3.1. Statutory Press Regulation

Here the whole process and mechanism of press control is a make of the legislature. That is, a law is developed creating boundaries which the media has to check in their daily activities. Such boundaries could be requirements for registration of media houses and licensing of those who want to practice journalistic activities. Such boundaries would also involve criminalization of certain journalistic activities. The government under this mode is in total control of the press.

Statutory control of the media goes with strict registration and licensing accompanied by conditions. Failures to observe conditions for the registration or a license always attract strict

[29] Hallin, D. C and Mancin, P, Comparing Media Systems: Three Models of Media Politics, Cambridge University press: Cambridge, 2004, pp. 7 – 9.

sanctions, including imprisonment or fines or both. In China[30], for instance, constitutionally protected freedom of speech is further required by the same constitution that the freedom should not affect interest of the nation, society and other citizens[31], should not affect state secrets, public order and social morals[32] and that the media has duty to protect security honor and interest of motherland.[33] Violation of these obligations would attract imprisonment or fine. Basing on this example, laws which control the press tend to be wide in interpretation and allow arbitrary use. At the end they encourage self-censorship.

3.2. Voluntary Media Self-Regulation

As compared to statutory mechanism, non-statutory mechanism reflects a media regulatory mechanism where the whole process of media monitoring is done by the media stakeholders themselves through a professional code of ethics and code of conduct. No any legislation creates the mechanism, the regulator or the professional code of ethics or code of conduct. The whole process of supervision, which involves arbitration and enforcement, is free from any government interference.

In order to ensure that there is freedom of the press, the press should be independent from the government, politicians or any kind of economic control.[34] Self-regulation can, however, appropriately work where regulatory body entrusted with that function is independent in facts and in assumptions.[35] That is, the

[30] More information can be obtaied from Esarey, A, *Speak No Evil: Mass Media Control in Contemporary China***.** Freedom House, 2006.
[31] Article 51 of 1982 Constitution
[32] Article 53
[33] Article 54.
[34] Refer OSCE, The Media Self-Regulation Guidebook, Vienna, 2008 and the Abuja Declaration
[35] See the Leveson Inquiry, An Inquiry into the Culture, Practices and Ethics of the Press, (Report) November 2012 Vol. IV: London, p 1515

established regulatory body should not execute its functions so as to favour the media industry it is supervising or function in favour of politicians or the rich. For the regulator to be independent, what is looked on is the source of funding in running the day to day activities of the body. Independence of the regulatory body can easily be affected by the way the body is funded.[36]

However, government funding of a regulatory body's budget is not *per se* removal of independence of regulatory body. This is evidenced by the position which prevails in German in relation to German Press Council, and in Finland in relation to Council for Mass Media. The said regulatory bodies are non-statutory media self-regulatory bodies, although they receive 30% of their budget from their respective governments. The governments do not interfere with the bodies in their functions. The amount contributed to the budget of the bodies is only a contribution to the Councils in the process of dealing with complaints. If complaints against the media malpractice goes to the court of law, it would imply cost on the part of the government.[37]

Likewise, self-regulatory body would be considered independent where it can be shown that there is transparency in appointment of members of the regulatory body and transparency in its composition. Thus, the Abuja Declaration[38], in part, provides that for the regulatory body to be free, the composition of the body should involve nominated and competent representatives of diverse sections of society, including the judiciary and other

[36] Ibid, p. 1516
[37]For more discussion on the said position see Fielden L. Regulating the Press: A Comparative Study of the International Press Councils.: Oxford: RISJ, 2012
[38] Adopted by Journalists' Ethics and Self-Regulation, IFJ – WAJA Conference, Abuja April 3 and 4, 2000.

media stakeholders appointed by the members themselves and not by government or external bodies.[39]

Media self-regulatory mechanism is the mechanism which a number of countries with free press follow. Thus, Scandinavian countries which are top ranked in freedom of the press can be recorded.[40] What should be noted is that independent self-regulation of the media can flourish clearly in a liberal, democratic society of a higher level. In such a society, criticism of the government is the right of the citizens and governments would have high level of tolerance. Likewise, voluntary regulation can further find conducive environment in those countries were the press is so responsible to the professional requirements of accuracy and the culture of commitment to journalism standards as required by code of ethics.

A self-regulatory media control body is expected to have an arbitration system which shall be transparent, less costly and timely. This will lead to effectiveness of the profession code of ethics and thus ensure responsible press. Likewise, sanctions imposed by the council will be effective and the media industry will respectively win public respect and trust in its role. The main challenge of self-regulatory mechanism is, however, the possibility of independent regulatory body being biased.[41]

3.3. Co-Regulatory or Hybrid Press Regulatory Approach

A co-regulatory media control mechanism is where an independent media regulatory body is established by a statute.

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[39]Item 2

[40]Refer RSF, 2017 World Press Freedom Index ranking, available at https://rsf.org (accessed on 18.22019 at 1:53pm) and RSF, 2018 World Press Freedom Index, available at https://rsf.org (accessed 18.2.2019 at 1:53pm).

[41] This was the reason for the removal of the Permanent Commission of Inquiry in UK. Currently Independent Press Standards Organization of UK which is created by newspapers owners is cautiously taken as independent

However, although the regulatory body will be created by a statute, the body will be independent of the government. In Ireland, for instance, media control is under the Irish Press Council (IPC) which is a creature of the Defamation Act of 2009.[42] IPC is an independent regulator. To ensure that the regulatory body is independent, the Act provides for the individuals who are eligible to seat as members of the council[43] and provides for a free appointment processes.[44] Furthermore, the Council is given power to develop a code of ethics and thereafter, create Press Ombudsman who has the duty to receive complaints, adjudicate and report to the Council.

In Kenya, likewise, the Media Council of Kenya (MCK) is recognized under the Media Council Act, 2013 which replaced the Media Act of 2007. Although the Council receives funds to support some of its activities, the Council is independent as declared by provisions of section 11 of the Act which considers the Council as independent from the government, political or commercial interests. Importantly, Complaint Commission[45], which is independent[46], is created to implement professional Code of Conduct which was adopted by the media stakeholders before it was further adopted by the Media Council Act.[47]

Co-regulatory mechanism is not very different from self-regulatory mechanism in that they both encourage independent media regulatory bodies and that the media should regulate itself without any government interference. However, in co-regulatory mechanism, the government requires such an envisaged

[42] See Second Schedule to Defamation Act, 2009 of Ireland which was applied to recognize Irish Press Council.
[43] Schedule 2.5 ibid
[44] Schedule 2.6 ibid
[45] See section 27 the Media Council Act, 2013 (K)
[46] Section 30 ibid
[47] Refer Second Schedule to the Act which create Code of Conduct for the Practice of Journalism

independent body to, first and foremost, be recognized by legislation once the set criteria are met. However, compared to states which are highly liberal, democracies which encourage pure media self-regulatory mechanism, states which prefer co-regulatory mechanisms have no much trust on the media as leaving the media to operate itself without minimal government interference, it is feared, may result into irresponsible journalism.

The intention and rationale for such minimal government interference is to protect the public[48] although in some countries especially within Africa intention of co-regulation is not protection of the public but rather protection of the government in power. Such countries can be considered as semi-democrats as they are not totally convinced that the citizenry has all the right to censor the government and those into power believe that the government is the custodian of the truth.[49]

3.4. Subjection of the Press to Ordinary Laws Approach

No regulation mechanism of media regulatory model encourages that there should not be any regulator or media regulatory body to control media operations and activities. The media operations in this model are subjected to the normal penal and civil laws. Normal laws in existence provide for offences and civil wrongs which, if committed by the media then responsible individual journalists or the media houses are liable. For instance, the media would be criminally responsible for publication of seditious information, obscene material and false information. Likewise, in civil relationship, publication of defamatory statement and

[48]See for instance The Leveson Inquiry (n 36), p 1523.

[49]Bakircioglu, O, "The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality" in Germany Law Journal, Vol. 08, No. 07, 2007 at p. 720. See also the reasoning of the european Human Rights court in Handyside v the UK (1976) EHRR 732 at para 48.

invasion of privacy remain normal civil wrongs which can be committed by the media.

There is no pure and practical experience of the no-regulation model today. However, some countries, including Finland and USA are equated to the model. In such countries, such as Finland, there are no media laws or press laws to regulate the media.[50] There are, however, laws to protect the press and laws to protect the public.[51] In the US, First Amendments to the US Constitution[52] do not allow making of any law which would take away freedom of speech and of the press. And according to Freedom House, journalistic activities and the media in USA are free from state control.[53]

No regulation media regulatory mechanism is possible in a highly responsible and professional media. Similarly, this mechanism is possible in a highly democratic society and tolerant government adhering to the respect of good governance and rule of law principles. In such societies the extent of freedom of expression is so high as to allow people to say anything whether it annoys, is considered by others inappropriate or it would have not been said.[54] Lessons are from the Scandinavian countries which are ranked highly on press freedom and therefore press free countries in the world.[55]

[50] The Leveson Inquiry, (n 36), p 1718.
[51] Press freedom is protected in Freedom of Expression of the Mass Media Act, 2003.
[52] Adopted 15 December, 1791.
[53] http:freedomhouse.org/report/freedom-press/2016/united-states (accessed on 29/05/2017).
[54] Masanja, T, "Media Freedom: A Lesson from Precedents and Authoritaive statements" in SAUT Law Journal, Vol. 1 No. 1 , 2012 at p. 103.
[55] See RSF, 2017 and RSF, 2018 (n 40).

4. Media Regulation in Tanzania

The year 2016, saw the parliament of Tanzania repealing the Newspapers Act, 1976[56] and the enactment of the Media Services Act.[57]Apart from a long outcry from the media stakeholders, the Information and Broadcasting Policy of 2003 has played a recommendable role towards repealing of the Newspapers Act. Chapter I of the Policy set goals for media services and regulation in the country. The Policy, among others, requires the media to offer professional services in accordance with professional norms and ethics and therefore challenges media practitioners to consider establishing and supporting a professional ethics regulatory body. Thus, as from the year 2017, print media operations in Tanzania is, statutorily, under the Media Services Act (the "Act"). But since 1995, alongside the regulation of the print media in the country under the Newspapers Act, there has been the Media Council of Tanzania as a self-regulatory body which still exists.

4.1. Statutory Press Legulatory Approach

Although the Constitution of the United Republic of Tanzania of 1977 (the "Constitution") does not have an explicit article on freedom of the press, article 18 on the right to freedom of expression applies. The article following the 18th Constitutional Amendments of 2005[58] encapsulates international legal standards and best practices on protection of the right to freedom of expression. The freedom, however, can be limited by article 30 of the Constitution which is a general derogation clause to human rights and freedoms in the Constitution. The derogation clause allows limitations to the rights and freedoms in the Constitution

[56] Through section 66 of Media Services Act.
[57] Act No. 12 of 2016
[58] Act no 1 of 2005 through section 5.

where the purpose of the limitation is to protect public interest amongst others.

Basing on the constitutional framework above, the Media Services Act provides for a legal framework and enforcement mechanisms over the press in Tanzania. The Act provides prerequisite conditions to operate media activities and for regulatory bodies to check media operations.

4.1.1. Legal Framework

a. Registration of Print Media

According to section 2 of the Act, print media is interpreted to include newspapers, journals, magazines, newsletters and related materials. According to the Act, it is sanctioned to publish, sell, offer for sale, import, distribute or produce print media without being registered for that purpose.[59]According to Media Services Regulations (the "Regulations"),[60] anyone who wants to engage in print media activities, has to fill in an application form for the purposes of obtaining a license under section 8 of the Act. Regulation 8(1) of the Regulations requires any application for a license to attach in the filled in applications forms;

> "(a) certificate of incorporation or any other form of legal registration;
>
> (b) a business plan containing vision, mission, policy of the media outlet, place of and nature of the media business and other particulars such as curriculum vitae, certified copies of academic certificates and names of editors;

[59] See section 8 ibid
[60] GN No. 18 published on February 3, 2017

(c) Dummy of the intended media layout; and

(d) Pay prescribed fee as provided for in the Schedule to these Regulations."

A license issued will have one year renewable life time.[61] Renewal of the license is subject to the submission to the Director of Information Services Department an application for renewal accompanied with annual performance report.[62] This implies that failure to submit annual performance report, and obvious renewal fees, will make the Director refuse to renew. Furthermore, before a license is issued, the applicant may be required to deposit bond for the purposes of meeting any compensation and cost for media malpractice.[63] The amount of the bond is determined by the Minister responsible for information services. An application for license may be rejected where it is established that the required information is not submitted in accordance with regulation 8(1) of the Regulations.

b. Accreditation of journalists

According to section 19(1) of the Act, no person is allowed to practice journalistic activities if he/she has not attained accreditation. According to the Act, accreditations can either be two years renewable or a life time accreditation.[64] Media Services Regulations provides for criteria for eligibility to accreditation. Accordingly, Regulation 17(1) makes eligible to journalist accreditation those practicing journalism, including foreign journalists and people with outstanding services for media profession. Eligible also are students of media studies and mass

[61] See regulation 8(3) of the Regulations
[62] Regulation 8(4) of the Regulation
[63] Regulation 8(5) ibid
[64] See section 19(1) of the Act and Regulation 9(2) and 23 of the Regulations

communication although they are entitled to temporary accreditation.[65]

According to Regulation 17(2) of the Regulations, a person becomes eligible for accreditation if he or she is a holder of a diploma or degree in journalism or media related studies from a recognized institution offering journalism or such related studies or a holder of any other degree and a diploma or higher media related studies. Once accreditation is granted, a press card, which is none transferable, is issued as evidence of accreditation.[66]

c. Rights and Obligations of Media Houses

While section 7(1) of the Act guarantees the media, the right to freedom to gather and collect information, to have editorial freedom and freedom to disseminate information, section 17(2) of the Act thereafter, provides reciprocal obligations of the media. The media thereof shall have obligations to adhere to professionalism and serve the public. The public media then is required to be favorable to the government and the public by appraising and highlighting developmental activities of the government.[67] The private media is given separate obligations which, arguably, are the extensions of the above mentioned obligations. Thus, section 17(2) of the Act obligates the private media to conduct its activities professionally and uphold matters of public interest. The government may further direct private media houses to publish any matter considered to be in public interest.

Media houses are given general obligations which they have to abide by in the gathering and collection and dissemination of

[65] See Regulation 18 of the Regulations
[66] Section 20 of the Media Services Act read together with regulation 21 ibid
[67] These are obligation of the public media house covered by clause (1) of the section.

information to the public. The general obligations are provided for by section 7(3) of the Act as read together with regulation 5(1) of the Regulations. Just to mention, but a few, media houses in their journalistic activities are required to publish information which will not affect national security or endanger safety of the life of any person. The media houses are also required to abstain from publishing information which injures the reputation of a person, amount to invasion of privacy and indecency information.

Furthermore, the media is required that in publishing information, it should ensure that there would not be any disclosure of proceedings of the cabinet, interfere with pending matters and any information which may hinder or cause substantial harm to government to manage economy.

Ultimately, the print media after starting publications and circulations of the print materials, is required to submit to the Director of information Services and the National Archives two copies of each issued print material.[68] The copies are required to be in both print and electronic forms. Any cost implication in the delivery of the said copies is on the media house involved.

4.2. Regulatory Institutional Framework

The Media Services Act, apart from criminalizing some journalistic activities and providing requirements for exercising journalistic activities, it provides supervisory organs to check day to day media operations in the country. It provides institutions vested with supervisory powers as regulators. Those institutions, as provided for by the Act, are revisited in this part.

[68] Regulation 6 of the Regulations

4.2.1. Information Services Department

Information Services is a department under the Ministry of Information, Culture, Sports and Artists, herein the Ministry of Information. Information Services Department is established by section 4(1) of the Media Services Act and it is under the Director. One of its functions is to assist the government in the development and review of information and communication policies, regulations and standards[69] and thereafter monitor and evaluate implementation of such policies, regulations and standards.[70] The Act further vests the Department with the function of collecting and processing news materials and information and distributes them to others.[71]

The Information Services Department is vested with powers to license print media after receiving an application.[72] The Director is likewise vested with powers to reject an application for a license if he or she considers that the application is short of the requirements for issuing a license.[73] In other words, an application for a license can only be declined where the requirements for a license are not met and not otherwise. The Director is further vested with powers to suspend or cancel issued licenses.[74] A license can be suspended or cancelled where it is established that the licensee has failed to abide with the conditions attached to the license.

Where decision to suspend or cancel a license is entered by the Director and the license holder is not satisfied with the decision, he or she can appeal to the Minister of Information under section

[69] Section 5(c) of the Act
[70] Section 5(d) ibid
[71] Section 5(m) ibid
[72] Section 5(e) ibid
[73] Under section 9(a) of the Act.
[74] Under section 9(b) ibid as read together with regulation 9 of the Regulations

10(1) of the Act. In the appeal, the appellant has to establish, and therefore prove that, the Director, in suspending or cancelling the license, erred in law in entering that conclusion or that there was non-observance of the required procedures which should be reflected in pronouncing suspension or cancellation of a license.[75] It is also a sufficient ground of appeal, if it is proved that suspension or cancellation of the license did not base on the evidence produced to establish or prove breach of conditions attached to the license.[76] Where the appellant is not satisfied by the results of the appeal as entered by the Minister, he or she has to appeal to the High Court of Tanzania.[77]

4.2.2. Journalists Accreditation Board

The Accreditation Board is established by section 11 of the Media Services Act. The Board is composed of seven members appointed by the Minister of Information according to the requirements of section 12 of the Act. Apart from the requirements of gender balance amongst the members of the Board, according to section 12(1) of the Act, the Board is composed of a senior accredited journalist, the Director of Information Services Department, the Secretary to the Independent Media Council, a law officer from the Attorney General's Chambers, a representative from a higher learning institution which provides journalism, media studies or related field, a representative of a public owned media and a representative of an umbrella of private owned media.

Section 13 of the Act provides for the functions of the Board. For the purposes of revisiting those functions which directly go to regulatory function of the Board towards print media, the Board has the following functions;

[75] Section 9(2) ibid
[76] ibid
[77] Regulation 10(3) of the Regulation

a) Accreditation and issuance of press card to qualified journalists[78]
b) Adoption and thereafter enforcement of Code of Ethics of Journalists[79]
c) Promotion of professional and ethical standards[80]
d) Maintain roll of accredited journalists[81]

Basing on the above mentioned functions the Board is vested with the powers to suspend an accredited journalist from practice or expunge an accredited journalist from the roll of journalists.[82] The Board is also vested with powers to impose fine for non-compliance of obligations of accredited journalists.[83] Once a journalist is suspended or his name is expunged from the roll, the journalist shall not be allowed to practice journalism for three months.[84] However, the Board, through section 21(4) of the Act, has discretion to restore the name of the journalist in the roll where there is an application for the restoration by the victim or on Board's own motion or after holding an inquiry to satisfy itself on reasons for expunging the name or for the suspension. The same applies to lifting of suspension to practice.

Apart from the powers of the Board to suspend and expunge journalist from the roll of accredited journalists, according to section 19(5) of the Act, the Board can cancel accreditation of a journalist where it is established that the journalist has acted in a gross professional misconduct violating the Code of Conduct. Cancellation can also take place concerning a foreign journalist who has been accredited, according to the provisions of the Act

[78] Section 13(a) of the Act read together with section 20 of the Act and regulation 21 of the Regulations.
[79] Section 13(b) of the Act.
[80] Section 13(c) ibid.
[81] Section 13(h) ibid.
[82] Section 14(c) ibid.
[83] Ibid.
[84] Section 21(2) and 21(3) ibid.

where it is established that the journalist does not pursue the purposes of accreditation as given out during application for the same.

The Act and the Regulations, which should be read together, require that once a cancellation is done under section 19(5) of the Act, the press card issued should also be withdrawn or cancelled under regulation 22. However, what invites a comment is the fact that the Regulations add an extra ground for withdraw or cancellation of a press card. That is, withdrawal or cancellation of a press card can take place if the concerned journalist has violated national laws and policies. It suffices, therefore, to say that two reasons can render an accredited journalist's accreditation be cancelled, and that is, if a journalist grossly violated the Code of Conduct and where a journalist violates laws and policies of the country.

Where the Board has entered a decision to suspend a journalist from practice, expunged the name of an accredited journalist or cancels the name of an accredited journalist and the affected individual is aggrieved by such a decision, an appeal can be lodged before the Minister of Information.[85] The High Court of Tanzania then can be approached where the decision of the Minister is considered inappropriate[86] as is shown in part 4.2.5 herein.

4.2.3. Independent Media Council

Independent Media Council is the regulatory body of the print media in Tanzania as established by section 24 of the Media Services Act. Membership of the council is mandatory to all accredited journalists in the country.[87] In executing its duties, the

[85] Section 21(5) of the Act.
[86] Section 21(6) ibid.
[87] Section 25(1) ibid.

council functions through elected chairperson, vice chairperson elected by the council and two accredited journalists elected by media associations.[88] According to section 2 of the Act, media associations are organizations registered or recognized by law engaged in media related activities. However, day to day activities of the council is under the Secretary to the Council[89] who is appointed by the council through competitive recruitments.[90] The secretary can only be removed by the council under section 33 of the Act.

Section 26 of the Act provides functions and duties of the council provided in executing its duties the council should take into considerations and reflections on national unity, national security, sovereignty, integrity and public morals. The duties of the council include preparation and adoption of the Code of Ethics and thereafter oversee its implementation.[91] This duty is done in consultation of the Journalists Accreditation Board while executing its functions under section 13(b) and 13(c) of the Act. The Council is further tasked to promote and oversee media accountability in the country.[92]

In order to ensure that the media adheres to professional and ethical standards, the council is mandated to create a committee to deal with any breach of the Code of Ethics by the media.[93] Such a committee, named complaints committee, shall have the mandate to receive complaints against a media house or a journalist for overstepping the Code of Ethics and cause injury to the complainant.[94] In order to ensure efficiency and speed, the

[88] Section 25(2) of the Act
[89] Section 32 ibid.
[90] Section 31 ibid.
[91] Section 26 ibid.
[92] Section 26(d) ibid.
[93] Under section 27 ibid.
[94] Section 28 ibid.

committee is required to complete its adjudication process within three months.[95]

4.2.4. The Minister

The Minster responsible for information matters is mandated by the Media Services Act to perform some regulatory functions, as far as the print media is concerned. It is the mandate of the Minister at the first place to prohibit importation of any publication which, in the opinion of the Minister, is against the interest of the public.[96] The minister further, has powers to order that particular information should not be published and therefore circulated to the public if the minister is convinced that publication of such information, and therefore circulation, may be against national security or public safety[97] and therefore jeopardize national security or that can threaten public safety. This means that, the minister may order the publisher that such type of information should be withheld from the public.

Apart from above mandates of the Minister in his regulatory powers, the Minister is an appellate organ in relations to decisions entered by the Directorate of Information Services, Journalists Accreditation Board.[98] As explained above, where an individual is not satisfied by the decision of the Director of Information Services in the processes of registration of a print media, he or she is given the avenue to challenge the decision through the Minister. The same is to a journalist who has been denied accreditation by the Accreditation Board or a journalist who has faced punishment by the Ethics Committee of the Independent Media Council.

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[95] Ibid.
[96] Section 58 of the Act
[97] See section 59 ibid
[98] According to section 10 of ibid and regulation 26 of the Media Services Regulations

4.2.5. The High Court of Tanzania

The High Court of Tanzania is involved after an individual is aggrieved by the decision of the Minister as explained above. Where decisions of the Directorate of Information Services or of the Journalists Accreditation Board are appealed before the Minister[99] and the individual involved is aggrieved by the decision thereof, the High Court of Tanzania will be involved.

5. Non-Statutory Press Control in Tanzania

Journalists and media stakeholders formed the Media Council of Tanzania (MCT) in 1995.[100] The Council is a voluntary, independent and non-statutory organization registered as a non-governmental organization under the Societies Act.[101] According to the preamble to the MCT Constitution, the Council has duties and responsibilities to ensure, enhance and defend freedom of the press in Tanzania. In performing its duties and responsibilities, according to the preamble of its constitution again, MCT belief and intention is to adhere to professionalism and ethical standards of accuracy, objectivity, honest, fairness, decency and independence.

While vision of the Council is to see 'A democratic Tanzania with free, responsible and effective media,' its mission is '[creating] an environment that enables a strong and ethical media contributing towards a more democratic and just society.'[102] Basing on vision and mission of the Council, objectives of the council, thus, *inter alia,* are to promote and defend media freedom[103], and to oversee

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[99] ibid
[100] See Media Council of Tanzania, Self Regulate or Perish: The History of the Media Council of Tanzania Up to 2009, DSM: MCT, 2010, p. 2
[101] Cap 337 [R.E 2002]
[102] MCT Constitution, 1995. Also available at www.mct.or.tz (accessed on 12 February, 2019)
[103] Article 3(a) ibid

that journalists and those involved in the media industry adhere to the highest professional and ethical standards.[104] Likewise, the council intends to protect the public from journalists and media industry malpractice[105] and to ensure relationship amongst media fraternity is harmonious.[106] Therefore, in order to achieve this recommendable approach in overseeing media operations, the Council tasks itself towards the duty to conciliate, mediate and arbitrate upon complaints from the public or amongst the media themselves for alleged breach of Code of Ethics.[107]

As a voluntary self-regulatory body, members of the council include media outlets[108], media training and research institutions, media professional associations, press clubs and editors forum.[109] According to article 9(i) of the MCT constitution, membership of the Council is automatic once an entity recognized as a member to council is legally established. However, there is an option of withdrawal from compulsory membership an option which is open within 30 days. Some of the duties and obligation of the members is to ensure that they function in adherence to the Code of Ethics and Conduct of the council.[110] In order to ensure adherence to the Code of Ethics and Conduct of the Council, that is taken care of by the Ethics Committee which is established under the Governing Board.[111] The Committee is independent in

[104] Article 3(b) ibid
[105] Article 3(g) ibid
[106] Article 3(c) ibid
[107] Article 3(c) of MCT Constitution.
[108] Media outlets means a single umbrella entity, registered or not, which directly or indirectly owns, controls, manages, or makes policies for two or more media outlets. See article 1 of MCT Constitution.
[109] Article 7 of MCT Constitution. Editors Forum comprises registered organization of media editors whose main objective is to bring together media editors for the purpose of discussing pertinent issues, exchanging experiences and information and generally to enhance the freedom of the media and in particular, to defend the independence of editors. See Article 1 MCT Constitution.
[110] Article 11(2) ibid.
[111] Article 12 ibid

its decisions from the Board and the Council[112] and it comprises not less than 5 members, including two representatives from the civil society, representatives from the media and two lawyers.[113]

If an individual is aggrieved by contents of any publication and thinks that there is breach of the Code of Ethics, he or she can file complaints to the Ethics Committee. However, before complaints are sent to the Committee, the individual is required first to send the same to Executive Secretary of the Council who will consider merits of the complaints.[114] If the secretary is of the opinion that the complaint does not merit attention of the Committee, he will try to amicably resolve the matter between the parties.[115] When the complaint accesses the Committee, the Committee is required to conduct public hearing.[116] The Committee, likewise, is required to issue its decision in public[117] and within three months.[118] Its decision may give orders or awards according to article 18(9) of MCT constitution which ranges from dismissal of the matter, reconciliation of the parties, publication of an apology, temporary suspension of a member, payment of a token as compensation and payment of costs.

6. Impact of Multiple Regulation of the Print Media

It is hereby established that the media in Tanzania is regulated, statutorily, by institutions established in the Media Services Act and, voluntarily, self-regulated by MCT. It is the argument of this presentation that a single profession should be regulated by only one regulator. Unless there is clear demarcation on the

[112] Article 18(1) ibid
[113] Article 18(2) ibid
[114] Article 18(3) ibid
[115] Article 18(4) of MCT Constitution.
[116] Article 18(5) ibid. However, proviso to the article requires matters involving children and victims of violent or sexual crimes to be held in camera.
[117] ibid
[118] Article 18(10) ibid

responsibilities of the established regulators, possibilities of duplication of work, contradictory relationship amongst regulators and confussion amongst media stakeholders is obvious.

This follows the fact that both regulatory institutions regulate the same field of profession and therefore the same people. Thus, while on one hand, regulatory institutions established in the Media Services Act are there to regulate performance of the media through registration of print media and accreditaion of journalists[119], the Media Council of Tanzania is also there to ensure that once a media outlet is recognised becomes a member of the Council for purposes of supervising its activities[120], on the other. A media outlet is composed of a media house or institution and the journalists who work with the organization.[121] In other words, both regulatory institutions check perfomance of the same people and the same group of professionals.

Furthermore, both reglatory institutions are established for the same purpose of regulating the press in the country. It is the purpose of the enactment of the Media Services Act and the regulatory mechanism therein to ensure that the media industry in the country conducts its responsibilities professionally.[122] It is also the purpose of the MCT that the press in the country should strive to perform its activities guided strictly by professional principles.[123] Thus, it is amongst objectives of the Council to ensure that the media industry in the country 'adhere to the highest professional and ethical standards'.[124]

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[119] See section 8, 19 and 25(1) of the Act.
[120] See articles 7(a), 7(d) and 9(i) of MCT Constitution.
[121] Refer section 3 of the Media Services Act and article 1 of MCT Constitution.
[122] This is implied from the long title to the Act and also as provided by section 7(1) (b), 7(a) (iii), 13(c) and 26(1) (a).
[123] See paragraph 2 of the preamble to MCT Constitution.
[124] According to article 3(b) ibid.

For the purposes of ensuring professionalism in the media industry, the Media Services Act establishes the Independent Media Council (IMC).[125] The Council is mandated, among others, to promote professional and ethical standards among journalists.[126] For that purpose the Council is given mandate, in consultation with Journalists Accreditation Board, to adopt 'a code of ethics for journalists'.[127] The adopted code sets professional and ethical standards as a guideline to all accredited journalists. On the other hand, the MCT has in place a Code of Ethics for Media Professionals.[128] According to the preamble to the MCT Constitution;

> "A Code of conduct is a set of general principles from which rules adopted by media stakeholders are drawn, to provide a framework of reference for professional standards. They meant to govern conducts and practices of media professionals in the course of their duties". [129]

In other words, the IMC which is a regulatory institution under the Media Services Act and the MCT have and will have in place two different codes of ethical standards. The two codes regulate conducts of the same media industry in the country. While, according to the Media Services Act, an accredited journalist must observe code of ethics as estblished under the Act[130], members of the MCT are given obligation to 'adhere to the Code of Ethics and Conduct of the Council'.[131]

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[125] Under Part IV of the Act.
[126] Section 26(1) (a) (ii) ibid
[127] According to section 26(1) (a) (i) ibid.
[128] See Code of Ethics for Media Professionals, 2016 edition.
[129] Para. 1.
[130] See sectio13 (b) and 19(5) of the Act and regulation 22 of the Media services Regulations.
[131] Refer article 11(2) of MCT Constitution.

Both the IMC and the MCT, likewise, establish under them committees to enforce their adopted codes of ethical standards. The IMC establishes 'Complaint Committee' with mandates to deal with print media content complaints.[132] The MCT on its side establishes Ethics Committee[133] for the same purpose as Complaint Committee under the IMC.[134] Thus, functions of the Ethics Committee revolves around receiving complaints from the public for infringement of Code of Ethics for Media professionals. This leads to duplication of activities between the IMC and the MCT. Likewise, this leads to controversy and failure to clearly know who is mandated to oversee media professionalism in the country.

In addition, the Media Services Act which provides for regulation of the media industry in the country establishes rights and duties of the media houses.[135] Duties of media houses are attached to print media registration as conditions for a license holder. Thus according to section 9(b) of the Act, failure to comply with the conditions of a license holder lead to either cancellation or suspension of a license. This mandate is vested to the Director of Information Services Department.[136] Likewise, the MCT Constitution provides for the rights and duties of its members.[137] It is the duty of the members of the MCT to ensure that they observe the provisions of the MCT Constitution and observe Council's Code of Ethics and Conduct.[138] Taking into the mind that the IMC and the MCT have different codes of ethics with some deviations from each other, it would put media stakeholders, especially journalists at crossroad.

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[132] See section 26(1) (c) and 27(2) of the Act
[133] As to article 18(1) read together with article 3(c) of MCT Constitution.
[134] Ibid.
[135] See section 7 and regulation 5(1) of the Regulations.
[136] Section 9 of the Act.
[137] See article 10 and 11.
[138] See article 11(a) and (b).

In addition thereof, there is a conflicting relationship between established media regulators in the country. the MCT is against the Media Services Act and considers the Act 'more draconian than its predecessor,' the Newspapers Act, 1976.[139] The MCT considers that the Act has introduced government control of the media through the Minister responsible for information affairs, Information Services Department, Journalists Accreditation Board and the IMC. This is considered by the MCT as improper and that the media should voluntarily be regulated through self-regulation approach. In the same inclination, the MCT is against registration for print media and licensing of journalists as it is provided in the Act because the relevant provisions are considered open to abuse by the enforcers..[140] Moreover, the MCT considers the Act having 'various provisions imposing a large number of content restrictions that go beyond the content limitations that international law permits'.[141] So, it would be contrary to obligations of members of the MCT, under article 11(d) of the Council's Constitution, to observe mandatory requirements of the Media Services Act. The said article 11(d) of the MCT Constitution requires members of the MCT to 'promote the image, status and work of the Council'.[142]

On the other hand, the enactment of the Media Services Act establishing statutory control of the media industry in the country was necessitated by lack of media professionalism.[143] Because of lack of professionalism in the media, there was a need to enact a law which could provide strict statutory regulation of

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[139] MCT Annual Report 2016, p. 10. See also MCT, State of the Media 2016, MCT: DSM, p. 10.
[140] ibid.
[141] Ibid. Also MCT Annual Report 2015, p. 4.
[142] According to article 11(d).
[143] See Bunge la Tanzania, Majadiliano ya Bunge, Bunge la Tano – Kikao cha Nne, tarehe 4 Novemba 2016 p. 64 -65. Also Bunge la Tanzania, Majadiliano ya Bunge, Bunge la Tano – Kikao cha Tano, tarehe 5 Novemba 2016. These parliament sesssions deliberated on the enactment of the Media Services Act, 2016.

the media industry. This is through recognition of journalism as a profession.[144] This resulted into imposition of mandatory obligations of media houses and journalists. This position implies lack of trust on the MCT despite the fact that it has been in existance for about 24 years, attempting to promote media professionalism in the country. Likewise, the MCT is a foreign donors dependent in financing its planned activities.[145] This affects sustainability of the Council and thus can compromise independence of the Council. However, the Council has been there and it has done some recommendable jobs.[146]

It should be noted that, it has been the aim and a long struggle of media stakeholders in the country that the media industry does not fall under government control through statutory media regulation.[147] Having in place a statutory media council was the projection of the Information and Broadcasting Policy of 1993. The move to introduce statutory council did not go through.[148] Now the same has been introduced by the Media Services Act despite the fact that the Information and Broadcasting Policy of 2003, which replaces 1993 Policy, insists on media stakeholders establishing appropriate media ethics regulatory body[149] and review of legal regime on the media so as to come out with a friendly media legal environment.[150]

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[144] Ibid
[145] See MCT (n 100), pp 23 – 24 and MCT Annual Report 2016, p. 19 and 25.
[146] For discusion on effectiveness of MCT see Ryoba, A., "Media Self-Regulations in Young Democracies: Just How Effective are Media Councils?" in African Communication Research, Vo. 5, No. 2, 2012. See also MCT Annual Reports of 2015 and 2016
[147] See MCT (n 100), p. 3.
[148] Ibid
[149] Policy Goal 1.2.
[150] Information and Broadcasting Policy, 2003. See objective 2.2.

7. Conclusion and Recommendations

7.1 Conclusion

It can therefore be said here that there are established minimum legal standards and established best practice on how the press should, administratively, be regulated. This ranges from legal guarantee by international legal instruments on human rights and global practice. The purpose of all these minimum legal standards and best practices is to ensure that the right to freedom of expression, the right to freedom of the press and of speech takes primacy and regulatory mechanisms remain exceptions only. The rationale behind is the tenet that without freedom of expression, free press and free speech, as foundations of democracy, there is no democratic society.

Any regulatory model prevalence in any state should ensure that the right to freedom of expression, of the press and free speech is not unnecessarily abridged. Any regulatory model preferred in a given state should be the one that makes it possible that the press enjoys freedom to seek, collect and disseminate information, on the one hand, and makes it possible the public to enjoy the right to receive information. However, existing regulatory model should ensure that while the press enjoys its rights, it should not do it at the expense of the public. The public should be protected from any press malpractice. For that matter, it is the global trend contemporarily that for the press to be free, to work within code of ethics and conduct and to work for the interest of the public, voluntary self-regulatory mechanism or co-regulatory mechanisms are preferred. However, the two models should show, in practice, that they are independent to fit the purpose. Government control or a hand on the press regulation is discouraged as it may always result into self-censorship at the expense of the public.

In Tanzania, government control of the press is evident through the provisions of the Media Services Act and its Regulations. Likewise, voluntary self-regulation of the press exists in Tanzania. Both approaches are considered to be legitimate, although institutions under the Media Services Act seem to be considered as higher authorities and therefore would act strictly over media considered to be mired in malpractices. As already mentioned, four institutions are created for that purpose. However, the role of the Media Council of Tanzania should be appreciated here. The Council is legally recognized and the government appreciates its role.[151]

The role of the MCT is also recognized by the media stakeholders as are the members of the Council and the public at large. This is evidenced by the work of the Ethics Committee. For instance, at annual basis, the council receives a number of complaints for adjudication and the decisions thereof are observed.[152] But also the council enjoys network with local civil societies, research and training institutions and international press freedom organizations.[153]The Council even won an international Press Institute Pioneer Award in the year 2003 which is an international award towards an institution or a media house which has contributed to the promotion and protection of press freedom. Thus, the Media Council of Tanzania received the award "in recognition of its pioneering work in defending and promoting press freedoms in Tanzania".[154]

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[151]The Council is registered under the laws of Tanzania, Tanzania Broadcasting and Information Policy 2003 also government media outlets are members of the Council and in the year 2004 when the Council was selected to host Worlds Association of Press Councils (WAPC) Congress the government contributed to the Council's budget. See MCT (n 100), p. 74.

[152] Visit http://mct.or.tz (Arbitration services)

[153] See MCT (n 100), pp. 73 - 83

[154] See ibid, p. 79

Following co-existence of the Media Council of Tanzania as a voluntary self-regulation media control mechanism and statutory regulatory mechanisms as established by the Media Services Act, the two mechanisms find themselves working in an antagonistic way. While the Media Council, on its part, considers itself to have been working through international legal standards and practice, statutory institutions under the Media Services Act are considered by the government as a necessity to check media malpractice by overstepping limitations to press freedom which is not absolute. Likewise, the Media Council of Tanzania being a donor funded organization is seen by a negative eye with its donor funders being viewed as people who might be carrying hidden interests.

7.2. Recommendations

1. The Media Services Act introduces four organs to deal with regulation of the press in Tanzania. The organs are Information Services Department, Journalists Accreditation Board, Independent Media Council of Tanzania and the Minister responsible for information. It is recommended that instead of having four organs or institutions dealing with one field or profession, issuance of license to media houses, accreditation of journalists and adjudication activities can be appropriately carried out by a single organ or institution, say the Independent Media Council. This will assist in avoiding possible duplication of work and save costs.

2. As a country we have to think of an appropriate media regulatory body as envisaged by the Broadcasting and Information Policy of 2003. A debate should be encouraged between and among the media stakeholders on which media regulatory mode is required now taking into consideration that the country now follows a

multiparty system, the economy is liberalized and the legal environment on media has changed.

3. However, it is hereby advised that before the media is left free to organize itself. Let us emulate countries like Kenya, Zambia, Swaziland, Burkina Faso, Benin, Ivory Coast and Mauritania. These countries, apart from the fact that we share almost the same political culture and socio-legal environment, these countries established their media regulatory bodies after picking a leaf from the Media Council of Tanzania![155] So, Tanzania can start with co-regulatory approach provided established media council is independent. The intention thereof should be to ensure that the media is accountable and responsible as backed up by a law enforcing code of ethics and conduct as adopted by the stakeholders themselves.

4. To avoid duplication of activities between the Independent Media Council of Tanzania under the Media Services Act and the Media Council of Tanzania, an amendment of Media Services Act should be considered so that the over 20 years experience of the Media Council of Tanzania is recognized by the Act and take the position of the institutions established in the Act. The Constitution of Media Council of Tanzania and its contents should serve as a guideline for the council's activities.

[155] MCT (n 100), p. 79

COUNTERFEITING, DEFECTIVE PRODUCTS AND CONSUMER SAFETY: A CRITICAL ANALYSIS OF CONSUMER PROTECTION UNDER THE PRESUMPTION OF THE DEEMED MANUFACTURER IN TANZANIA.

Zaharani Kisilwa*

Abstract

This paper discusses the problem of counterfeiting and defective goods in Tanzania vis-à-vis the doctrine of the deemed manufacturer under the Fair Competition Act 2003 which provides at its preamble, among other things, protection of consumers from unfair and misleading market conduct. In principle, the doctrine holds that any person, be the producer of goods, supplier or otherwise, is strictly liable for injuries which may be caused to the consumers using their products. The author, particularly, attempts to critically address the substance and the implications of this doctrine under the law from a practical perspective. The main issue discussed is whether the law, by the doctrine of the deemed manufacturer, provides any guarantee for protection of the consumer against latent, deferred injuries caused by potentially harmful defective products. The paper establishes that the doctrine provides a feeble and turbulent terrain for establishing manufacturer's liability where the goods supplied by him have caused hazards to health and safety to consumer. The paper further establishes that the doctrine is not consumer protective, but a mere consumer compensatory scheme and that compensation as a post injury remedy does not guarantee protection of the consumer against potential perils to health and safety inherent in some counterfeit, defective goods.

Keywords: defective goods, consumer protection, consumer safety, strict liability, trade in counterfeit goods.

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1. Introduction

Counterfeiting is a global problem. It wreaks serious impacts to individuals, governments and economies.[1] It is one of the fastest growing economic crimes worldwide, threatening the economies of both developed and developing countries; it damages new investments, and increasingly, endangers public health and safety.[2] It is reported that, counterfeiting has been around for at least 2000 years.[3] Today, Counterfeiters have found a steadfast leverage in advancement of technology where currently they are able to produce, relatively, better copies of products and packaging.[4] By the year 2007, it was estimated that the value of counterfeit goods that crossed international borders was over USD 250bn, and the trend is alarmingly escalating.[5] In 2015, the Projected Value of Global Trade in Counterfeit and Pirated Goods was 1.77trn USD.[6] In mid-2017, a report indicated that global value of counterfeiting and piracy will reach between 1.90 and 2.81trn USD and its total socio-economic impacts to reach 4.2trn USD by 2022.[7] Roughly global imports of counterfeit goods are estimated to be worth half a trillion dollars a year or

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[1] DEREK B., and DELI, Y. "Conceptual Issues of Global Counterfeiting on Products and Services," Vol. 11, Journal of Intellectual Property Rights, January 2006, pp. 15-21.

[2] Ibid.

[3] Chaudhry, P.E., and Zimmerman, A.,Protecting Your Intellectual Property Rights: Understanding the Role of Management, Governments, Consumers and Pirates, New York: Springer-Verlag, 2013, p. 7.

[4] Laura Meraviglia, *Technology and counterfeiting: friends or foes?*UniversitàCattolica Del SacroCuore, 2016; <http://gfc-conference.eu/wp-content/uploads/2017/01/MERAVIGLIA_Technology_and_counterfeiting-friends_or_foes.pdf> (accessed on 14 March 2019)

[5] Organisation for Economic Cooperation and Development (OECD), *Magnitude of Counterfeiting and Piracy of Tangible products: An Update*. <http://www.oecd.org/industry/ind/44088872.pdf> (accessed on 14th March 2019)

[6] International Anti-Counterfeiting Coalition. http://www.iacc.org/counterfeiting-statistics.html14th March 2019.

[7] Frontier Economics, *A report on the Economic Impacts of Counterfeiting and Piracy, 2017,* p. 8. <https://cdn.iccwbo.org/content/uploads/sites/3/2017/02/ICC-BASCAP-Frontier-report-2016.pdf> (accessed on 14th March 2018)

around 2.5% of the total global imports.[8] Following its tremendous growth, counterfeiting has been christened the crime of the 21st century.[9] Its growth has followed the overall growth of the global economy and outsourcing.[10] Counterfeiting and piracy are taking place, practically, in all economies,[11] with China reported as the largest source of counterfeit and pirated products.[12] Africa, particularly, is increasingly becoming the most targeted market for counterfeit goods.[13] Having unsteady manufacturing economies, Africa becomes the dumping ground for low quality goods, particularly, from China.[14] Africa is important to China, which recognizes the continent both as the largest importer of its goods and the fourth largest investment destination.[15]In 2016, Chinese exports into Africa were reported

[8]Organisation for Economic Cooperation and Development (OECD)and European Union Intellectual Property Office (EUIPO), *Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact*, Paris: OECD Publishing, (2016), <http://www.keepeek.com/Digital-Asset-Management/oecd/governance/trade-in-counterfeit-and-pirated-goods_9789264252653-en#.WUzZo7aLncs> (accessed on14th March 2019)

[9] ZHIMIN, Chen, etal. "Brand Protection and Counterfeiting in the United Kingdom and China", International Journal of Management Cases, pp. 373-385.

[10]Ibid.

[11]OECD, *The Economic Impact of Counterfeiting and Piracy*<http://www.oecd.org/sti/38707619.pdf>(accessed on 14th March 2019)

[12] Novagraaf,*Counterfeiting, Plagiarism and Piracy: A Global Problem*, <http://www.novagraaf.com/en/services/brand-strategy/counterfeiting-plagiarism-and-piracy-a-global-problem>(accessed on 14th March 2019). See also Policy Forum Tanzania, *Engagement with the Brazil Russia India China South Africa: An Alternative Development Cooperation Initiative?*<http://www.policyforum-tz.org/sites/default/files/BRICSpaperforPolicyForum.pdf>(accessed on 14 March 2019)

[13]HAMAN Marius,"Africa Rising to the Anti-counterfeiting Challenge,"Vol. 5 No. 5, Journal of Intellectual Property Law & Practice, 2010, p. 349<https://academic.oup.com/jiplp/article-abstract/5/5/344/925891/Africa-rising-to-the-anti-counterfeiting-challenge>(accessed on 14 March 2019)

[14] OECD, Report on the Economic Impact of Counterfeiting and Piracy 200), <http://www.keepeek.com/Digital-Asset-Management/oecd/trade/the-economic-impact-of-counterfeiting-and-piracy_9789264045521-en#.WUza9LaLncs#page6>(accessed on 14 March 2019)

[15] Forum on China Africa Association, White paper on China-Africa Economic and Trade Cooperation. <www.focac.org/eng/>(accessed on 14 March 2019).

to be 102bn USD and imports to be 67bn USD[16] whereby four years earlier, in 2012, it was reported that out of the total trade amounting to 198.49bn USD, China exported to Africa 85.319bn USD in goods.[17] By January 2017, China reported a 51.35bn USD trade surplus.[18]

The East African Community, in 2008, declared a loss of £310m in revenues due to unpaid taxes by counterfeiters.[19] Similarly, the position regarding counterfeit products in Tanzania is particularly extremely perturbing: in 2010, the value of counterfeit products was reported to be about US$ 525m USD per annum.[20] In 2014, substandard goods were reported to comprise 30 per cent of all traded goods in Tanzania.[21] Counterfeits and substandard goods account for 15-25 per cent (equal to 900bn/-) of loss revenue through tax evasion.[22] Apart from revenue loss,

[16]David Dollar, *China's Engagement with Africa: From Natural resources to Human Resource,* Washington D.C: *The John L. Thornton China Center,* pp. 5-6 available at <https://www.brookings.edu/wp-content/uploads/2016/07/Chinas-Engagement-with-Africa-David-Dollar-July-2016.pdf> (accessed on 14 March 2019)

[17] Forum on China Africa Association, White paper on China-Africa Economic and Trade Cooperation. <www.focac.org/eng/>(accessed on 14th March 2019).

[18] Trading Economics, *China Balance of Trade*<http://www.tradingeconomics.com/china/balanceof-trade>(accessed on 14th March 2019)

[19] British Broadcasting Cooperation (BBC), *Africa - 'dumping ground' for counterfeit goods*, <http://news.bbc.co.uk/2/hi/africa/8424403.stm>(accessed on14th March 2019)

[20] DEOGRATIAS, K., and DEOGRATIUS, M, " Importation of Counterfeit Products: What Should Be Done?" The Economic and Social Research Foundation, TAKNET Policy Brief Series. 2010; 014 <http://www.taknet.or.tz/topics/PB%20COUNTERFEIT_FINAL.PDF>(accessed on 23rd June 2017)

[21] The United Republic of Tanzania, National Audit Office (NAO), Report of the Controller and Auditor General. <http://www.nao.go.tz/?wpfb_dl=118> (accessed on 14th March 2019)

[22] DEOGRATIAS, K., and DEOGRATIUS, M., "Importation of Counterfeit Products: What Should Be Done?" The Economic and Social Research Foundation, TAKNET Policy Brief Series. 2010; 014 <http://www.taknet.or.tz/topics/PB%20COUNTERFEIT_FINAL.PDF>(accessed on 14th March 2019)

counterfeits also affect consumers and their interests, in terms of hazards to health.[23]

Trade in counterfeit goods is increasingly gaining momentum with more than 90 per cent of all counterfeit products estimated to be substandard, hence defective.[24] Empirical data suggests that demand is mainly triggered by inexpensiveness of these goods which makes it ideal for the low income earners.[25] As per capita income is not good and the trade ties with China are strengthening, low quality goods are becoming imperative. Among other consequences, counterfeit goods significantly create health and safety risks to the people, including death.[26] All these happen while there is the Fair Competition Act, 2003 and a number of other laws[27] and regulatory institutions designed to eliminate these and related problems.[28] Surprisingly, the problem is still existing.

The number of counterfeit goods continues to grow in an exponential rate, and it seems there is no end to it. Given the

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[23] ASHATU, H., and MUHAJJIR, K., "Low Quality Products in Developing Countries'Markets: Is it one of globalization challenges?" Vol. 2 no. 1, International Review of Social Sciences and Humanities, 2011, pp. 26-36

[24]Ronald K. Ahimbisibwe, *Counterfeiting and its Impact on Social Economic Development*. <http://www.wipo.int/edocs/mdocs/africa/en/wipo_hl_ip_kla_15/wipo_hl_ip_kla_15_t_6_a.pdf>(accessed on14th March 2019)

[25] ASHATU, H., and MUHAJJIR, K., "Low Quality Products in Developing Countries'Markets: Is it one of globalization challenges?" Vol. 2 no. 1, International Review of Social Sciences and Humanities, 2011, pp. 26-36.

[26]See generally, KanoutéA., and ShallatL., Consumer Protection and Quality of Life in Africa through Competition and Regulation, Accra: Consumers International Regional Office for Africa, (2005).

[27] These include local and international instruments. Local instruments include The Fair Competition Act, 2003, The Trade and Service Marks Act, 1999 the Merchandise Marks Act, 1963 effective from 2005, the Patents (registration) Act, of 1987, the Copyrights and Neighbouring Rights Act, 1999 and the Sale of Goods Act, Cap 214. International instruments include the Paris Convention for Protection of Industrial Property of 1883, WORLD Intellectual Property Organsiation Treaty of 1970, The Harare Protocal, The Lusaka Agreement and the Trade Mark Law Treaty of 1981.

[28] Regulatory institutions include the Tanzania Bureau of Standards (TBS), the Fair Competition Commission, the Tanzania Foods and Drugs Authority (TFDA), Business Registration and Licensing Agency (BRELA), The Tanzania Revenue Authority (TRA), Energy and Water Utilities Regulatory Authority (EWURA)

concealed nature of counterfeit production, shipping, and consumption, the development of a solid understanding of the counterfeit market and its underlying supply chains constitutes a major challenge just as does the protection of the consumer.[29] Following from these pertinent facts, the paper, generally, analyses if by deeming a person a manufacturer and holding him, strictly, liable sufficiently, guarantees protection of the consumer's health and safety from the consequences of defective products.

2. Counterfeit Products

The term product refers to goods.[30] It may also refer to any articles manufactured for sale.[31] The two words are used as synonymous concepts. A product may exist singly or it may be part of another product: think of a desktop computer and a hard drive. Generally, goods include all *chattels personal* which refer to all movables.[32] Counterfeiting involves unauthorized manufacturing of products that imitate certain features of genuine goods and which may pass themselves off as registered products of other companies.[33] Counterfeit goods either bear without authorization, trademarks identical to trademarks already registered in respect of same types of goods or which cannot be distinguished in its essential aspects from such a trademark such as the logo, label, sticker, brochure, instructions for use or guarantee document bearing such a symbol. Thus, counterfeit goods infringe on intellectual property rights of the

[29] THORSTEN, Staake., etal., "The Emergence of Counterfeit Trade: A literature Review,"Vol. 43 No. 3, European Journal of Marketing, pp. 320 349 <http://dx.doi.org/10.1108/03090560910935451>(accessed on14th March 2019).

[30] Kelly D., etal, Business Law, 5th Ed,Great Britain:Cavendish Publishing Limited, 2005, p. 222.

[31] See <www.oxforddictionaries.com/definition/english/product>(accessed on14th March 2019)

[32] See section 2 of the Sale of Goods Act, Cap 214 R.E. 2002

[33] ZHIMIN, Chen, etal. "Brand Protection and Counterfeiting in the United Kingdom and China", International Journal of Management Cases, pp. 373-385.

existing trademark-holder.[34] Perhaps counterfeit goods are better defined within the meaning of *trade in counterfeit goods*, as the significance of counterfeiting is deeply embedded in trade. The author would, thus, adopt in that respect the following definition; trade in counterfeit goods is trade in goods that, be it due to their design, trademark, logo, or company name, bear without authorization a reference to a brand, a manufacturer, or any organization that warrants for the quality or standard conformity of the goods in such a way that the counterfeit merchandise could, potentially, be confused with goods that rightfully use such reference."[35] Sometimes trade in counterfeit goods is alternatively recognized as commercial counterfeiting, which is described as the fraudulent practice of affixing a false trademark to a product whereby the false trademark is made to appear superficially indistinguishable from its legitimate counterpart.[36] Thus, counterfeiters pass off their products intending to trick the consumer into purchasing the counterfeit product while believing the same to be genuine.[37]

3. Defective Products

There are significant variations as to the definition of defective products. At one instance, a product is said to be defective if the safety of that product is not one that consumers may reasonably expect, considering that they have sufficient information about it such as from its marketing, user instructions and warnings, and

[34] See Nokia Corporation v Revenue & Customs 2009 EWHC 1903 (Ch) 2009 ETMR 59, (2009) 32(8) IPD 32054. <http://www.bailii.org/ew/cases/EWHC/Ch/2009/1903.html>(accessed on 2 January 2017)

[35] THORSTEN, Staake., etal., "The Emergence of Counterfeit Trade: A literature Review,"Vol. 43 No. 3, European Journal of Marketing, pp. 320 349 <http://dx.doi.org/10.1108/03090560910935451>(accessed on14th March 2019).

[36] BAMOSSY,G., and SCAMMON L.D.,"Product Counterfeiting: Consumers and Manufacturers Beware,"Vol. 12, *Association for Consumer Research*,1985 pp. 334-339.

[37]Ibid.

the state of the product at the time of supply.[38] A product is also said to be defective if it is unfit for the intended purpose, it is of a wrong description and or sample, it is not of a merchantable quality, and it is inherently dangerous, such as when it causes health risks.[39] Furthermore, a product is defective if it can cause injury and or death, and if it lacks quality, as previously intimated by the consumer.[40]

Thus, the need for consumer protection regulation arises from the widespread sale of unsafe, unhealthy or inefficient products.[41] Given the magnitude of the problem on defective products, governments often intervene, requiring manufacturers and sellers to conform to minimum official standards or face embargos.[42] The need for consumer protection is, however, based on the inadvertency of sellers in ensuring that consumers do not make mistakes when buying.[43] While firms involved in counterfeit trade gain sweatless profits, the consumer who purchases a counterfeit product is susceptible to ghastly experiences which range from dissatisfaction, in the least, to serious health and financial injuries, in the most.[44]

4. Relationship Between Counterfeiting and Defective Products

The fact that counterfeiting involves passing off products as those produced by another is an indisputable signal for scores of

[38]Kelly D., etal, Business Law, 5th Ed,Great Britain:Cavendish Publishing Limited, 2005, p. 222.
[39] See Australian Knitting Mills v Grant (1936) A.C. 562
[40]See Sections 15,16 and 17 of the Sale of Goods Act, Cap 214 R.E. 2002
[41]ROBERT B.R.,"Toward a New Consumer Protection," Vol. 128 No. 1, University of Pennsylvania Law Review, 1979, pp. 1-40.
<http://www.jstor.org/stable/3311734>(accessed on 14th March 2019)
[42]Ibid.
[43]Ibid.
[44] BAMOSSY,G., and SCAMMON L.D.,"Product Counterfeiting: Consumers and Manufacturers Beware,"Vol. 12, *Association for Consumer Research*,1985 pp. 334-339.

a hidden and nasty motive including, but not limited to, goods being of inferior or substandard quality, being potentially defective, unsafe and less competitive in the face of the well established brands.[45] If the goods were introduced in their original brand name, it would take a fortune to create awareness as to their existence to the consumers. Logic dictates that most counterfeit products are potentially, defective products, as they do not usually involve sufficient research and development before their production as done with original goods. Thus, although goods are not defective merely because they are counterfeits nor are they free from defects merely because they are genuine, there is a very close relationship between counterfeits and defective goods for the mere reason that most defective goods come from counterfeits for lack of scientifically established production procedures which affect their quality and thus materially distinguishing them from their original counterparts.[46]

5. The Producer and Liability for Defective Goods

The law in Tanzania does not define the term *producer*. A producer in the present context, however, means *a person, company or country that makes, grows or supplies goods or commodities for sale*.[47] They include manufacturer of a finished product, the producer of any raw material or of a component part and any person who presents himself as producer by trade mark or name.[48] The supplier shall be treated as producer unless he

[45] ZHIMIN, Chen, etal. "Brand Protection and Counterfeiting in the United Kingdom and China", International Journal of Management Cases, pp. 373-38.
[46] Ronald K. Ahimbisibwe, *Counterfeiting and its Impact on Social Economic Development*. <http://www.wipo.int/edocs/mdocs/africa/en/wipo_hl_ip_kla_15/wipo_hl_ip_kla_15_t_6_a.pdf>(accessed on 23rd June 2017)
[47] See <www.oxforddictionaries.com/definition/english/product>(accessed on14th March 2019)
[48]Kelly D., etal, Business Law, 5th Ed,Great Britain:Cavendish Publishing Limited, 2005, p. 222.

identifies the producer or pre-supplier.[49] To sum up from these definitions, a producer is any person (natural or legal) that manufactures: *makes, grows or supplies goods, commodities or parts thereof for sale. It includes any persons (suppliers etc.) who represent themselves or suffer to be represented* as producers whether or not they actually are. When a person holds himself out or suffers to be held out as producer, he shall be liable as such. This is the quintessence underlying the doctrine of the *deemed manufacturer* under the Fair competition Act, 2003.

6. Consumer and Consumer Protection

The term *consumer* means one who consumes or utilises economic goods.[50] The law in Tanzania defines a consumer as to include any person who purchases or offers to purchase goods or services otherwise than for the purpose of resale but does not include a person who purchases any goods or services for the purpose of using them in the production or manufacture of any goods or articles for sale.[51] This definition implies that a consumer is a person who acquires goods or services only for personal consumption, excluding one who buys for other purposes.

The role of a consumer in the society is gigantic as he is the buyer and at the same time the tax payer which entitles him to the absolute right to expect that he will get the goods of the right type and quality and at the right time and price.[52] The consumer needs to be protected against product adulteration, fraud, and

[49] European Economic Community (EEC), EEC Directive 85/374/EEC - Liability for Defective Products. <https://osha.europa.eu/en/legislation/directives/workplaces-equipment-signs-personal-protective-equipment/osh-related-aspects/council-directive-85-374-eec> (accessed on 14th March 2019.

[50] See Merriam Webster Dictionary. <http://www.merriam-webster.com/dictionary/consumer> (accessed on14th March 2019

[51] See section 2 of The Fair Competetion Act of 2003.

[52] JANJUA, S.S.,"Administrative Machinery for Consumer's Interest: An Analytical Study," Vol. 67 No. 3, the Indian Journal of Political Science, July-September, p. 525.

inflationary price practices like hoarding, speculation, and black marketing.[53]Protection is *a means or method of defending, or the state of not being exposed to danger*.[54] From this definition, consumer protection involves instilling safeguards for the basic rights of consumers, enhancing buying power and balancing his relationship with sellers in the market.[55] Further, consumer protection, includes safeguarding against hazards to health and safety, the promotion and protection of economic interests, guaranteeing access to adequate information, controlling misleading advertisements and deceptive representation, providing consumer education and guaranteeing effective consumer redress[56]

Consumer protection is said to focus on three areas: first, on the need to guarantee physical protection of the consumer in which the consumer is defended against products that are unsafe and which endanger health. Second, it is concerned with the protection of the consumer's economic interest, which involves measures to protect against deceptive and other unfair trade practices and to provide adequate rights and means of redress. Lastly, it is concerns protection of public interest against the abuse, the monopoly position and restrictive trade practices.[57] Generally, these are effected through legal and institutional mechanisms. Thus in consumer protection, law protects the consumer as well as his interests. It provides for mandatory rules that guarantee consumer welfare by ensuring safety and quality controls of consumer goods and services, on the one hand, and the requirement to divulge necessary information related to the

[53]Ibid.
[54]See Merriam Webster Dictionary, meaning number 1 and 3. <http://www.merriam-webster.com/thesaurus/protection>,
[55] JANJUA, S.S.,"Administrative Machinery for Consumer's Interest: An Analytical Study," Vol. 67 No. 3, the Indian Journal of Political Science, July-September, p. 525.
[56]Ibid.
[57]Ibid.

product that the consumer purchases which give him the necessary power to exercise choice, on the other.[58]

Depending on the consumer's position in the economy, there are, broadly, two approaches to consumer protection: *paternalistic approach* and the *liberal approach*. Under the paternalistic approach, owing to diversity of products, multiplicity of packaging and distribution channels, the market is looked at as being non-transparent in which consumers are unable to access the necessary information.[59] In this situation, the average consumer's power to decide, rationally, on the appropriate product to buy, is said to be often paralyzed.[60] Thus, the law intervenes to make sure information is availed in comprehensible ways.[61]*Paternalist approach* is however, viewed as being prone to regulatory errors, and to political infiltration arising from too much discretionary powers of government officials.[62] The liberal approach shuns direct intervention by law and rather advocates for a patronizing approach.[63] Tanzania follows both approaches: a paternalist approach, having a good number of laws and regulatory institutions for consumer protection in place and a liberal approach, having a number of watchdog institutions[64] which control producers' conducts. Some of these are based on the common law and some passed in the parliament at different times, including the law in question. As in many other

[58] United Nations Conference on Trade and Development (UNCTAD),*Report on The Effects of Anti-competitive Business Practices on Developing Countries and their Development Prospects* 2008, p. 26.<http://unctad.org/en/Docs/ditcclp20082_en.pdf >(accessed on 16th December 2018

[59] OECD. Background Note for Global Forum on Competition. Round Table on the Interface between Competition and Consumer Policies. 2008: DAF/COMP/GF(2008) 4

[60] UNCTAD,*Report on The Effects of Anti-competitive Business Practices on Developing Countries and their Development Prospects* 2008, p. 26.<http://unctad.org/en/Docs/ditcclp20082_en.pdf >(accessed on 14th March 2019)

[61]Ibid.

[62]Ibid.

[63]Ibid.

[64] These are the Fair Competition Commission (FCC), the Fair Competition Tribunal (FCT) and the National Consumer Advocacy Council (NCAC).

jurisdictions, concern for consumer protection against unscrupulous producers is inevitable.

The focus on consumer protection, however, has been so ambulatory, changing over time due to social forces which have equally influenced changes in the law being a discipline in transition, moving from predominantly mono-disciplinary towards multi-disciplinary tradition, from national to a more international and global orientation.[65] The law on consumer protection has never remained in the same form. From this therefore, forms of consumer protection can be divided into the following categories; the archaic forms of protection and the new forms of protection.

7. Archaic Forms of Consumer Protection

It is worth noting here that the word archaic used to some forms of consumer protection at this part is not used to suggest diminished significance of the consumer protective character of the forms of consumer protection discussed here, but to distinguish them from the most current forms of consumer protection. Traditionally, the original form of consumer protection law was based on the common law of contract which entitled the injured person to sue the seller for a breach of contract.[66] Protection offered under contract law was later on enhanced through the famous sale of goods legislation which implied certain terms regarding the quality of goods into sales contract even though the parties did not specifically mention them.[67] During the 19th century, *caveat emptor* was central to the suits for defective goods.[68] It imposed the duty upon the buyer to

[65] Rob Van Gestel etal,EUI working Paper Law 2012/13 on Methodology in the New Legal World, European University Institute, p. 12.
[66]Elliot, C., and Quinn F., Tort Law 5th Ed, Edinburgh:Pearson Education Ltd, 2005, p. 173.
[67]Ibid.
[68] Means buyer beware

make sure that the product he buys is in good condition and works properly.[69] However, privity rule which is one of the principles underlying contract law is said to be the main restricting factor to the consumer protection dimensions of contract law.[70] Privity required that only a consumer who was directly connected through contract to the producer whose product injured the consumer could sue and recover compensation.[71] This shortcoming however, has been taken care of by the development of rules relating to contract rights of third parties.[72] We do not have similar law in Tanzania. Another shortcoming of the Privity rule is that only the person or the company that sold the product could be sued. It follows therefore, that if the person who sold you a defective product, for any reason, could not be traced; a consumer had no claim in contract against anyone else involved in the product supply.[73] This aspect is said to have weakened contract law as a means to guarantee maximum protection of consumers.[74]

A new branch of law, thus, developed within the weaknesses of contract law and it became known as tort law. The use of tort law to protect consumers was for the first time sparked by the case of *Donoghue v Stevenson*.[75] The case made it possible for producers of defective products to be responsible to the consumers of that product, irrespective of any contract. The case established a duty of care upon manufactures directly to the end users of the product. The manufacturer would be liable to the consumer if he

[69] See Merriam Webster Dictionary <http://www.merriam-webster.com/dictionary/caveat%20emptor> (accessed on 14th March 2019)
[70] Elliot, C., and Quinn F., Tort Law 5th Ed, Edinburgh:Pearson Education Ltd, 2005, p.174.
[71] Elliot, C., and Quinn F., Tort Law 5th Ed, Edinburgh:Pearson Education Ltd, 2005, p.173.
[72] An example is the English Contracts (Rights of Third Parties) Act 1999.
[73] Elliot, C., and Quinn F., Tort Law 5th Ed, Edinburgh:Pearson Education Ltd, 2005, p. 174.
[74] Ibid.
[75] 1932 AC 562.

negligently failed to exercise care. Thus, product liability of a manufacturer in tort law is based on the ordinary rules of negligence which require the consumer to prove the following; that there was fault on the part of the manufacturer, i.e., the manufacturer failed to take reasonable care and that the manufacturer's failure to take care caused the defect that made the product dangerous. Negligence of the seller will always depend on whether it was reasonable to expect them to examine the goods for faults or warn of any possible risks.[76] Seriousness of the danger and how practical it would have been for the manufacturer to prevent it are taken into consideration before holding him liable under tort law.[77]

Later developments of the law broadened the definition of the manufacturer as to include almost everyone involved in the supply chain of a defective product.[78] It also covered most products.[79] Tort, like contract law does not guarantee effective consumer protection as establishment of liability mainly called for proof of fault which consumers found utterly difficult since they would stand no better position as would the manufacturer in terms of evidence to back up injury claims.[80] Thus, contract law and tort law could not stand the tests of time in consumer protection mission. With development of technology and appearance of big corporations together with advancement of complex distribution chains, it became even more difficult to

[76] Elliot, C., and Quinn F., Tort Law 5th Ed, Edinburgh:Pearson Education Ltd, 2005, p.178.
[77] Ibid.
[78] Elliot, C., and Quinn F., Tort Law 5th Ed, Edinburgh:Pearson Education Ltd, 2005, p.176.
[79] Elliot, C., and Quinn F., Tort Law 5th Ed, Edinburgh:Pearson Education Ltd, 2005, p. 177.
[80] VAN DUNNÉ,Jan M.,"Liability for Pure Economic Loss: Rule or Exception? A Comparatist's View of the Civil Law - Common Law Split on Compensation of Non-physical Damage in Tort Law," Vol. 4 No. 397, European Review of Private Law, 1999, p. 428.

establish liability, pertinently necessitating introduction of other, more effective means of consumer protection.[81]

8. Contemporary Forms of Consumer Protection

Regulation by legislation is the most contemporary form of consumer protection. The significance of legislation became almost globally overpowering, with the weaknesses of contract and tort law which are the archaic forms of consumer protection not based on legislation.[82] In spite of any contractual limitations of liability, if a product or any of its component parts are defective, its manufacturer may be held liable for damage under legislation such as the Fair Competition Legislations which, among others, focus on consumer interest which is frequently stated as one of the important goals of competition law.[83] However, consumers are neither mentioned directly in the competition legislations nor are they frequently involved in decision making.[84] Certain competition laws cannot reach certain aspects of consumer interest such as safety, health, environment and privacy which require separate laws.[85] Many countries, unlike Tanzania, have specific legislation for consumer protection which are said to work hand in hand with competition legislations.

On the other hand, consumer education, besides competition laws, is also used to protect consumers. It involves delivering education to consumers and the necessary information in the

[81] Elliot, C., and Quinn F., Tort Law 5th Ed, Edinburgh:Pearson Education Ltd, 2005, p. 177

[82] ibid.

[83] UNCTAD,*Report on The Effects of Anti-competitive Business Practices on Developing Countries and their Development Prospects* 2008, p. 26.<http://unctad.org/en/Docs/ditcclp20082_en.pdf >(accessed on 16th December 2018

[84] Ibid.

[85] Ibid.

market to inculcate consumer power which in itself can be a forceful event to protect their rights.[86] Education involves provision of skills and knowledge which consumers need to negotiate and function effectively and responsibly in an ever changing and extremely complex market setting.[87] Through consumer education, consumers are expected to acquire the necessary information regarding the way markets work and what their rights are and how they can enforce them against market fraudsters.[88] Conclusively, contemporary consumer protection regulation can rightly be said to contain, at the minimum, matters related to competition, consumer protection and consumer education which are expected to work together.

9. Fair Competition Act 2003

Enactment of the Fair Competition Act, 2003 is said to have been triggered, among other factors, by the 1990s consequences of the global phenomenal changes that shifted private sector to the centre stage of economic development as a result of technological, economic, political and ideological changes.[89] The Act was made in compliance with the United Nations Conference on Trade and Development (UNCTAD) Model law on competition and in that respect most of its features mimic that model.[90] Appearing last in the list, consumer protection, is one of

[86]See part I under the general objectives of the United Nations General Assembly Resolution on Consumer Protection of 1985.
[87] Ringo W. Tenga,*Consumer Protection Model and the Tanzania Legal Compliance Framework with Some Reference to the Communications Sector*, 2009<https://www.academia.edu/9185397/COMPETITION_LAW_IN_TANZANIA>(accessed on 14th March 2019.
[88]Ibid.
[89]MkochaG.,*Competition Policy and Law in Tanzania, DG/FCC Tanzania, Third Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa at the South Africa Competition Commission, 2009*, p. 1<http://www.fct.or.tz/images/uploads/Competition-Policy-and-Law-in-Tanzania.pdf>
[90]Mkocha G.,*Competition Policy and Law in Tanzania, DG/FCC Tanzania, Third Annual Competition Commission, Competition Tribunal and Mandela institute Conference on*

its objectives, while others include increasing efficiency in the production, distribution and supply of goods and services, promotion of innovation and maximization of the efficient allocation of resources.[91] The Act establishes certain consumer protection authorities such as the Fair Competition Commission (FCC), Fair Competition Tribunal (FCT) and the National Consumer Advocacy Council (NCAC) whose responsibility is to watch over the market roles of suppliers, among others, and to control their conducts with a view to protecting consumers.[92]

Operating on the principles of independence, accountability, transparency and due process, the Act is distinguished in its spirit of promoting the consumer, emphasizing advocacy, as part of compliance strategy and involvement of the Judiciary in resolving consumer disputes.[93] Competition law and consumer protection are said to have an inevitable nexus; both deal with distortions in the marketplace which are believed to be driven by the interaction between supply and demand.[94] While market offenses, like price fixing or exclusionary practices distort the supply side because they restrict supply and elevate prices; consumer protection offenses, counterfeiting, among others, distort the demand side because they create the impression that a product or service is worth more than it really is.[95]

Competition Law, Economics and Policy in South Africa at the South Africa Competition Commission, 2009, p. 1<http://www.fct.or.tz/images/uploads/Competition-Policy-and-Law-in-Tanzania.pdf> p. 3

[91] National Board of Accountants and Auditors (NBAA), A5-Business Law for Foundation Level, Dar es salaam:Tanzania Printing Services, 2014; p. 210.

[92] See sections 62, 83 and 92 of the Fair Competition Act, 2003.

[93] Mkocha G.,*Competition Policy and Law in Tanzania, DG/FCC Tanzania, Third Annual Competition Commission, Competition Tribunal and Mandela institute Conference on Competition Law, Economics and Policy in South Africa at the South Africa Competition Commission, 2009*, p. 1<http://www.fct.or.tz/images/uploads/Competition-Policy-and-Law-in-Tanzania.pdf> p. 3

[94] LEARY, Thomas B.,"Competition Law and Consumer Protection Law: Two Wings of the Same House," Vol. 72 No. 3, Antitrust Law Journal, 2005, pp. 1147-1151.

[95] Ibid.

10. Deemed Manufacturer in the Fair Competition Act 2003

The Fair Competition Act, 2003 provides for strict liability of the producer.[96] Strict liability touches on the producer otherwise referred to as manufacturer or any person that is deemed to be manufacturer under certain conditions, regardless of whether he is one or not. It is worth to lay the premise upon which discussion at this part shall base, thus, for the purposes of strict liability of the producer; goods are defined as "*goods of a kind ordinarily acquired for personal, domestic or household use or consumption.*[97]Any person is deemed to be a manufacturer of goods if the following conditions are satisfied;[98]

i. If that person holds himself out as such.
ii. If he supplies and allows his business name, brand or mark to be applied to the goods he is supplying.
iii. If he allows the person to whom he supplies the goods to hold him out to the public as manufacturer.[99]

In connection to the foregoing, subsection (7) adds the last condition which is if the person *imports into the country goods of which he is not the manufacturer provided that at the time of the importation the manufacturer of the goods does not have a place of business in the country*. It follows from this therefore that, a manufacturer can be real or deemed. A *deemed manufacturer* may be any such person who holds himself out as manufacturer of goods or any supplier of goods who either allows his business name, brand or mark to be used in connection with such goods or allows any person to whom he supplies the goods to hold him out as manufacturer of such goods or any person who is the importer of the goods into Tanzania, if the real manufacturer

[96] See section 37 of the Act.
[97] See section 37 (5) (a) of the Fair Competition Act, 2003.
[98]See section 6 (a), (b) and (c) of the Fair Competition Act, 2003.
[99]Fair Competition Act, 2003

does not have a place of business in Tanzania. The significance of this provision is that a supplier can also be a producer of goods though he is not versed with the basics of production.

Particularly, however, the author is ceased with a sizeable degree of concern about the provisions of subsection 7 of the above said section under the law. The said concern stems from the fact that this section is not unique to Tanzania. With minor variations which might have significant legal implications, for instance, the European Union law [100] and the laws that it has influenced such as the English Consumer Protection Act of 1987[101] contain, *inter alia*, more or less similar provisions. The present section in its context, implies that any importer of goods into Tanzania is a manufacturer of the goods he imports, if one condition is satisfied, that is, if the real manufacturer of those goods, wherever he is, does not have a place of business in Tanzania. In this respect, the importer is deemed to be the manufacturer, and thus the term *deemed manufacturer*. The *deemed manufacturer* will strictly be held liable to the consumer if the goods he has imported are defective and cause damage for being counterfeit or for any other reason. Goods with defect for which the *deemed manufacturer* can be, strictly held liable, generally known as defective goods or defective products,[102] are referred to as *unfit or unsuitable goods* under the Tanzania Fair Competition Act.[103] Under this law, goods are unsuitable if;

[100.] See Article 3 (3) of the European Union Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States which establishes that the supplier of a product becomes the manufacturer where the producer thereof cannot be identified.

[101] See section 2 (2) (c) of the European Union Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States.

[102] As discussed, supra.

[103] Section 38 (1) of the Act. The word unsuitable is used in the marginal notes to the same section.

i. they were acquired by the consumer for a particular purpose that was, either expressly or impliedly, intimated to manufacturer previously,
ii. they are not reasonably fit for that purpose, whether or not, the said purpose is one for which goods of that kind are commonly supplied,
iii. by the reason of being unfit, they cause loss or damage to the consumer or to any person who derives title to the goods from the consumer.[104]

The *deemed manufacturer* shall be strictly liable to the consumer, therefore, if he imports goods under the stated conditions. The concept of strict liability has roots in common law of tort, which is marked by two divergent main theories: The theory of strict liability which holds that, the defendant is, prima facie, liable for the harm he has caused, regardless of whether he intended it or he was negligent[105] and the other holds that a plaintiff should *prima facie* be entitled to recover from a defendant who has caused him harm only if he, first, intended that harm and second, failed to take reasonable steps to avoid inflicting the intended harm which is known as negligence.[106] The liability of the *deemed manufacturer* does not fall under the second theory, i.e., the theory of negligence. It falls under the first theory, i.e., the theory of strict liability. Thus the *deemed manufacturer* is strictly liable even for defects inherent in the product as a result of the manufacturing process. A manufacturing defect is said to exist if the goods *depart from their intended design even though all possible care was exercised in the preparation and marketing of the product*."[107] In that respect, even the best and the most careful known

[104]See section 38 (1) (c)-(e) of the Fair Competition Act, 2003.
[105]EPSTEIN, R.A.,"A Theory of Strict Liability,"Vol. 2 No. 1, the Journal of Legal Studies, 1973 pp. 151-204.
[106]Ibid.
[107] See <http://www.medmarc.com/Life-Sciences-News-and-Resources/Products-Liability-360-Newsletter/Pages/Manufacturing-and-Design- Defects.aspx> (accessed on 14th March 2019).

manufacturers obsessed with manufacturing of quality products are prone to production of defective goods for the mere reason that the goods departed from their intended design.[108] Affected consumer has an obligation only to prove that the goods are defective, whether original or counterfeit, he needs not prove negligence on the part of the manufacturer since, in strict liability, the focus is on the product, not on the conduct of the manufacturer.[109] However, proof of damage is necessary.

On the one hand, strict liability of the *deemed manufacturer* is justified, generally, in that it provides compensation through loss spreading.[110] It is said that it is always desirable to place the economic costs on the manufacturer because he stands in a better position to absorb and pass them on to other consumers in which case, by so doing, he becomes a *de facto* insurer against its defective products, with premiums built into the product's price structure[111]; deterrence; encouragement for useful conduct; amelioration of expensive and time consuming problems of proof; protection of consumer expectations; and cost internalization[112] in which strict liability is said to provide a mechanism for ensuring that the absolute good of the product outweighs its absolute harm.[113]

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[108]Ibid.
[109]Ibid.
[110] SLABBERT, M. Nöthling, etal. "The Application of the Consumer Protection Act in the South African Health Care Context: Concerns and Recommendations,"Vol. 44 No. 2, the Comparative and International Law Journal of Southern Africa, 2011, pp. 168-203.
[111] See <https://en.wikipedia.org/wiki/Product_liability>(accessed on the 14th March 2019).
[112]SLABBERT, M. Nöthling, etal. "The Application of the Consumer Protection Act in the South African Health Care Context: Concerns and Recommendations,"Vol. 44 No. 2, the Comparative and International Law Journal of Southern Africa, 2011, pp. 168-203.
[113]See <https://en.wikipedia.org/wiki/Product_liability>(accessed on the 14th March 2019).

Moreover, strict liability is said to ebb the impact of information asymmetrically, between manufacturers and consumers as the former have better knowledge of the dangers of their own products than the latter. Manufacturers therefore properly bear the burden of finding, correcting, and warning consumers of those dangers.[114]Further, it has been said that, shifting the threat of product liability judgments onto *deemed manufacturers*, presumably, most able to ensure loss prevention, was appropriate because, firstly, they are best positioned to prevent goods related harm by procuring safer goods and, secondly, as members of the product supply chain, they are best suited to prevent the loss at the lowest cost.[115] On the other hand, it is specifically justified in the following points; that a consumer is likely to encounter problems on service of process[116] and in suing a foreign manufacturer who is in a country far away from the country into which goods were imported and where the consumer is located.

Also the costs involved for the consumer to undertake such a course are certainly high. Additionally, local regulation applicable in the consumer's country may not necessarily be applicable in a foreign court in determining the issue[117] and that a local judgment may not always be enforced in a foreign jurisdiction where the manufacturer is located.[118] Thus, the deeming of the importer as manufacturer is said to solve the

[114]Ibid.
[115]SLABBERT, M. Nöthling, etal. "The Application of the Consumer Protection Act in the South African Health Care Context: Concerns and Recommendations,"Vol. 44 No. 2, the Comparative and International Law Journal of Southern Africa, 2011, pp. 168-203.
[116] GLYNN, Stephanie,"Toxic Toys and Dangerous Drywall: Holding Foreign Manufacturers Liable for Defective Products. The Fund Concept," Vol. 26, Emory International Law Review, p. 318.
[117]Kelly D., etal, Business Law, 5th Ed,Great Britain:Cavendish Publishing Limited, 2005, p. 222.
[118] GLYNN, Stephanie,"Toxic Toys and Dangerous Drywall: Holding Foreign Manufacturers Liable for Defective Products. The Fund Concept," Vol. 26, Emory International Law Review, p. 318.

dilemma by providing to the consumer for the possibility of proceeding against a person or entity in his own country. Therefore, someone who does not manufacture the defective goods or sell them to the consumer may nevertheless, find themselves liable to compensate a consumer who suffers loss because of the defects in the goods he has merely imported, on account of being deemed a manufacturer.[119]

11. Consumer Protection under the Doctrine of the Deemed Manufacturer

The doctrine has a number of serious legal and practical impediments that undermine the spirit behind its creation i.e. protection of the consumer. These impediments are discussed as follows:

11.1 Establishing Manufacturer's Liability under the Doctrine

The deemed manufacturer's liability under the law is exclusively based on the question whether the goods are unsuitable or not. Unsuitable goods are those that are considered to be unfit for use by consumer. As unfitness becomes key word, safety of goods becomes a non-issue. Unfitness takes a small part in the general safety of goods. The author acknowledges that, goods that are unfit may be a serious cause of imminent, perceptible harms. The consequences of harm caused by seemingly fit, but inherently unsafe goods are comparatively more severe and involve a larger number of consumers at risk beyond a single individual. Most counterfeit goods are unsafe, and research has it that the goods cause human harm in many ways and induce unsuspected human suffering, and sometimes, even cause death.[120] Fitness for

[119]Kelly D., etal, Business Law, 5th Ed,Great Britain:Cavendish Publishing Limited, 2005, p. 222.

[120]Michele Forzley, *Counterfeit Goods and the Public's Health and Safety*, International Intellectual Property Institute, 2003, p. 1.

use is assessed under the law only in terms of the individual consumer's point of view. However, what is fit to one may not necessarily be fit for the other. Furthermore, not all goods which in one's point of view appear to be fit for their purpose, will also be safe to them. A consumer's subsequent claim that goods are unfit presupposes that the goods were delivered to him and he consumed them. As the law focuses on unfitness of the goods for the purpose of an individual consumer, it becomes individualistic. It ignores many members of the public who may not, in their perception, have found the goods unfit, but still the goods being unsafe to them without their knowledge, posed serious health risks over time.[121] In fact, the goods pose serious health hazards, not only to the individual consumer, but also to the public. There is therefore a need to look into public interest beyond the individual consumer's interest. It should be noted that damage arising from the use of defective products may take longer to be experienced and may not easily be connected to the use of any particular product previously sold to the consumer. The researcher is of the view that the law primarily concerning itself with the unfitness of goods is redundant as issues of unfitness are effectively taken care of in a different law.[122] The only difference here being the fact that the wrongdoer is held liable strictly. The implication of this shortcoming is that much as the definition focuses on whether or not the product was unfit to the individual, it opens room for the influx of low-end products into the Tanzanian market, hence increasing consumer health risks. It also widens room for culprits to slip away without liability. As demand for counterfeits and low quality goods is accelerating, because of most consumer's low purchasing power, the situation is seriously aggravated.

[121] See section 38 (c)-(e) of the Act.
[122] See section 16 of the Sale of Goods Act, Cap 214 R.E. 2002.

11.2 Lack of Sustainable Safeguards Against Hazards to Consumer Health and Safety

The doctrine of deemed manufacturer fails to sufficiently address consumer safety from the risks of defective goods. This is aggravated by the fact that consumers of counterfeit goods are generally unable to assess the risk of harm of a product before use.[123] For instance, if a product is harmful to consumer, once it is consumed or used, it is often too late to prevent harm despite the fact that it was initially found by such consumer to be fit for his use. This has been reported to be the common consumer tendency even in advanced economies where the irresistible charm of low price products raises the need to consider possible risks associated with the products.[124] Interestingly, safety of goods under the doctrine appears to be guaranteed only in terms of safety standards,[125] notices declaring certain goods unsafe, notices banning certain goods and consumer expectation standards.[126] Outside those limits, all goods are by necessary implication considered to be safe. In connection to that, Fair Competition Act prohibits exportation or supply locally of all goods that fall within the said limits in the following wording; *No person shall export goods or supply goods in the country which are prohibited by sub-section (1) unless the minister has, by notice in writing, given to such person, approval to export such goods."*[127]

This section implies that goods may not be exported or supplied locally if they fall under the said conditions. Further, that goods

[123] Michele Forzley, *Counterfeit Goods and the Public's Health and Safety*, International Intellectual Property Institute, 2003, p. 1.

[124] GLYNN, Stephanie,"Toxic Toys and Dangerous Drywall: Holding Foreign Manufacturers Liable for Defective Products. The Fund Concept," Vol. 26, Emory International Law Review, p. 318.

[125] Safety standards are made by the Tanzania Bureau of Standards as per the Standards Act, 2009.

[126] See section 40 (1) of the Fair Competition Act, 2003

[127] See section 49(1) and (3) of the Fair Competition Act, 2003. This includes local supply if those goods are prohibited.

falling outside those limits are acceptable and may be exported and supplied. This necessarily occasions chances for supplying goods from abroad that do not fall under the restricted categories. With this, come counterfeits and goods whose safety may or may not be within the limits of the safety standards provided by the law. Particularly, the law requires that all consumer products safety standards must contain requirements relating to (1) performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the goods in question, (2) testing during, or after the completion of, manufacture or processing and (3) sticking in a certain form and content, markings, warnings or instructions to accompany the goods, as are reasonably necessary to prevent or reduce risk of injury to any person.[128] These factors however, are not to be expected to contain in full all the possible risks present in some products. Some products have risks which cannot entirely be prevented while some can be prevented but preventing them can make products overly expensive and unaffordable by an ordinary consumer.[129]

Besides, products safety standards in practice look mainly at *risk-benefit analysis* to determine the question as to what is a reasonable standard.[130] In special circumstances, safety standards are not enough: a product may contain all that it is required to contain, and it may have been tested and bear all the marks, warnings and instructions to accompany the goods. But still it may be a threat to safety of a consumer, depending on many factors such as (1) language literacy level and (2) understanding of the technical terms, (3) ignorance and the habitual disregard of product information before use and (4) poor scientific knowledge at the relevant time. Beginning with the language literacy and the level of understanding technical jargon; Tanzania does not

[128] See sections 48 (1)(a)(b) and 49 generally of the Fair Competition Act, 2003.
[129] Adams,A.,Law for Business Students, 6th Ed, England: Longman, 2010, p. 266.
[130] Ibid.

produce enough to sustain its needs, so it mostly imports from China, India, South Africa, Kenya and United Arab Emirates in order to bridge the gap.[131] Most products imported from abroad have information on their use printed either in English or in other languages. Besides, other languages like Chinese which features in most goods, English is a language which not many Tanzanians master adequately.[132] This emasculates their understanding of these products and how unsafe they might be.

Apart from English problems, there is yet an even bigger problem with the education system in Tanzania, which leaves many students unable to read and write, including those at the level of secondary schools.[133] Without regard to whether one can or cannot read, habitual disregard of reading product information, which is shared by consumers of all types, including those that live in developed nations, is yet another problem. A few practical cases from foreign jurisdictions will illustrate the author's argument and might be useful to predict what might as well happen in Tanzania. In *Worley v Tambrands Ltd* (2000)[134], a woman sought damages following injury related to toxic shock syndrome after the use of tampons. One of the issues discussed by the court in this case was the issue of whether there was adequacy of the warnings given. Although the risks of use were stated in the leaflet in the tampon box, the information was not printed on the box and regular users would not habitually read the leaflet. The court held that the warnings in the leaflet were

[131] The value of Imports has been reported to have reached 1351.30 USD Million in December of 2014 from 1109.90 USD in November of the same year. See <http://www.tradingeconomics.com/tanzania/imports>

[132] A 2011 report found that only one in six East African primary students could pass a basic english literacy test with Tanzanian students scoring lower than Kenyans and Ugandans on both the English and Kiswahili tests. See the report at <http://www.uwezo.net/publications/reports/> (accessed on 10th August 2018)

[133] See Tanzania Human Rights Report 2012, p. 122<http://www.humanrights.or.tz/downloads/tanzania_human_rights_report_2012.pdf>

[134] PQR 95

sufficient to meet the expectations of users which left the consumer without any remedy despite the injury.

Poor scientific knowledge at the relevant time on the other hand, causes manufacturers not to observe safety standards by including information on the possible risks arising from use of certain products for various reasons, is another challenge. A typical illustration is given of genetically modified food crops in respect to which a study reports that despite the high level of acceptance of Genetically Modified Foods in Tanzania, there is a general lack of understanding, awareness and knowledge of the technology behind it, terminology and its potential health risks.[135]Numerous studies on Genetically Modified Foods report that they have the potential to cause some common toxic effects such as hepatic, pancreatic, renal, as well as reproductive effects. They may also redefine the hematological, biochemical, and immunologic parameters.[136] These are long term health effects yet to surface.

Once more, lessons from other countries' experiences with similar legal practice in the area under discussion might signal what might happen in the long run. In the case of *A& Others v National Blood Authority* (2001), consumers suffered hepatitis C through blood transfusions. Prior to this case, there were a number of cases in which, due to poor scientific and technical knowledge, more than 14,000 patients suffered this disease, and more than 1200 were infected with Human Immunodeficiency

[135]Christopher P.L., etal, *Tanzanian farmers' knowledge and attitudes to GM biotechnology and the potential use of GM crops to provide improved levels of food security*: *A Qualitative Study*, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2912813/>(accessed on14th March 2019).

[136]DONA A.,"Health risks of genetically modified foods,"Vol. 49 No. 2, Crit Rev Food SciNutr, 2009 pp. 164-75.

Virus HIV from blood transfusions and tissue transfers.[137] In another case of *XYZ & Others v Schering Health Care Limited, Organon Laboratories Limited and John Wyeth & Brother Limited* [138] eleven women claimed, in a representative suit, to have suffered serious health hazards from the use of defective contraceptives. All suffered from one or more of the following: Deep Vein Thrombosis DVT,[139] leg pain and loss of mobility, very severe headaches, nausea and giddiness. Others include restricted working ability, stroke, swollen legs, episodes of chest pain and dyspnea, severe loss of confidence anxiety and sleep disturbance.[140] The products contained Combined Oral Contraceptives (COCs) whose health effects were not well known at the material time. According to this case, contraceptives with COCs began to be used in 1960 and most, if not all women involved in this case, began use of the contraceptives in early 1980s and 1990s. Awareness about the risks was obtained by 18th day of October 1995.[141] This discovery came many years after consumers had already suffered immensely and irreparably.

This is how lack of scientific and technological knowledge at the relevant time may compromise consumer protection efforts. In these and other situations, it cannot possibly be expected that product information are of any use to an ordinary Tanzanian who, as the largest consumer of goods, has an overarching interest only on their use, but not technicalities involved in their making which, necessarily, dictate the use. Therefore many are at risk of failing to gain a requisite knowledge on the safest possible

[137] Report of the Expert Group on Financial and Other Support (Chairman: Lord Ross) March 2003, Edinburgh, Scottish executive. Available @ http://www.gov.scot/Publications/2003/03/16844/20519
[138] 2002 EWHC 1420 (QB.
[139]DVT, is a blood clot that forms in a vein deep in the body. They occur when blood thickens and clumps together. Most deep vein blood clots occur in the lower leg or thigh. See <www.nhlbi.nih.gov/health/health-topics/topics/dv>
[140]See paragraph four of the case.
[141]See paragraph 11 of the case.

use of a product, and consequently, the potential for risks is equally higher and the law fails to address this sufficiently.

Further, in the absence of consumer product safety standards, consumer safety under the Fair Competition Act is balanced upon *the reasonable consumer expectation* test with regard to description, price and other circumstances.[142]The reasonable consumer expectation standard has proved to be a source of more problems to consumer protection. Practically, the test has caused problems in many jurisdictions, and has mostly been disapproved for various reasons. In the experience of the English court, for instance, such test known as "public expectation test" is subject to determination by court and as such does not necessarily reflect the reality of what the public really expect.[143] See for instance, the case of *B (A Child) v McDonald's Restaurants Ltd*[144], in which the court dismissed a group action in respect of personal injuries caused by the spillage of hot drinks sold by the defendants. In this, although customers were entitled to expect basic precautions to be taken against risks, the court thought that public expectation in this regard was too high and thus, the defendant was not found liable. Research reports that the expectations of consumers provide an extremely vague and unstructured basis on which to assess manufacturer's liability and that, it is difficult and cannot be applied to separate problems.[145]
Further, that it can be utilized to explain most any result that a court chooses to reach.[146] The consumer expectation test is also

[142] See section 40 (1) of the Fair Competition Act, 2003.
[143] Adams,A.,Law for Business Students, 6th Ed, England: Longman, 2010, p. 266. See also the case of *B (A Child) v McDonalds Restaurants Ltd* 2002 EWHC 490 (QB).
[144] 2002 EWHC 490 (QB)
[145] KYSAR, D.A., "The Expectations of Consumers," Paper 32, Cornell Law Faculty Publications,2003,<http://scholarship.law.cornell.edu/lsrp_papers/32>
[146]KYSAR, Douglas A., "The Expectations of Consumers," Paper 32, Cornell Law Faculty Publications,2003, p. 1715.
<http://scholarship.law.cornell.edu/lsrp_papers/32>

said to be vague and lawless as it provides little, if any, guidance in cases where harm inherent in the product befalls passersby who have neither purchased nor consumed the product, what would be the possible expectations of the consumer in these situations?[147] Further arguments hold that consumers may not have formed specific expectations at all with regard to the relevant product features in case of a diversity of technologically complex products, which is mostly the fact. In most, if not all, cases consumer expectation may be general and driven by attitude giving birth to an unconscious hope that the product will not harm him if he treats it with a reasonable amount of care. Because of these, no jurisdiction has appeared ready to accept consumer expectation test.[148]

In view of the said difficulties, in an American case, for instance, a court decided to move away from the *consumer expectation test* as a means to determine liability for defects in the goods.[149] It was observed in the said case that the test regards consumer expectations as a top limit rather than as a base on a manufacturer's responsibility under strict liability principles. The court suggested two tests working together in order to bypass this limitation; one, the plaintiff must prove either that the product failed to perform safely in the expectation of an ordinary consumer under ordinary circumstance (the consumer expectation, which mainly provides for manufacturing defects), or that there are more risks inherent in the product design than there is benefits (risk benefit analysis, which provides for design defects).[150] These two tests best work when they are used together. In yet another American case *Brethauer v. General Motors Corp* (2009) the Court, applying the standards established in

[147] KYSAR, Douglas A., "The Expectations of Consumers," Paper 32, Cornell Law Faculty Publications,2003, p. 1716.
<http://scholarship.law.cornell.edu/lsrp_papers/32>
[148]Ibid.
[149]Barker v. Lull Engineering *Co* 573 P. 2d 443 - 1978
[150]Barker v. Lull Engineering Co573 P. 2d 443 - 1978

Barker v. Lull Engineering Co. noted that although the *consumer expectation test* is not required where the consumer would not know what to expect, because he would have no idea how safe the product could be made, in close cases, the court may deem it necessary to consider both the consumer expectation test and the risk-benefit analysis test.[151]

From these facts, it can be concluded that for best results, the consumer expectation test cannot work alone, that it has to work hand in hand with the other arm established in *Barker v. Lull Engineering Co.* Worldwide, and this is a common practice. However, the Fair Competition Act despite providing for consumer protection does not say anything about risk benefit analysis. This is an anomaly in the law which needs urgent incorporation, given the type of its consumers, and the fact that this doctrine is expected to reinforce the *doctrine of the deemed manufacturer.*

11.3 Compensation Rather Than Protection

In order for the consumer to get a manufacturer held, strictly liable. for his deeds, not only has he to prove that the goods he bought from him and consumed were unfit, but also that the goods caused him loss or damage. Proving loss or damage is thus critical to the liability of the deemed manufacturer, and the consumer will only be compensated upon such proof.[152] It therefore follows from this, that if there is no loss or damage, there is no compensation. Dealing with seeking compensation for the consumer who has suffered serious harm is equal to grappling with curing a problem that the law itself has

[151]See<http://www.omlaw.com/azapp-blog/postings/2009/strict-liability-consumer-expectation-test-instruction-is-not-limited-to-where-consumers-have/> (accessed on 14th March 2019)

[152]See section 38 (1) (a) (e) of the Fair Competition Act, 2003.

groomed[153] rather than tackling the source of the problem. Since there is no means under the Fair Competition Act, 2003 to recognise unsafe goods, unless they have caused loss or damage to the consumer, it is logical to conclude that it does not prohibit imports of potentially unsafe goods. When these goods cause loss or damage to the consumer, proof thereof maybe difficult.[154] Further that, compensation provided by the law, may not always be guaranteed when a defective product has deferred damage to a distant future, which is the key to accessing legal intervention. In the long run, damage suffered may not necessarily be connected to the use of any specific product previously, and the *manufacturer* in question may have long since been out of business, declared bankrupt or even possesses insufficient assets to satisfy judgment.[155] Some may find themselves with no one to sue and no compensation for the losses they have incurred.[156]

The paper further finds that the goods that are inherently unsafe, but which may appear to be fit for the purpose for which they were bought, are not covered by the law. This renders the use of the phrase *consumer protection* to be a misnomer. How possibly does one protect a consumer who is suffering from a serious health damage arising from the extensive use of an unsafe product? Assisting him to recover compensation, as advocated by the law, is indeed, not by any standards, similar to protection. The assumption is that compensation would only assist the consumer to obtain medical attention rather than to be afforded protection. In principle, the concept of protection concerns parrying harm away from meeting the individual. The law under discussion obviously becomes functional at a point where the

[153] For instance, by its failure to guarantee non-importation of counterfeits and substandard goods into Tanzania.
[154] GLYNN, Stephanie,"Toxic Toys and Dangerous Drywall: Holding Foreign Manufacturers Liable for Defective Products. The Fund Concept," Vol. 26, Emory International Law Review, p. 318.
[155]Ibid.
[156]Ibid.

consumer in question has used an unsafe product, and has suffered a recognizable loss or damage. It should be noted that some health conditions are incurable, take various types of cancer as a case in point. The author, in this regard, is therefore, of the view that the law is rather compensatory than protective.

12. Concluding Remarks

The paper concludes that although section 37 of the Fair Competition Act, 2003 and its doctrine of the deemed manufacturer thrives to protect consumers by establishing a strict liability for any person who played a part in the supply chain of the product, the grounds for establishing such liability impair the functionality and the spirit of the law in this respect. Particularly liability is established if consumer bought goods for a particular purpose, the goods are not fit for that purpose and because of that the consumer suffers loss or damage. The consumer will be compensated for such injury only upon proof of the same and not otherwise. To succeed, injury must be connected to goods supplied by that particular deemed manufacturer in order to have him pinned down to liability. It is concluded here that the law is propped up only toward post-injury consumer compensation. It is thus useless if damage from such goods is deferred. The author argues that this practice is unrealistic because damage is not always imminent.

Sometimes it takes long to cause diagnosable effects and that, by the time the consumer has sustained it, there may be a bigger problem of proving whether the damage was really caused by any particular product supplied by a given supplier, deemed to be manufacturer. Not to mention the fact that most offenders may have ceased to exist in the market for various reasons. For this reason, we find that, the law is merely compensatory than protective. To be protective, among others, it should be capable of averting hazards to consumer's health and safety, which, is not

sufficiently guaranteed. The author thus, concludes that, the law is a mere compensatory scheme than protective.

It is hereby recommended that to guarantee consumer protection in its strictest sense, the law should be reinforced with physical checks of the goods at the point of sale and the time of entry into Tanzania. Particularly, pre and post shipment inspection (including airports, borders and islands) must be done to ensure goods are of good quality. Good quality may be assessed from the experiences of other countries importing similar goods for a fairly long period of time. This may help to know if the goods have any serious health and safety risks before importing the same into Tanzania.

THE RIGHT TO NATIONALITY AND ITS BURDEN OF PROOF IN TANZANIA: AN ILLUMINATION IN THE CASE OF ANUDO OCHIENG ANUDO *VERSUS* UNITED REPUBLIC OF TANZANIA

Clement B. Mubanga[1]

Abstract

The right to nationality is a fundamental human right. Indeed, it stands to be a right to have rights. It creates a gateway towards other rights. Protection of this right is in its equivalence essential. One of essential means to protect this right is to ensure that there are effective rules and standards of proof of nationality. The Tanzanian citizenship legal regime places the burden to prove one's nationality in the hands of the same person who claims to be a Tanzanian citizen. The law does not further provide as to what constitutes proof of nationality. This burden of proof was brought to test in the case of Anudo Ochieng Anudo versus United Republic of Tanzania where the burden was shifted to the United Republic of Tanzania. This article highlights the essentiality of the right to nationality, the challenge of proof of nationality in Tanzania given the prevailing position of burden of proof and the implication of the shift of burden of proof in the case of Anudo.

Key words: Nationality, Proof, Citizenship, Tanzania

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1.0 Introduction:

Proof of nationality[2] constitutes an essential element in protecting the right to nationality. The latter is endorsed under both International and African norms to be a fundamental human right, hence its insistence of protection. More particularly, universality in the right to nationality, avoidance of arbitrary deprivation of nationality and the right to recognition as persons under the law are enshrined under the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC)[3] in particular. In Tanzania, the right to nationality is directly provided for in the Law of the Child Act.[4] In order to protect this right, states are enjoined to act against practices that render people stateless. At this juncture, the 1954

[2] The term nationality has been used synonymously with the term citizenship. Thus in a number of treatises the right to citizenship is also known as the right to nationality. There has been differentiation of the terms citizenship and nationality where nationality has been defined as the jural relationship which may arise for consideration under international law and citizenship referring to the jural reference under municipal law. In other words, nationality determines the civil rights of a person, natural or artificial, particularly with reference to international law, but citizenship is intimately connected with civic rights under municipal law. However, as noted at page 18 in Manby, B (2016) *Citizenship Law in Africa: A Comparative Study*, Third Edn, Johannesburg, Open Society Foundations, with the coming of the era of democracy based on universal suffrage, as well as decolonization and self determination the idea that all those with the nationality of a state have the right to participate in its government – a distinction between nationality and citizenship has been unacceptable. Thus, in this article the term citizenship will be used synonymously with the term nationality in its form of legal status rather than in broader participatory sense.

[3] See articles 15 and 6 of the UDHR, article 24(3) of the ICCPR, articles 7(1) and 8(1) of the CRC, article 6 of the ACRWC. The latter does not mention directly the right to nationality, rather it combines the right to nationality with the right to registration of birth with a hope that registration of birth carries in it with right to claim nationality depending on the laws of a given country.

[4] 2009 in particular section 6(1) which stipulates: "a child shall have a right to name, nationality and to know his biological parents and extended family" and section 6(2) which prohibits deprivation of the above rights subject however to provisions of any other written laws.

Convention Relating to the Status of Stateless Persons[5] and the 1961 Convention on the Reduction of Statelessness[6] are worth mentioning.

The right to citizenship is indeed a foundation of rights bestowed on citizens. The importance of this right can be felt deeply when one is deprived of one's citizenship. Wanyeki has this to note:[7]

> "There is something deeply painful about being assumed not to belong. Or being forced to make choices about one's identity to belong to. Or to have one's belonging snatched away. Lacking citizenship (itself a human rights violation), renders one vulnerable to more human rights violations. We need to settle the question of who is an African by tossing out limiting notions of our states and ending the priority given to descent over naturalization."

Sir Walter Scott, the Scottish novelist, poet, historian and biographer[8] had these wise words worthy reproducing regarding the importance of citizenship:

> "Breathes there the man with soul so dead, who never to himself hath said, this is my own, my native land! Whose heart hath never within him burned, as home his footsteps he hath turned, from wandering on foreign strand! If such there breathe, go mark him well; For him no Minstrel raptures swell; High though his titles, proud

[5] This Convention, among others provides for an international framework for recognition of stateless persons, the definition of a stateless person and obliges state parties to do away with statelessness status of individuals in their territories by such measures like naturalizing them.
[6] This Convention on the other hand provides for, among other things an international framework on conferral and withdrawal of citizenship in order to avoid statelessness. It gives into effect article 15 of the UDHR by articulating the right to nationality not to be arbitrarily deprived.
[7] Wanyeki, M.L (2007) The Political Outcasts of Africa article available at http://www.africa.upenn.edu/afrfocus/afrfocus033107.html accessed on 1st April. 2009
[8] 1771-1832 in The Lay of the Last Minstrel, ed.Margaret A.Allen, canto sixth, 1, lines 16, p.123

his name, Boundless his wealth as wish can claim; Despite those titles, power, and pelf, The Wretch, concentred all in self, Living, shall forfeit fair renown, And, doubly dying, shall go down To the vile dust, from whence he sprung, Unwept, unhonor'd, and unsung."

Citizenship determines the legal status of individuals within a state and shapes their relationship with the government, setting out the parameters of an individual's civil, political, social, economic and cultural rights and competence.[9]

Protection of the right to nationality is bound to fall prey when called for proof of one's citizenship status at a point when there is a lack of means to effectively prove one's citizenship. This can render individuals whose citizenship status is in doubt to be stateless.[10] Of more possibility is when individuals are either undocumented or even when documented, their documentation not constituting proof of their citizenship. More complication to this arises where their domestic laws oblige them to bear the burden to prove their citizenship.

In practice, proof of citizenship in most African countries has been facing a challenge. The challenge has been due to, among others, practical impossibility of obtaining identity documents such as birth certificates, passports and national identity cards, and imposition of legal burden of proof of nationality to individuals who suffer this impossibility or weaknesses in obtaining such identity documents.

On March 22nd 2018, the African Court on Human and People's Rights in Arusha passed a judgment in a nationality case against

[9] Dube, R *et al* (2012) "Identity, Citizenship, and the Registrar General: The Politicking of Identity in Zimbabwe" Research and Advocacy Unit.

[10] Under International law a stateless person is one who is not considered as a national by any state under the operation of its law. In other words, a stateless person does not possess nationality of any country.

the United Republic of Tanzania: the case of *Anudo Ochieng Anudo versus United Republic of Tanzania*.[11] This case has brought to test the practice and law on protection of the right to nationality in Tanzania. This article discusses this test in the context of the burden of proof underpinning the Tanzanian citizenship legal regime and its decisional shift in the case of Anudo.

2.0 Anudo Case and the Burden of Proof under the Tanzanian citizenship Legal Regime

Anudo Ochieng Anudo was a project manager with a German NGO working on access to clean water. In 2012, when he was processing formalities of marriage, he approached Babati Police Station. The authorities suspected of his Tanzanian citizenship and as a result retained his passport. His nationality was withdrawn and he was then deported to Kenya. The Kenyan side expelled him in return, rejecting that he was not Kenyan. Anudo could not enter the United Republic, and thus remained in the "no man's land" between the Tanzania-Kenya border in Sirari.

On September 2nd 2013, Anudo sent a letter to the Minister of Home Affairs and the Immigration Services Department requesting to know why his passport was confiscated by the Police. Following investigations conducted by the Immigration Department, he was formally informed that he was not a Tanzanian citizen and that his passport was obtained using fake documents. The passport had been cancelled and on September 1st 2014, he was deported back to Kenya where he was on November 6th 2014 arraigned before Court and declared him to be in an irregular status. Following the Court's decision, he was expelled back to Tanzania and stayed in the "no man's land" in stateless status.

[11] Application No.012/2015. The case will hereinafter be referred to as Anudo case in this article.

Before the Court, among others Anudo contested for the right to nationality and the right not to be arbitrarily deprived of his nationality. He submitted that he was a Tanzanian citizen by birth and claimed that his both parents were Tanzanian citizens by birth. In evidence of this claim of nationality, he claimed to hold a birth certificate showing that he was born in Tanzania, had a Tanzania voter's card and passport number AB125581, all issued by relevant authorities.

The Court argued, among others, that Anudo's citizenship was being challenged 33 years after his birth during which period he held himself as a Tanzanian. It also considered the fact that Anudo's parents' citizenship was not disputed by the United Republic. As such the Court concluded that Anudo was arbitrarily deprived of his nationality contrary to article 15(2) of the Universal Declaration of Human Rights. Of particular reference, under this article, was the deliberation on who had the burden of proof of nationality under the circumstances. The Court shifted the burden on the Respondent State to prove, on the contrary, on the basis of legal documents that were issued by the same. How then was this a turning point under the Tanzanian citizenship legal regime?

At this juncture, we find section 44 of the Immigration Act[12]relevant. It goes thus:

"Section 44. Where in any proceedings under or for any of the purposes of this Act, any of the following questions is in issue, namely:

(a) whether any person is or is not a citizen of Tanzania; or
(b) whether any person's presence within Tanzania is lawful, the burden to prove that, that person is a citizen of Tanzania or that his presence in Tanzania is lawful shall

[12] Cap 54 R.E 2016

lie upon the party contending that, that person is a citizen of Tanzania or as the case may be, that his presence in Tanzania is lawful."

Overtime, this has been the practice, under the Tanzania citizenship regime, where an individual whose citizenship is in doubt bears the burden to prove her citizenship. The burden has been heavy laden following the lack of a single document that can stand on itself to prove Tanzanian citizenship with an exception of a certificate of naturalization or registration dully issued. The following part explores the challenge.

3.0 The Challenge of Proof of Tanzanian Citizenship

The Constitution of the United Republic of Tanzania[13] does not specifically provide for the right to nationality. However, on providing for rights enshrined under it, there are differentiations in rights conferred to every person and those specific for Tanzanian citizens. For example, while the right for equality of human beings and the right to life[14]are provided for every person, the right to freedom of movement and participation in public affairs[15] are exclusively conferred on citizens of Tanzania. Mention of Tanzanian citizen continues in delineating on who can vie for positions such as presidency. Article 39 (1) (a) provides that only a Tanzanian citizen by birth is entitled to be elected to hold the office of the President of the United Republic of Tanzania. Reference in interpreting or determining on who is a Tanzanian citizen by birth, under this article, is referred to the Tanzanian written law on citizenship law.

Similar reference to Tanzanian written law on citizenship is followed by statutes that contain matters of citizenship. Section 6

[13] 1977 as amended
[14] Articles 12 and 14 respectively
[15] Articles 17 and 21 respectively

(1) of the Law of the Child Act[16] which provides for the right to nationality, among others, subject this right to Tanzanian written law on citizenship. The Registration and Identification of Persons Act[17] follows the same trend by defining a citizen to mean a person who is a citizen of the United Republic in accordance with the law for the time being relating to citizenship.[18] The Non-Citizens (Employment Regulation) Act[19] similarly refers directly to the Tanzania Citizenship Act[20] when defining a non – citizen to mean a person who is not a Tanzanian pursuant to the Tanzania Citizenship Act. All these references reveal two important considerations: one, the significance of citizenship in determining one's rights, and two, the highly elevated position and dependence accorded to the Tanzania Citizenship Act. The latter case implies that any shortfall in the Tanzania Citizenship Act in matters of determination and proof of Tanzanian citizenship have enormous negative implications to an individual. In other words, the Tanzania Citizenship Act is expected to be as perfect as possible in protecting the right to nationality.

The Tanzania Citizenship Act itself provides for three means/categories of attainment and acquisition of citizenship that is, by birth, descent and by naturalization respectively. The types are interpreted according to five historical periods, that is the period before independence of Tanganyika (before December 9th 1961); during sultanate empire for Zanzibar (before Zanzibar Revolution on January 12th 1964); after independence of Tanganyika and before Union (from December 9th 1961 to April 25th 1964); after the Union of Tanganyika and Zanzibar to date

[16] No.21 of 2009
[17] Cap 36 R.E 2012
[18] See section 3
[19] 2015

[20] Cap 357 R.E 2002

(from April 26th 1964). These categories are further explained as follows:

(1) Citizenship by Birth:

There are five main periods considered when determining Tanzania Citizenship by birth namely,

(a) Citizenship by birth before Tanganyika Independence (Before December 9th 1961).

A person was regarded as citizen of Tanganyika if he or she was born in Tanganyika before Tanganyika's independence, if at the date of his or her birth was a citizen of the United Kingdom, colonies or British protected person, and if one of his or her parents was born in Tanganyika. The first law applicable here was the Tanganyika (Constitution) Order in Council.[21] Later, section 1(1) of the Citizenship Act[22] made a further recognition. Under the Tanzania Citizenship Act[23] such a citizen is recognized as a citizen of Tanzania by birth before the Union of Tanganyika and Zanzibar under section 4 (1) read together with section 30 of the Act.

(b) Citizen by birth from the date of Independence of Tanganyika until before Union of Tanganyika and Zanzibar (From December 9th 1961 to April 25th 1964)

A person who was born in Tanganyika on the day of Independence of Tanganyika and during the period before the Union was recognized to be a citizen of Tanganyika by birth if he or she was born in Tanganyika and one of his parents was a citizen of Tanganyika. This is different from the above where the requirement is birth of one's parent while in this circumstance is

[21] 1961
[22] Cap 512 of 1961
[23] Cap 357 R.E 2002

being a citizen of Tanganyika by then. The law applicable under this part is section 3 of the Citizenship Act.[24] Under the Tanzania Citizenship Act such a citizen is recognized as a citizen of Tanzania by birth before the Union of Tanganyika and Zanzibar under section 4(1) read together with section 30 of the Act.

(c) Citizen who was born in Zanzibar before Revolution (Before January 12th 1964)

A person who was born in the Isles before Revolution and thus considered as a Zanzibar subject was regarded as a citizen of Zanzibar as per section 3(1) of the Zanzibar Nationality Decree.[25] Following the Presidential Decree[26] which passed the Existing Laws Act of 1964 to amend, recognize and allow pre-existing laws to continue to apply, a person who was born during this period continued to be recognized as a citizen of Zanzibar after the Revolution.

Before the enactment of the Zanzibar Nationality Decree, the Nationality and Naturalization Decree[27] was used to recognize a citizen of Zanzibar by birth. Under the Tanzania Citizenship Act, such a citizen is recognized as a citizen of Tanzania by birth before the Union of Tanganyika and Zanzibar under section 4 (1) read together with section 30 of the Act.

A citizen of Zanzibar cannot be regarded as such if his or her parents were born from any of these states; Australia, Belgium, Canada, Ceylon, France, Italy, New Zealand, Portugal, Republic of Ireland, Union of South Africa, United States of America as per section 1(2) read together with the third schedule of the Zanzibar Nationality Decree.

[24] Cap 512 of 1961
[25] Cap 39 of 1952
[26] No.1 of 1964
[27] Chapter 134, 1911

(d) Citizen who was born in Zanzibar on or after the Revolution and Before the Union of Tanganyika and Zanzibar (From January 12th 1964 to April 25th 1964)

A person who was born in Zanzibar on or after the Revolution and before the Union of Tanganyika and Zanzibar was recognized as a citizen of Zanzibar under section 3 (1) of the Zanzibar Nationality Decree. Under the Tanzania Citizenship Act such a citizen is recognized as a citizen of Tanzania by birth before the Union of Tanganyika and Zanzibar under section 4 (1) read together with section 30 of the Act.

(e) Citizen born in the United Republic of Tanzania on or after the Union of Tanganyika and Zanzibar (From April 26th 1964 to date)

A person born in the United Republic of Tanzania on or after the Union of Tanganyika and Zanzibar is recognized as a citizen of Tanzania by birth if one or both of his parents is a citizen of Tanzania as per section 5 of the Tanzania Citizenship Act.

(2) Citizenship by Descent:

A citizen by descent is recognized as such when born outside Tanzania and his determination of citizenship depends on the period he or she was born as well as the citizenship of his or her parents.

(a) Citizen born outside Tanganyika before Independence (Before December 9th 1961)

A person born outside Tanganyika before Independence if at the date of his or her birth was a citizen of the United Kingdom, colonies or British protected person was recognized as a citizen of Tanganyika by descent if his father was a citizen of Tanganyika by birth or registration/naturalization. He or she was recognized as such under section 1 (2) of the Citizenship Act.

Under the Tanzania Citizenship Act, such a citizen is recognized as a citizen of Tanzania by descent under section 4 (3) read together with section 30 of the Act.

(b) Citizen born outside Tanganyika on or after the date of Independence of Tanganyika until Before the Union of Tanganyika and Zanzibar (From December 9th 1961 to April 25th 1964)

This also is recognized as a citizen of Tanganyika by descent if his father was a citizen of Tanganyika during his or her birth. He or she is recognized as such under section 1(2) of the Citizenship Act. Under the Tanzania Citizenship Act such a citizen is recognized as a citizen of Tanzania by descent under section 4(3) read together with section 30 of the Act.

(c) Citizen born outside Zanzibar the before Revolution

This is recognized as a citizen of Zanzibar if his or her father was a citizen of Zanzibar as per section 4 of the Zanzibar Nationality Decree. Under the Tanzania Citizenship Act, such a citizen is recognized as a citizen of Tanzania by descent under section 4(3) read together with section 30 of the Act.

(d) Citizen born outside Zanzibar on or after the Revolution and Before the Union

This was recognized as a citizen of Zanzibar if his or her father was a citizen of Zanzibar as per section 4(2) of the Zanzibar Nationality Decree. Under the Tanzania Citizenship such a citizen is recognized as a citizen of Tanzania by descent under section 4(3) read together with section 30 of the Act.

(e) Citizen born outside Tanzania on or after the Union:

Such a person is recognized as a citizen of Tanzania by descent if during his or her birth his or her father or mother was a citizen of

Tanzania as per section 6 of the Tanzania Citizenship Act. It must be noted that before the enactment of the Tanzania Citizenship Act, determination of citizenship of a person born outside Tanzania was based on father's citizenship while after its enactment, determination of the said citizenship is up to now based on both father and mother. It must also be noted that a person born outside Tanzania cannot acquire citizenship by descent if one or both of his or her parents are citizens of Tanzania by descent.

(3) Citizenship by Naturalization

This is a category of citizenship acquired by resident foreigners who qualify under the law to be naturalized as citizens of Tanzania. According to the Tanzania Citizenship Act, there are four groups of foreigners who can apply for naturalization as citizens of Tanzania. These are; Resident foreigners aged 18 years and above; a person born outside Tanzania to a father or mother who is a citizen of Tanzania by descent, a minor child below 18 years and a resident woman married to a citizen of Tanzania.

The Tanzania Citizenship Act however, has its historical gaps that create fertile conditions for exclusion and non-recognition as Tanzanian citizens. Kamazima[28] has this to note:

> "The definition of who is a Tanganyikan in 1961 and a Tanzanian in 1995, ignored the past history of the region, hence allowing citizenship problems shaking Tanzania today to occur. The Tanzania government's declaration of four citizens 'aliens' in 2001[29] and queries of citizenship

[28] Kamazima, S.R (2018) "Towards the understanding of citizenship problems shaking contemporary Tanzania and strategies to evade similar dilemmas in the future" *International Journal of Advanced Scientific Research and Management,* Vol.3 Issue 1 at page 26

[29] The four were the then Tanzania's High Commissioner to Nigeria, Timothy Bandora; the then Chairperson of the National Sports Council and the Director of Habari Corporation, Mr.Jenerali Ulimwengu;(both claimed to be Rwanda nationals); the then former outspoken

> status of some Tanzanians; the operation of illegal immigrants conducted in country between 2001 and 2002 and Rev. Mtikila's claims over the former presidents (Nyerere and Mkapa) citizenship status, have roots in conditions similar to those in Kagera region. The fact that the presidential appointee, the Minister for Home Affairs, has the final say on approving or disapproving citizenship registration or naturalization, creates more questions on who is defined a Tanzanian, and in what context. There is need, therefore, for the review of the citizenship laws in the country to accommodate and appreciate conditions that surrounded the establishment of Tanganyika and Zanzibar, and later Tanzania as defined today."

The Tanzania Citizenship Act does not provide for general proof of citizenship. It is only in cases of doubt of citizenship that the law gives mandate to the Minister to issue a certificate thereof. In practice, however, there are no rules in place that account for effecting this provision. In addition, even if the certificate can be issued, the provision still requires that further evidence of an individual's citizenship prior to the clearance by the Minister may be required. In other words, the certificate is not, in no way, a conclusive proof of citizenship. It goes thus:

CCM Publicity Secretary in Zanzibar, Ms.Mouldine Castico (claimed to be Zambian) and the then CCM Chairman, Kagera Region, Mr.Anathory Amani (claimed to be Ugandan). These were not the first to be questioned of their citizenship. In 1990s Hon.Idi Simba, the former Minister of Industries and Trade and Member of Parliament for Ilala Constituent in Dar Es Salaam was alleged a Burundi citizen; the Hon.Arcardo Dennis Ntagazwa, the former Minister for Lands and Minister in the Prime Minister's Office in 2000and Member of Parliament for Kibondo Constituent was alleged to be Burundian citizen; in 1995 the Hon.Joseph Mungai, Minister for Education and Member of Parliament for Mufindi Constituent was alleged a Kenyan. Others included Hon.Hashim A.Z.Saggaf a former MP for Dodoma Urban who was alleged a Yemen citizen in 1996; Hon.Dr.A.W.Aman Kabourou, the then opposition Wing in the Parliament and MP for Kigoma Urban Constituent was alleged Burundi citizen and Hon. Abdulrahman Kinana, the then Speaker of the East African Legislative Assembly in 2000 was alleged a Somali.

> "The Minister may, in any cases which he thinks fit, on the application of any person with respect to whose citizenship of the United Republic a doubt exists, whether on a question of fact or law, certify that, that person is a citizen of the United Republic; and a certificate issued under this section shall, unless it is based on false representation or concealment of any material fact, be conclusive evidence that, that person was a citizen on the date of the certificate, but without prejudice to any evidence that he was such a citizen at an earlier date."[30]

A passport is also another document that is considered in proof of nationality. In practice, however, a passport is not considered in Tanzania to be a final conclusive document to prove Tanzanian citizenship. Zakaria narrates his experience in his article "When a Tanzanian is not Tanzanian" [31]

> "I got a shock of my life this week when officials of the Ministry of Home Affairs told me that possessing a Tanzanian passport did not mean I was a Tanzanian. I can assure you if you cut my veins, as the blood starts to flow out, the red blood cells will be singing, "Tanzania nakupenda (a Swahili word meaning, I love Tanzania) with all my heart." How dare, not one person, but three of them, suggest that just because I had a Bongo land 'pasi' (Swahili word for passport) did not automatically or manually make me a Tanzanian?.....My first passport was issued in October 1986. It was so bulky one needed a bag to carry it. It did no (*sic)* fit in any ordinary pocket so it was a relief when the government decided to reduce its size in 1992. In 2000, the authorities changed the Tanzanian passport again and another change in

[30] Section 21 of the Tanzania Citizenship Act Cap 357 R.E 2002
[31] Tony Zakaria, "When a Tanzanian is not a Tanzanian" Business Times Friday, January 4-10, 2008

> 2004.....more painfully, we had to apply afresh as if we never owned passports before. We had to present evidence of birth of self, parents and provide sworn testimony that we were original Bongo flesh (Bongo is used to refer to Tanzania) or original stock, eh I mean parents.....Am I not Tanzanian enough? If a passport is not sufficient proof of nationality, why should the planned Bongo identity card be any different? Will the attitudes change in the offices where visas and passports are issued...Any visa or passport laws that are responsible for unduly inconveniencing the public should be scrapped. A passport like nationality are not privileges, but rights that should be readily given and respected."

Indeed, a passport is in practice not considered to be conclusive proof of citizenship. This is in contrast with section 11 of the Tanzania Passports and Travel Documents Act[32] which stipulates:

> "The holding of a passport or travel document shall be *prima facie* evidence of nationality or domicile of the holder and of his entitlement to state protection."

While section 44 of the Immigration Act requires an individual whose citizenship is required to be proved to bear the burden to prove the same, the law does not proceed to lay down rules to constitute this proof. As a result, proof of citizenship has continued to rely on various documents and practices that in themselves leave wide discretions in the hands of the executives who decide on whether citizenship is finally determined and proved. To prove one's citizenship, Mubanga[33] analyses mechanisms and documents relied on, such as certificate of birth,

[32] Cap 42 of 2002

[33] Mubanga, C.B. (2013) "Who is a Tanzanian Citizen? An Appraisal of the Mechanisms of Proof of Tanzanian Citizenship." *Open University Law Journal*. Vol 4, 1:7-19.

passport, national identity card, academic certificates, voter's registration card, race, tribe, language tests, names and oral interviews all of which have their inherent weaknesses and pitfalls.

Proof of Tanzanian citizenship is further made challenging due to ineffective mechanisms of identification and registration of persons. While registration of persons for national identity cards is going on under the National Identification Authority (NIDA), analysis of the rules and procedures in the exercise is required, especially in deciding as to who is a Tanzanian worthy a card identifying her as such. In undertaking this exercise, the following documents are required: birth certificate, primary school leaving certificate, passport, secondary school leaving certificate, driver's license, health insurance card, social security fund card, voter's identity card, tax payer's identity number (TIN), Zanzibar resident card, and a letter from hamlet chairman.[34]

In a nutshell, the law and practice regarding proof of Tanzanian citizenship effectively leave any person whose citizenship is in doubt under a fragile risk of being left stateless in the absence of effective means to prove one's citizenship.

4.0 Conclusion

The right to nationality is a fundamental human right that needs to be protected. One of essential considerations in protecting this right is by promulgating clear rules and standards of means to prove it. These rules and standards are lacking under the Tanzania legal citizenship regime. The lack of these rules and standards will have a negative impact to individuals whose nationality status falls to be in issue and also cause difficulties and pitfalls to officers who are responsible in determining

[34] These requirements are available at http://www.nida.go.tz/swahili/index.php/kitambulisho-cha-taifa accessed on 6th November, 2018.

citizenship. The burden of proof of nationality should go in tandem with provision of means to prove nationality in order to avoid statelessness. The case of Anudo leaves much to illuminate in the existing jurisprudence of the African human rights bodies in nationality cases and particularly in the Tanzanian citizenship legal regime.

TANZANIA LAWYER JOURNAL IN-HOUSE STYLE

A. General

1. All title headings for the articles, case comments and book reviews should be in capital letters and bolded.
2. Subtitles should be in Arabic numbers e.g. 1. Introduction if the article does not have subtitles within the titles and if there are sub titles then it should be e.g.:

   3.0 An Overview on Criminal Law

   3.1 Tanzania Penal Code

   3.2 Criminal Procedure Code

3. Name of the author should be capitalized in each first letter of the name with a* after the name.
4. There should be an abstract on each paper and should not exceed 250 words. This does not apply to case notes and book reviews.
5. The heading of the abstract should be in italic form and bolded and indented on the left side below the name of the author.
6. The abstract should be in Book Antiqua with 11 font size.
7. There should be four Key Words for every article manuscript below the abstract.
8. The manuscript shall be typed in Book Antiqua, (Font size 12 and for footnotes it should be font size 10), 1.5 line spacing.

B. Word Limit and Specific Criteria

1. Comment articles

Manuscripts for comment articles analyzing and commenting on recent cases, legislation and other topical matters must range between 1500 and 3000 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 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

2. 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 150- 250 words indicating briefly the overall argument of the author. Four key words must be written immediately below the abstract and footnotes must be kept to the minimum.

3. Book Reviews

Book reviews may range between 1500 to 4000 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 in 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

C. Mode of Reference/Citation of Sources

i. Reference to sources shall be done by using footnotes only.

ii. Cases shall be cited as: Joseph Warioba v Stephen Wassira & another [1997] TLR 272. Cases names within the text shall be italicized.

iii. 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: Shivji, I. G, Pan-Africanism or Pragmatism? Lessons of the Tanganyika Zanzibar Union, Mkuki na Nyota, Dar es Salaam, 2008, p.14.

iv. A chapter in an edited book should be cited in the following format: Author's name followed by title of chapter in italics with the word 'in' then the names of editors, title of the book, publisher, place and year of publication followed by pages of chapter.Example: Roos, A, 'Data Protection' in van der Merwe, D et al, Information and Communications Technology Law, LexisNexis, Durban, 2008, pp. 313-397, at p.356.

v. 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.

vi. Where a particular paper is cited and is not published, it shall be indicated as unpublished.

vii. The use of 'op cit', 'loc cit', or other such abbreviations, other than 'ibid' (next to the work cited immediately above) are not acceptable.

viii. Cross-references should be done in the following manner 'Makulilo (n 7) p.14'.

ix. Citation of internet based materials should always indicate the link and the date when it was accessed.

x. Where abbreviations are used, they shall be written out in full for the first time and then abbreviated when used for the next and subsequent time (s)

xi. Consistence shall be maintained in the use of numbers, symbols, and other characters e.g. dates. Quotations within the text shall be in quotation marks, indented and in font size 10. Quotation marks should always be double, but within a quotation only single quotation mark is required. Up to two lines of quote may be included

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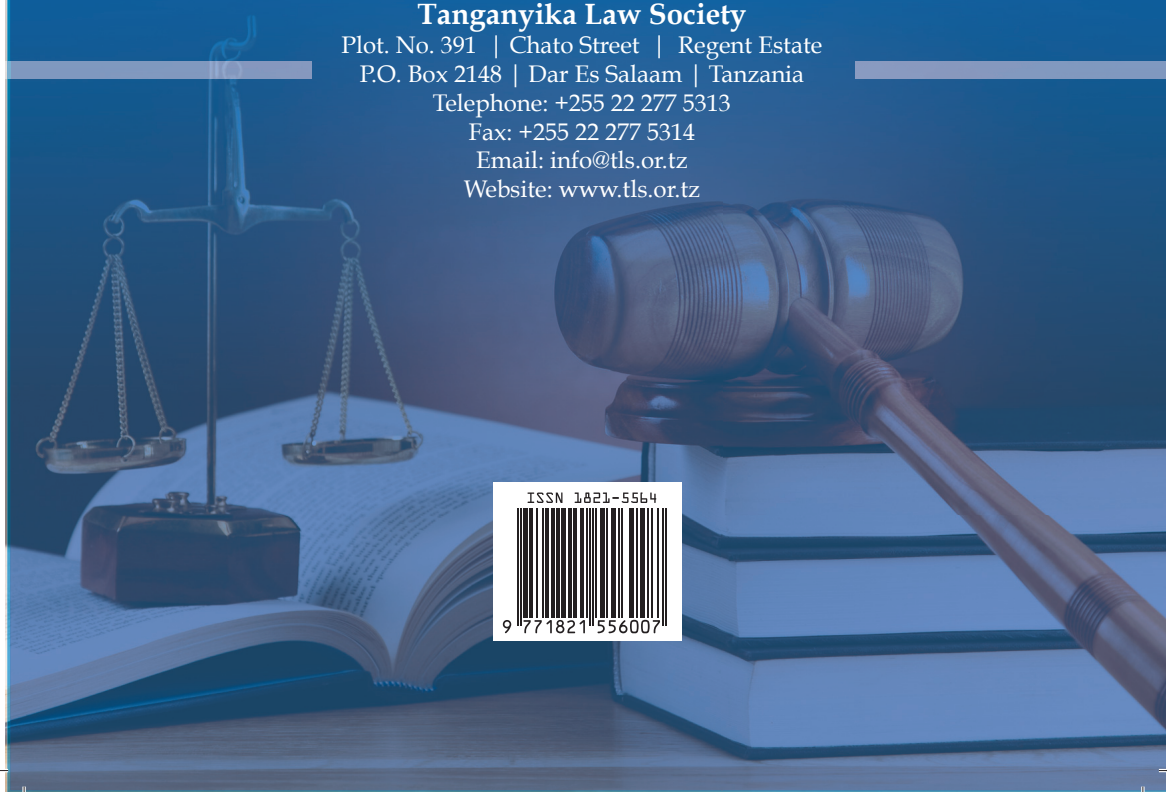

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